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THE LAWYERS REPORTS ANNOTATED

BOOK XLV

ALL CURRENT CASES OF GENERAL VALUE AND
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BURDETT A. RICH, EDITOR, AND

HENRY P. FARNHAM, ASST.

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LAWYERS' REPORTS

ANNOTATED.

MICHIGAN SUPREME COURT.

Don J. LEATHERS

v.

John CANFIELD, *Plff. in Err.*

(.....Mich.....)

A real-estate broker cannot be regarded as a middleman entitled to a commission from both sides, if he has contracted expressly to serve the buyer and throughout the negotiations endeavors to depress the price and arrange conditions favorable to the buyer.

(June 7, 1898.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of plaintiff in an action brought to recover commissions alleged to have been earned by the sale of certain real estate. *Reversed.* The facts are stated in the opinion.

NOTE.—*Fraud and secret dealings or interest of real-estate brokers as affecting their commissions.*

- I. *General doctrine.*
- II. *In order to decrease price.*
- III. *In cases of conflicting interests.*
- IV. *Nondisclosure of true position.*
- V. *Soliciting others.*
- VI. *Conspiring with purchaser.*
- VII. *Secret profit.*
- VIII. *Negligence of broker.*
- IX. *Agreement to divide commissions.*
- X. *By purchase of property.*
- XI. *Double commissions.*
 - a. *General rule.*
 - b. *Reasons for the rule.*
 - c. *Custom or usage.*
 - d. *Pooling arrangements.*
- XII. *Exceptions to rule.*
 - a. *General.*
 - b. *Knowledge or consent.*
 - c. *Mere middleman.*
- XIII. *As affecting purchaser.*
- XIV. *Miscellaneous cases.*
- XV. *Burden of proof.*

The question of real-estate broker's commissions as affected by the negligence, fraud, or default of the principal and a defective title will be found in *note* to *Brackenridge v. Claridge* (Tex.) 43 L. R. A. 593.

The question of real-estate brokers as the procuring cause of the sale is discussed in *note* to *Hoadley v. Savings Bank of Danbury* (Conn.) 44 L. R. A. 321.

The *note* to *Lunney v. Healey* (Neb.) 44 L. R. A. 593, deals with the question of performance of his contract by the broker.

45 L. R. A.

Mr. R. W. Butterfield, with Messrs. Hanchett & Hanchett, for plaintiff in error:

A party cannot act as agent for both buyer and seller, and recover a commission from either of them, if his employment by the other party was unknown to him.

Scribner v. Collar, 40 Mich. 375; *Green v. Knoch*, 92 Mich. 26; *Flint & P. M. R. Co. v. Dewey*, 14 Mich. 477; *People, Plugger, v. Overysse* Twp. Bd. 11 Mich. 225; *Moore v. Mandelbaum*, 8 Mich. 433; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Holcomb v. Weaver*, 136 Mass. 266; *Campbell v. Baxter*, 41 Neb. 729; *Berlin v. Farwell* (Cal.) 31 Pac. 527; *Rice v. Davis*, 136 Pa. 439; *Weinhouse v. Cronin*, 68 Conn. 250.

I. *General doctrine.*

The compensation to which the broker is entitled is the consideration for the engagement into which he enters, and such reward is the inducement to the service, and the faithful performance of it is generally the condition on which the reward becomes due. *Price v. Keyes*, 62 N. Y. 378, 384.

It is a condition precedent to the right of the agent to the compensation agreed to be paid him, that he shall faithfully perform the services he undertakes to render, and if he abuses the confidence reposed in him, and withholds from his principal facts which ought in good faith to be communicated to the latter, he will lose his right to any compensation under the agreement. *Hall v. Gambrill*, 92 Fed. Rep. 32, 37; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984.

A real-estate broker assumes the duty of finding a purchaser for the property and of bringing the party into communication with his principal, and to use his best efforts to forward the negotiations between them in the interest of his employer; and to this extent he becomes an agent, and a fiduciary relation is established which requires on the part of the agent, within the sphere of his employment, fidelity and good faith to his employer. *Young v. Hughes*, 32 N. J. Eq. 372, 383.

The policy of the law is to exact from an agent the strictest integrity in reference to the duty owing from him to his employer. *Hammond v. Bookwalter*, 12 Ind. App. 177.

The law exacts of the broker an honest and faithful performance of his duty. *Schwartz v. Yearly*, 31 Md. 270.

And it is the purpose of the court to see that

To secure fidelity in the conduct of an agent, the law will not permit the agent to place himself in a situation in which he may be tempted, by his own private interest, to disregard that of his principal.

Flint & P. M. R. Co. v. Dewey, 14 Mich. 477; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Everhart v. Searle*, 71 Pa. 256; *Fuller v. Dame*, 18 Pick. 472; *Bollman v. Loomis*, 41 Conn. 581.

While the law permits the plaintiff to receive a commission from both buyer and seller where each knows his employment by the other, it is the duty of the agent in such case to fully disclose his employment and the extent thereof, what he is employed to do, in order that each party may know the capacity in which he acts, and the extent to which he is employed to act for each party as against the other, to entitle him to commission.

McDonald v. Maltz, 94 Mich. 172; *Rice v. Davis*, 136 Pa. 439; *Frankel v. Wathen*, 58

Hun, 543; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Webb v. Paxton*, 36 Minn. 532; *Murray v. Beard*, 102 N. Y. 505; *Ferguson v. Gooch*, 94 Va. 1, 40 L. R. A. 234.

There could be no recovery upon the theory that the plaintiff was acting simply as a middleman to bring the parties together. In such case, in order to recover, he must not be under employment by one of the parties to negotiate in his interest and secure terms or price favorable to that party, and he must not so act.

Ranney v. Donovan, 78 Mich. 318; *Montrass v. Eddy*, 94 Mich. 100; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Knauss v. Gottfried Krueger Brewing Co.* 142 N. Y. 70; *Empire State Ins. Co. v. American Cent. Ins. Co.* 138 N. Y. 446; *Siegel v. Gould*, 7 Laus. 177; *Orton v. Scofield*, 61 Wis. 382; *Phinney v. Hall*, 101 Mich. 451.

Messrs. McGarry & Nichols and Judkins & Perkins for defendant in error.

the agent by reason of the confidence reposed in him by his principal secures to himself no advantage from the contract. *Collins v. McClurg*, 1 Colo. App. 348.

A person standing in the place of and representing the vendor is bound to discard every feeling of friendship, to know no self-interest, to act as he judged the interest of the vendor would induce the vendor to act if present in person instead of being present by an agent; and it is his duty to accept the larger offer for the benefit of his client. *Haydock v. Stow*, 40 N. Y. 363.

The rule that a real-estate broker is entitled to his commissions whenever he has procured a purchaser willing to comply with the conditions fixed by his principal depends, not only on the fact that he is to be regarded as the agent of the seller, but that as such agent he acts with the utmost good faith toward his principal. *Pratt v. Patterson*, 112 Pa. 475; *Henderson v. Vincent*, 84 Ala. 99; *Collins v. McClurg*, 1 Colo. App. 348.

The relation between the broker and his principal is one of a confidential nature requiring the utmost good faith on the part of the broker, and entitling the principal to the benefit of the broker's skill, knowledge, and advice. *Butler v. Baker*, 17 R. I. 582; *Henderson v. Vincent*, 84 Ala. 99; *Mears v. Stone*, 44 Ill. App. 444, 447; *McGuire v. Carlson*, 61 Ill. App. 295, 297; *Merryman v. David*, 31 Ill. 404; *Page v. Voorhes*, 40 N. Y. S. R. 696, 698; *Gilder v. Davis*, 137 N. Y. 504, 20 L. R. A. 398; *Condit v. Blackwell*, 22 N. J. Eq. 481, 487; *Parkist v. Alexander*, 1 Johns. Ch. 394; *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 91; *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Lowther v. Lowther*, 13 Ves. Jr. 102; *Smith v. Seattle, L. S. & E. R. Co.* 72 Hun, 202; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984; *Collins v. McClurg*, 1 Colo. App. 348.

An agent must not put himself during the continuance of his agency in a position which is adverse to that of his principal, for the reason that the principal bargains for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exercise of all this in his own favor. *Cottom v. Holliday*, 59 Ill. 176, 179; *Kronenberger v. Fricke*, 22 Ill. App. 550, 553; *Reardon v. Washburn*, 59 Ill. App. 161.

And the principal is entitled to expect his 45 L. R. A.

active aid in the conduct of the negotiations. *Young v. Hughes*, 32 N. J. Eq. 372, 383.

It is the duty of the broker to act in matters touching the agency with sole regard to the interest of his principal, and in accepting the employment he undertakes to manage the interest confided to him, and is charged with the trust imposed in him to the best of his ability for the benefit of his principal. *Price v. Keyes*, 62 N. Y. 378, 384.

The obligation of the broker to his principal requires that if he does anything his efforts shall be directed towards making a sale upon the terms given. *Watts v. Howard*, 51 Ill. App. 243, 246.

A broker is held to the obligation of loyalty to his employer in the matter of his agency, and if he fails in that he may not recover for his services; but there must be bad faith on his part to produce such a result. *Hinton v. Coleman*, 76 Wis. 221.

An agent for sale cannot sacrifice the property of his principal for the sake of his commissions, but the desire of earning them is generally a motive to diligence and an incentive to exertion. *Price v. Keyes*, 62 N. Y. 378, 384.

And if the broker or agent is guilty of bad faith toward his principal in the transaction he forfeits his right to commissions. *Hafner v. Herron*, 165 Ill. 242, affirming 60 Ill. App. 592.

And if the broker or agent employed to procure a purchaser acts in bad faith towards his employer the latter is not bound to carry out the contract. *Finch v. Conrade*, 154 Pa. 326.

If he abuses the confidence reposed in him by his principal he may be deprived of commission and compensation. *Collins v. McClurg*, 1 Colo. App. 348; *Sea v. Carpenter*, 16 Ohio. 412; *Hall v. Gambrill*, 92 Fed. Rep. 32, 37; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984.

The rule is the same if he is guilty of any fraud, concealment, or misrepresentation, or if he takes any advantage of his position to the injury of his principal. *Collins v. McClurg*, 1 Colo. App. 348; *Cox v. Haun*, 127 Ind. 325, 327.

And if an agent does not perform his duty, or is guilty of gross negligence, or gross misconduct, or gross unskillfulness, he not only becomes liable to his principal for the damages the latter may have sustained, but he also forfeits his claim to commissions. *Collins v. Mc-*

Long, J., delivered the opinion of the court:

This action is brought to recover a commission of \$30,000, which plaintiff claims was agreed to be paid to him by defendant for plaintiff's services as a broker in procuring the purchase by the Thayer Lumber Company from defendant of 10,000 acres of pine land situated in Missaukee and Kalkaska counties. Plaintiff's claim is that in June, 1895, he met Mr. Monroe, superintendent of the Thayer Lumber Company, at Muskegon, and arranged with him to open negotiations with defendant for the purchase of this tract of timber, and in pursuance of which certain correspondence was had with defendant. Defendant would not consent to put these lands into the market, and refused to give an option thereon, but stated in a letter of November 6, 1895, that he would not refuse an offer of \$1,500,000. On November 11, 1895, plaintiff called on defendant at his place of business, and as to that

interview testified: "Mr. Canfield said (in speaking of this timber) that he had always intended it should be manufactured at Manistee, and he would prefer to sell it at less money to come to Manistee than to come to Muskegon, or anywhere else. I told him the price which he always held it at was altogether too high, and these folks would be glad to look at it at a price they thought they could afford to buy it. Mr. Canfield said to me that he had been offered \$1,200,000 or \$1,225,000,—I am not positive which. I asked him if he would give me an option on it for thirty days for \$1,300,000 for the Thayer Lumber Company to look at it, or rather for my parties to look at it. I guess I did not tell him the Thayer Lumber Company then. He said not; he would not give me an option in writing, but would withhold it from market for thirty days' time in which the parties would have to go and estimate it." The plaintiff further testified: "I asked him about commissions in case I found

Clurg, 1 Colo. App. 348; Porter v. Silvers, 35 Ind. 295; Sea v. Carpenter, 16 Ohio, 412.

So, any wilful disregard of the obligations which devolve upon him will bar his recovery. Jansen v. Williams, 36 Neb. 869, 20 L. R. A. 207.

If he is guilty of such misconduct as amounts to treachery, or if he wholly fails to recognize the duties and responsibilities imposed upon him by his situation, and so conducts himself that his services are of no value, it is just and reasonable that he should receive no compensation, and to this extent the law is well settled. Eldson v. Saxon (Tex. Civ. App.) 30 S. W. 957.

There must be no unlawful device resorted to between the broker and the purchaser. Zittle v. Schlesinger, 46 Neb. 844; Bach v. Emerich, 3 Jones & S. 548.

And if the broker reaps any advantage over his principal either by the performance or by the violation of a duty, it will inure to his principal. Dodd v. Wakeman, 26 N. J. Eq. 484, 487.

The mere fact that a broker volunteered his services does not absolve him from the duty of fidelity in the relation of trust and confidence which he seeks and assumes. Conkey v. Bond, 36 N. Y. 427, Affirming 34 Barb. 276.

And the rule that when an agent acting within the scope of his authority perpetrates a fraud for the benefit of his principal, and the latter receives the fruit of it, he thereby adopts the fraudulent acts of his agent, does not apply so as to validate a delegation of his agency by a broker; otherwise the principal would be at the mercy of the broker. Carroll v. Tucker, 2 Misc. 397.

In the application of the rule it makes no difference whether the result of the agent's conduct is injurious to the principal or not, as the misconduct affects the contract from considerations of public policy rather than of injury to the principal. Hafner v. Herron, 165 Ill. 242, Affirming 60 Ill. App. 592.

And it matters not that there was no fraud meant, nor any injury done, as the rule is not intended to be remedial of actual wrong, but preventive of a possibility of it. Hafner v. Herron, 165 Ill. 242, Affirming 60 Ill. App. 592; Young v. Hughes, 32 N. J. Eq. 372.

The want of good faith on the part of the broker towards his principal is shown, when he acts adversely to his principal's interest, or where, representing his principal, he conceals

from him an arrangement intended for the advantage of the other party. Hafner v. Herron, 165 Ill. 242, Affirming 60 Ill. App. 592; Pratt v. Patterson, 112 Pa. 475; Prescott v. White, 18 Ill. App. 322.

Yet, in the discharge of their agency, brokers are bound only to the exercise of reasonable skill and diligence, and so long as they are guilty of no bad faith, and exercise the same care and diligence that a prudent man would exercise in the management of a like business, they are entitled to receive a compensation for their services. Guesnard v. Louisville & N. R. Co. 76 Ala. 453, 457.

And bad faith and fraud in the dealings of an agent or broker will not be presumed, and to defeat a liability upon that ground they must be shown by the party who seeks to defeat the liability. Buckingham v. Harris, 10 Colo. 455.

So, although an honest error in judgment to the injury of his employer may or may not render him liable for damages, or to a reduction of his compensation, as such broker, yet it does not forfeit his contract for at least some compensation. Hinton v. Coleman, 76 Wis. 221.

The law exacts an honest and faithful performance of his duty, but it does not oblige him to misrepresent or to conceal the truth; and if a statement thus fairly made operates to defeat the sale, it cannot be said that he has acted in bad faith towards his principal. Schwartz v. Yearly, 31 Md. 270, 277.

If the act of the broker corresponds with his duty, but the motive which prompts it is a low and inferior one, there is no conflict between his duty and his interest; it cannot affect the validity of the act as between the broker and his principal. Price v. Keyes, 62 N. Y. 378, 384.

And when the duty and interest of the agent coincide, and he does the act which his duty prompts, but the impelling motive of it is the interest which he is to derive from it and not the duty, the act must stand justified although the motive may be criticized. *Ibid.*

The issue of fraud or bad faith on the part of the agent must be alleged in the principal's answer to an action against him to recover commissions, before he can introduce proof in support of the same as a means of defeating the agent's right to commissions; and where the same is not so alleged the court commits no error in refusing to instruct the jury that in transacting the business it is the duty of the broker to act wholly in his principal's interest,

a purchaser for it—in case my parties should take it after looking at it. He said he had expected to pay a good commission to anyone in case it was sold. I asked him what he called a good commission, and he said he thought \$25,000 was a good, fair commission. I told him it was not enough for a deal of that kind at any such price. He said he would wait until they got through looking at it to see whether they wanted it or not, and then we probably would have no trouble in agreeing upon a commission." Plaintiff testified that he had another interview with defendant on December 3d, in which he told defendant that his offer of \$25,000 commission was not enough, and that he ought to have a commission of \$32,500. He says in this interview he told defendant, "I was getting a small commission from the other side." The Thayer Lumber Company completed the examination of the land, and on December 13 Mr. Monroe went with plaintiff to Manistee

to see defendant. No arrangement was made in regard to the purchase, and the parties separated. Plaintiff says that on that day, after Mr. Monroe had gone, he again told defendant that he was getting a small commission from the other parties,—from Mr. Monroe. About the 3d of January following this last interview, the defendant was in Grand Rapids, and plaintiff sent for Mr. Monroe to meet him. Before Mr. Monroe came, plaintiff says he had a further talk with defendant about commissions, in which it was agreed between them that he should receive \$30,000. At this meeting no arrangement was made for the sale of the land, as the parties could not agree upon the price. It appears that before the time plaintiff met defendant at Manistee, and at which time he claims to have told defendant he was getting a small commission from Mr. Monroe, he had arranged with Monroe for a commission of \$10,000. This agreement Monroe put in writing on December 11,

and that, if in making the contract he acted for or in the interest of either himself or the purchaser, or any other party, the same will be a violation of duty. *Lawson v. Thompson*, 10 Utah, 462.

II. In order to decrease price.

The nondisclosure of the price that the purchaser is willing to pay, by means of which the broker induces his principal to accept less than the original sum, is an act of bad faith on the part of a broker which will bar his right to commissions. *Talbot v. Luckett* (Md.) 30 Atl. 565.

And if the broker endeavors to persuade his principal to take less than the price at which he is authorized to sell he is not so much serving his employer as he is the purchaser. *Watts v. Howard*, 51 Ill. App. 243, 246.

A broker cannot conceal from one principal an acceptance of an offer, and endeavor with knowledge of that acceptance to get lower terms from his principal, and yet recover his commissions as compensation for services rendered. *Martin v. Bliss*, 57 Hun, 157, 160.

And if, with knowledge that the purchaser has accepted the principal's terms, and will buy at his price, he endeavors to beat his principal down in price, such act is fraudulent and a breach of duty, and will bar his commission. *Ibid.*

Where there is a preconceived arrangement between the broker and his assistant and the purchaser, whereby the fact that a certain person is to be the purchaser is concealed from the principal, with a view of inducing him to sell at a less price than he otherwise would have done, the broker is guilty of bad faith in the performance of the obligation to his principal. *Hafner v. Herron*, 165 Ill. 242, Affirming 60 Ill. App. 592.

And the broker's commissions were denied upon the same ground where the purchaser was perfectly responsible, but through fear of competition if his name appeared, he was not disclosed to the principal, with whom negotiations were conducted in the name of his clerk as the ostensible buyer, as the broker had an offer upon the terms and at the price proposed by his principal, and approached his principal with a view of inducing him to take a less price. *Pratt v. Patterson*, 112 Pa. 475.

But the mere fact that the broker drove the purchaser to the land and fixed a price upon it, 45 L. R. A.

before he had obtained from the principal the figure at which he would sell, or authority to sell, does not indicate that he concealed from him the fact in regard to its value, nor does it tend to show a perpetration of a fraud upon him, especially where the principal, without any unfair practices, and with deliberation, determined the net price per acre, and the terms upon which he would sell, knowing that the broker's compensation depended upon his exertions or ability to sell for more than he was willing to take, and especially where no offer had been made at the time, and the broker was not certain that the intending purchaser would buy at the price, and the purchaser intimated that the property was too high and did not close the bargain until several days after the broker was authorized to sell. *Barringer v. Stoltz*, 39 Minn. 63.

And if the principal or the intending purchaser has no knowledge of statements made by the broker to the effect that he advised a relative of the intending purchaser that the property was worthless, and that the intending purchaser had better not buy the same, and the parties were not influenced by such statements, they cannot be given in evidence in an action to recover commission. *Boyd v. Watson*, 101 Iowa, 214, 221.

And the mere fact that the principal relied upon representations concerning the situation of property to be taken in exchange, and its value, and other statements tending to increase its value in the future, and charged the broker with nonperformance of his duty, and with gross misconduct and neglect of duty, will not be sufficient to show a culpable neglect of duty on the part of the broker in the absence of fraud or intent to deceive, where the principal completes the negotiations himself, as the presumption is that the representations were made in good faith in the absence of an averment to the contrary,—especially when it is not shown that the broker was employed to ascertain facts which might affect the value of the property, as it could not be necessarily inferred from an allegation that such an act fell within the scope of his duty or agency. *Coe v. Ware*, 40 Minn. 404.

An instruction to the jury to the effect that if they believe that the broker was authorized by the principal to negotiate the sale upon certain terms, and that the broker, either knowing, or having reason to believe, that he could ob-

1895, as follows: "Dear Sir: Confirming our verbal agreement of on or about the 22d ultimo, and our further conversation at Grand Rapids to-day, as requested by you, I write to say that if you negotiate with John Canfield the purchase by this company of the Canfield pine lands, so called, in Missaukee and Kalkaska counties, amounting to about 10,000 acres, we are to pay you \$10,000, which will be in full of your commissions and services and expenses in the matter. Otherwise we are under no obligations to you on account of any services you may have rendered or expenses incurred; it being the understanding that if we so purchase we are to get the property for the amount actually going to Mr. Canfield for the same." In reference to this agreement plaintiff testified: "At the time Mr. Monroe said he would give me \$10,000 if I would use my influence to get the timber for them at a price they could afford to buy it at, I said to him that I would do what I could,

but I did not want that to bar me from any commissions from Mr. Canfield; that it would be no price as a commission for a deal of that size,—of that magnitude. He said he did not care anything about how much commission I got from Mr. Canfield as long as he got the timber for the actual price going to Mr. Canfield." It appears that after this meeting of the parties in Grand Rapids on January 3, 1896, no further negotiations were had between the parties in reference to purchase and sale of the lands until in December following, when negotiations were opened between defendant and Mr. Monroe, and the lands were purchased from defendant by the Thayer Lumber Company for \$1,200,000 some time in January, 1897, the contract being finally made, and first money paid, in February following. Mr. Monroe testified: "During the fall of 1895 and up to January 3, 1896, when they [the negotiations] terminated, Mr. Leathers was acting in my behalf and in

tain a purchaser at those terms, sought to induce the principal to accept a less sum than he had proposed, the broker by such conduct forfeits his right to commissions, modified by stating that the burden of proof in the matter was upon the principal, is not error, as the principal is bound to establish his defense of bad faith. *Buckingham v. Harris*, 10 Colo. 455.

III. In cases of conflicting interests.

In any case in which it appears that the interests of the agent and those of his principal conflict, the courts will subject the case of the former to the closest scrutiny, and infer that he acted corruptly and from a self-interest in all cases of doubt, and thus cast upon the agent the burden of proving the good faith and honesty of the transaction. *Hammond v. Bookwalter*, 12 Ind. App. 177, 181.

And the rule is the same even when they remotely conflict with his own interests, or those of another party; the law, having a just regard for human frailty, will not permit him to act, nor will it hold his acts obligatory on the principal. *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368.

A broker or agent undertaking a special business for another cannot, on the subject of that trust, act for his own benefit to the injury of his principal. *Dodd v. Wakeman*, 26 N. J. Eq. 484, 487; *Parkist v. Alexander*, 1 Johns. Ch. 396; *Condit v. Blackwell*, 22 N. J. Eq. 486; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Hammond v. Bookwalter*, 12 Ind. App. 177, 181.

If the broker has a personal interest hostile to the interests of his principal, the law requires him to disclose the actual situation and his own interests fully to his principal, and the *onus probandi* is upon him. *Humphrey v. Eddy Transp. Co.* 107 Mich. 163, 167; *Fountain Coal Co. v. Phelps*, 95 Ind. 271.

In cases in which the interest of the principal and the agent are in conflict it will not suffice simply for the agent to show that the principal has received all that he directed the agent to ask, or that the amount was all that could have been procured from a stranger, as the agent cannot act in the transaction in the dual relation of both agent and principal. *Hammond v. Bookwalter*, 12 Ind. App. 177, 181.

The broker cannot lawfully take secret interest in contracts which he is authorized to make. *Smith v. Seattle*, L. S. & E. R. Co. 72 Hun, 202.

And any advantage gained by an agent, 45 L. R. A.

whether it is the fruit of performance or violation of duty, belongs to his principal. *Dodd v. Wakeman*, 26 N. J. Eq. 484, 487.

The rule which forbids the broker or agent dealing with the property of his principal on his own account applies to a case in which there is a voluntary assumption of the agency. *Dennis v. McCagg*, 32 Ill. 444; *Casey v. Casey*, 14 Ill. 112.

The broker's right to recover was denied in *Eberhart v. Camp*, 35 Ill. App. 248, as he was interested in the subject-matter and acted on behalf of himself and his co-owners, for the reason that if one of two or more parties having an interest in the same subject-matter acts for the benefit of all, he is, in the absence of an agreement to the contrary, not entitled to any compensation or commissions.

Whenever a broker invested with the power to sell the property of his principal makes a sale within his authority which he believes to be for the best interest of his principal, the fact that in making it the impelling motive that actuates him is self-interest, and not his duty to his principal, does not give the principal a right of action against him for fraud in case the sale proves disadvantageous, as the intention of the agent to defraud his principal must exist in fact and cannot be imputed to him. *Price v. Keyes*, 62 N. Y. 378, 385, *Reversing* 1 Hun, 177, 3 *Thomp. & C.* 370.

But the rule "that in matters touching the agency agents cannot so act as to bind their principals, where they have an adverse interest in themselves," does not apply to a case where a broker who is employed as an agent to sell has an interest in the sale of the estate, for a third person, so long as he does not permit his interest in other like transactions to interfere with his duty to his principal. *Gaty v. Sack*, 19 Mo. App. 478.

IV. Nondisclosure of true position.

It is the duty of the broker to make a full disclosure to his principal of his interest in the subject-matter, and also of all information he has thereon. *Jansen v. Williams*, 36 Neb. 869, 20 L. R. A. 207.

He is bound to disclose to his principal all facts known to him material to the transaction. *Young v. Hughes*, 32 N. J. Eq. 372, 383; *Page v. Voorhies*, 40 N. Y. S. R. 696, 698; *Bookwalter v. Lansing*, 23 Neb. 291; *Hall v. Gambrill*, 92

my interest. I had an arrangement with him, in case he got a satisfactory price for the timber, and negotiated the trade, we were to pay him a certain sum of money. . . . Before we sent our man onto the lands, I saw Mr. Leathers, and asked him, 'What do you want out of this?' . . . and he said in a trade of that kind he ought to have \$25,000 from us. I told him if that was his bottom figure, we would go no further. . . . He said he could do us a lot of good in a trade of that kind, and wanted to work for our interest alone. . . . We finally agreed that if Mr. Leathers would work solely for our interest, and for no commissions from the other side, and we were to have the timber for the net amount that Mr. Canfield sold it for, we would pay him \$10,000 in cash, in case he negotiated the sale at a price satisfactory to us. . . . In doing what he did during the fall of 1895, I understood he was acting for me." The defendant testified that he made no agreement

with Mr. Leathers to pay him a commission, but, on the contrary, stated to him that he would not pay him any commission. He further testified that Mr. Leathers wanted a commission of \$40,000, and he told him he would have nothing to do with the deal, as he was able to make his own sales and handle his own lands as well as anyone could do it for him.

The defendant's claims on the trial were: (1) That he did not employ plaintiff; and (2) that plaintiff was in the employ of the Thayer Lumber Company, and working for and in its interests, and not in the interest of defendant. Plaintiff's claim was that he stood in relation to the parties as a broker, acting for both. The court charged the jury as follows: "Upon the question of double commissions,—whether a broker may act for both parties to a deal, whether he may be agent for both buyer and seller,—I understand the law to be that the broker cannot act as the agent of both parties where their

Fed. Rep. 32, 37; *Proudfoot v. Wightman*, 78 Ill. 553.

And if he does not do so he is guilty of a fraud, and his contract is against public policy and void, and there can be no recovery on it. *Hampton v. Lackens*, 72 Ill. App. 442; *Cotton v. Holliday*, 59 Ill. 176; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Rice v. Wood*, 113 Mass. 133; *Holcomb v. Weaver*, 136 Mass. 265; *Walker v. Osgood*, 98 Mass. 348; *Fuller v. Dame*, 18 Pick. 472; *Bollman v. Loomis*, 41 Conn. 581; *Atlee v. Fink*, 75 Mo. 100.

So, the intentional concealment of important and material facts from the knowledge of his principal by a broker will deprive him of his right to commission for procuring a buyer. *Collins v. McClurg*, 1 Colo. App. 348.

And if the broker disregards his duty to notify his principal of an increase in value, and he attempts to sacrifice the property, it is a fraud upon the right of the principal. *Hall v. Gambrill*, 92 Fed. Rep. 32, 37. To the same effect, *Proudfoot v. Wightman*, 78 Ill. 553.

And any concealment from his principal in any way bearing on the transaction will defeat his claim. *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984; *Collins v. McClurg*, 1 Colo. App. 348.

And such acts render the transaction null and void. *Bookwalter v. Lansing*, 23 Neb. 291.

Especially when he knows of the matter which ultimately defeats his efforts. *Berg v. San Antonio Street R. Co.* 17 Tex. Civ. App. 291.

There must be no misrepresentation, and an entire absence of concealment or suppression of any fact within the knowledge of the agent which might influence the principal. *Condit v. Blackwell*, 22 N. J. Eq. 481, 487; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Banks v. Judah*, 8 Conn. 146; *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 91; *Huguenin v. Baseley*, 14 Ves. Jr. 273; *Lowther v. Lowther*, 13 Ves. Jr. 102.

All agreements between a real-estate agent or broker and the proposed purchaser touching the subject-matter of his employment, which are not disclosed to his principal, should be scrutinized closely, and if not found compatible with entire integrity and good faith toward the principal they will defeat the agent's claim for commissions from the principal. *Hobart v. Sher-* 45 L. R. A.

burne, 66 Minn. 171, 173; *Webb v. Paxton*, 36 Minn. 532.

In a case in which the customer had been found by the broker before he received his appointment by his principal to sell the property, his recovery of commissions from his principal was sustained, even though the latter was not informed by him when the contract of employment was made that he had a customer ready to buy, as the mere fact that the purchaser had expressed a desire to meet the principal after having been shown the property by the broker did not constitute a fraud sufficient to prevent his recovery. *Donohue v. Padden*, 98 Wis. 20, 22.

In a case where the principal's evidence showed that he was induced to enter into the contract by reason of the broker's false representations "as of his own knowledge" regarding the rents of the premises to be taken by his principal in exchange, and that upon discovering the sale to be false and fraudulent the principal refused to carry out the contract, it was held error in the court below to refuse to charge the jury that if the broker stated to his principal of his own knowledge what the aggregate rents of the premises were, and the principal was thereby influenced to enter into the contract, and such a statement was untrue to the principal's prejudice, in that the rents were materially less, then the broker was not entitled to recover; and further, that it was error to add to such charge that the representations were intentionally false on the broker's part, as it was immaterial whether the broker knew them to be false or not if he made them with his own knowledge, and that the principal had a right to rely upon such representations. The court therefore reversed the order of the court below in favor of the plaintiff, and ordered a new trial. *Kramer v. Bjerrum*, 19 App. Div. 332.

In a case in which the principal sought to escape payment of commissions on an exchange of property upon the ground that the broker had not disclosed to him a mortgage upon the property to be taken in exchange, the court held that it could not be said to be a matter of law that the failure of the broker to inform his principal of the mortgage was such a breach of duty as would forfeit any right to compensation; that the question was one for the jury to decide, as to whether the failure to inform the principal of the mortgage in question was, un-

interests are adverse, without their knowledge and consent. Where the double agency is unknown to either party, the broker cannot recover from both; that is, he cannot enforce the payment of commissions from the party who was ignorant of his being employed by the other,—who was ignorant of the double employment. Where the double agency is known and assented to by both parties, and each agrees to pay the broker a commission, he may recover from both; and where the broker is simply acting as a middleman to bring the parties together, and takes no part whatever in the negotiations between them, he may, to this extent, act as the agent of both parties, and recover commissions from each; and it is immaterial in such case that either party was unaware that he was employed by the other. It is claimed by the plaintiff in this case that that was his relation to this deal,—that he was simply a middleman to bring the parties together, they to make their own contract as

to price and terms; while on the part of the defendant it is claimed that he was at least employed to serve the Thayer Lumber Company to a greater extent; he was to do something more, as it is claimed by the defendant in behalf of the Thayer Lumber Company; that he was to do everything he could to obtain a purchase for them on as reasonable terms as he could. There is a question of fact over which there is a controversy, and that is for you to determine which is correct."

The defendant asked the court to charge the jury as follows: "It appears by the evidence of the plaintiff that after the time when he claims the agreement was made between him and Mr. Canfield by which he was to be paid a commission by Mr. Canfield he worked and acted in the business relating to the sale of the lands to the Thayer Lumber Company against Mr. Canfield's interest and in the interest of the Thayer Lumber Company. Under the facts

der all the circumstances of the case, a breach of duty owing by the broker to his principal, as it did not follow that, even if the principal had known of the existence of the mortgage, he would have refused to enter into the contract of exchange. *Page v. Voorhies*, 40 N. Y. S. R. 696, 698.

If a broker has a knowledge of the condition of the country and the enhancement of the value of the land by reason of its proximity to oil fields, and he negotiates a sale at a price far below its value without divulging his knowledge to his principal, he forfeits his right to commissions. *Hall v. Gambrill*, 92 Fed. Rep. 82, 37. In this case the broker's agency commenced about six years before the land was sold, and the land had increased nearly \$100 per acre.

But where the tax bills were before the principal at the time negotiations were pending for the exchange of the land, and he examined or had an opportunity to examine them and to determine for himself whether or not the taxes were due, the principal was not released from payment upon the ground that the broker made false representations as to the amount of taxes due. *Mason v. Hinds*, 47 N. Y. S. R. 163, 166.

V. Soliciting others.

A broker's solicitations to others to purchase the property under his option, if his principal, who was seeking to purchase the property, did not will not be construed as showing bad faith towards his principal, where, having obtained the option at the lowest price for which the owner would sell the property, he made solicitations to such other parties without bad faith towards his principal, whereby such parties were called upon to purchase provided his principal did not do so. *Hinton v. Coleman*, 76 Wis. 221.

VI. Conspiring with purchaser.

If the principal sues the broker and the purchaser for an alleged fraudulent conspiracy, and a fraudulent sale in pursuance thereof to the purchaser, the failure of the principal to establish fraud on the part of the purchaser will not prevent a recovery against the broker, if the jury find that they confederated to deprive the principal of his title to the property, and sacrificed it by means of a sale under the power given to the broker in disregard of the principal's interests, and with a view to their

own personal profit and advantage. *Price v. Keyes*, 62 N. Y. 378, 382, Reversing 1 Hun, 177, 8 Thomp. & C. 720.

In such an action evidence tending to show that a sale of the property in gross was in violation of oral instructions given to the broker, who negotiated the sale, and which shows that in so doing the agent departed from his instructions, does not *ipso facto* prove or constitute fraud, although if the agent sells in violation of instructions he may commit a breach of duty and subject himself to liability to his principal; but such evidence is competent on the issue of fraud, and with other circumstances may satisfactorily establish it so as to deprive the broker of commissions. *Price v. Keyes*, 62 N. Y. 378, 382.

VII. Secret profit.

If an agent makes any profit in the case by any concealed management either in buying or selling, or other transactions on account of his principal, the profits will belong exclusively to the principal. *Collins v. McClurg*, 1 Colo. App. 348; *Cottom v. Holliday*, 59 Ill. 177; *Merryman v. David*, 31 Ill. 404.

And in case of a sale for more than the price fixed he must account to his principal for the excess. *Collins v. McClurg*, 1 Colo. App. 348; *Merryman v. Davis*, 31 Ill. 404.

The broker's claim was disallowed in *Collins v. McClurg*, 1 Colo. App. 348, where they represented the best price to be \$14,000, when in fact he received \$16,000, and retained the difference.

And an action by the principal to recover the money in the broker's hands was upheld without the necessity of a demand where the broker had concealed the fact that the original purchaser afterwards expressed a desire "to carry" half the property, and that he then sold the other half at an increased price to other parties, and accounted to and settled with his principal for the whole at the original price per acre, and received compensation for selling without disclosing the fact that the increased price had been obtained for the other portion. *Love v. Hosa*, 62 Ind. 255.

VIII. Negligence of broker.

If there is any unreasonable neglect of duty on the part of the broker it is a question which must be decided according to the circumstances of the case. *Biddison v. Johnson*, 50 Ill. App. 178.

as related by the plaintiff, he is not entitled to recover." This was refused. This request was based upon the testimony given upon the cross-examination of the plaintiff and upon certain letters written by him to Mr. Monroe. On December 4, 1895, during the time the negotiations were going forward, plaintiff wrote Mr. Monroe: "I went to Manistee yesterday. . . . I saw Mr. Canfield while there, and told him your men were now looking the land over, and that you expected a report from them about the 10th. The thirty days will be up the 14th. Canfield expects to go away about the 18th. I could find out but little from him, further than that there were several parties now figuring on the timber. Dempsey is without doubt the most dangerous competitor, as he wants the timber. Chick found out yesterday that he expected to make a deal with Dempsey, and claims he has a sure thing of a sale; but all we can judge from what he says is, we know he is working hard to sell

to Dempsey. I am satisfied that whatever you do about making the deal will have to be done by the 14th, and it seems to me it would be well to have a thorough understanding with your folks down east so as to save any delay, as I believe Dempsey wants this timber. Antisdell told Chick that Dempsey had raised his bid to \$1,200,000." Again on January 4 he wrote Monroe: "Mr. Canfield left Manistee at four o'clock. I had several talks with him yesterday and today, and have tried hard to impress upon him that you would buy if the price was reduced to what it should be." On January 6 plaintiff wrote Mr. Monroe again, saying: "I started in to help you get this tract of timber, and no one else, and I don't want you to think that I shall do anything nor say one word to anyone until you decide to drop it, if you do so decide; and I am ready to assist you in the matter in your interest, the same as I have thus far. P. S. You need have no fears of Mr. Canfield or anyone

Gross negligence on the part of the broker, which causes a failure of the transaction and renders his services worthless, is a bar to his right to compensation for his services. *Fisher v. Dynes*, 62 Ind. 348, 352.

And negligence on the part of a broker employed to effect an exchange of property in not disclosing to his principal the refusal of a warranty deed of the premises to be taken in exchange on account of a clause relating to the unpaid taxes, is such gross negligence as will bar his right to commissions for effecting such exchange,—especially where he keeps his principal in ignorance of the fact until the time stipulated in the contract has expired, and where there is no authority to insert such a clause in the deed. *Ibid*.

The principal's letter which embodies the terms of sale and is complete as a contract, except that it does not contain a description of the land, and directs the broker to have the cash sum paid in bank and to "bind the contract, and I will do as I have said above," is explicit as to terms, and the broker's neglect in not binding the trade will bar his recovery of commissions. *Yoder v. White*, 75 Mo. App. 155.

IX. Agreement to divide commissions.

While the law requires good faith and fair dealing on the part of an agent toward his principal, and will not permit him to assume a double capacity, whereby his personal interests may in any manner conflict with the interests of his principal, yet there is nothing reprehensible in a broker's agreeing to divide his commission with the purchaser, as the same is a personal sacrifice on the broker's part to further the interests of the principal, and is no defense to an action for commissions. *Scott v. Lloyd*, 19 Colo. 401; *Armstrong v. O'Brien*, 83 Tex. 635; *Chase v. Veal*, 83 Tex. 338.

Such an agreement cannot be given in evidence in order to defeat the broker's right to commissions. *Lemon v. Lloyd*, 46 Mo. App. 452; *Huggins Cracker & Candy Co. v. People's Ins. Co.* 41 Mo. App. 530; *Reese v. Garth*, 36 Mo. App. 641.

And it cannot be treated as a cause of the reversal of a judgment as being a fraudulent agreement concealed from the principal and the other purchasers which would work a revocation of the agency, and deprive the broker of his commissions. *Chase v. Veal*, 83 Tex. 338. 45 L. R. A.

And an agreement between brokers to divide commissions, both acting for different parties, has been upheld. *Morgenstern v. Hill*, 8 Misc. 356; *Jarvis v. Schaefer*, 105 N. Y. 289; *Dearing v. Sears*, 19 N. Y. S. R. 325.

So, the mere fact that a broker is assisted in the procuring of a purchaser by a party who makes no claims against the principal for commissions does not deprive the broker of his commissions. *Schuster v. Ganzenmuller*, 17 Misc. 308, Reversed in 18 Misc. 16, and a new trial ordered on the ground of improper exclusion of certain evidence, although the court admitted that there was evidence in support of the conclusion reached by the jury that the broker was the procuring cause of the sale, and that the case might have been correctly determined upon the facts.

Where the broker practically admits an arrangement with the agent of the other party to divide his commissions with him, and has equivocal relations with him as to the subject-matter of his employment by his principal, the burden is upon the broker to establish his entire good faith in the premises, and that such arrangements and relations are compatible with faithful services for his principal. *Hobart v. Sherburne*, 66 Minn. 171, 173.

And an agreement to give an attorney a share of the amount recovered will not defeat his right to commissions as such arrangements are lawful. *Sussdorf v. Schmidt*, 55 N. Y. 319.

Want of good faith is not shown by the employment by a broker of another to aid him in the consummation of a sale, as one broker may assist another in making a sale. *Hafner v. Herron*, 165 Ill. 242, Affirming 60 Ill. App. 592; *Carter v. Webster*, 79 Ill. 435.

X. By purchase of property.

Agents are bound to exercise the utmost good faith towards their principals, and cannot lawfully take secret interests in contracts which they are authorized to make, and when an agent is employed to sell he cannot lawfully become the purchaser, or if he is authorized to buy he cannot lawfully become the seller, and when he violates these rules he commits a fraud on his principal; and whoever gives an agent interest in a contract which he is authorized to make becomes a guilty participant in the fraud of the agent, and a contract so entered into is voidable at the election of the principal. *Smith v. Seattle*, L. S. & E. R. Co. 72 Hun,

else knowing through me that you have been east." On November 20, 1895, he also wrote Mr. Monroe: "I saw Canfield hereto-day, and had quite a talk with him. He talks about the same as last week. Says he will wait thirty days from the 14th inst. But I am satisfied from what he says that Dempsey is quite strongly of the notion of buying the tract. This, added to what I heard while at Manistee last week, which I told you about, leads me to believe that there is something more than simply talk. I saw O'Brien to-day, and cautioned him against any favorable talks to Canfield about extending the railroad, and he will be all right. He told me he had a talk with Hughart before he went away, and that they had agreed that the rate would simply be enough to cover the costs of construction and hauling. I believe, in order to save time, it is safe for you now to put your men on at once, and look the timber." In reference to the building of the Grand Rapids & Indiana Railroad

spoken of in the above letter, the plaintiff testified: "This tract of land was 23 miles north and east of the Grand Rapids & Indiana Railroad. . . . Mr. Monroe and I talked about the timber being brought over the Grand Rapids & Indiana Railroad, and Mr. Canfield talked about it with me in his office. . . . Mr. Canfield talked about the building of his road from Luther to Manistee, and if the Grand Rapids & Indiana could be got to extend their road into this timber it would be brought out that way, and he could take it to Manistee." Plaintiff further testified as follows:

Q. You say, in the talk of November 14th with Mr. Canfield it was discussed that by the extension of the Grand Rapids & Indiana road up into the timber the timber could be brought down into Manistee. Did you do anything for Mr. Canfield to aid in the extension of that road to the timber?

A. No sir; I do not know that I did.

202. To the same effect, *Reardon v. Washburn*, 59 Ill. App. 161; *Fish v. Leser*, 69 Ill. 394, 400; *Kronenberger v. Fricke*, 22 Ill. App. 550, 553; *Anderson v. Weiser*, 24 Iowa, 428, 432; *Jansen v. Williams*, 38 Neb. 869, 20 L. R. A. 207; *Ruckman v. Bergholz*, 37 N. J. L. 437, 440; *Bain v. Brown*, 56 N. Y. 285; *Reed v. Warner*, 5 Paige, 650; *Halsey v. Montelro*, 92 Va. 581, 583.

He cannot be both purchaser and agent, for such a position violates the fiduciary relation which agency creates. *Morgenstern v. Hill*, 8 Misc. 356; *Dutton v. Willner*, 52 N. Y. 318, 319.

The two positions of principal and agent are inconsistent with each other; in the one case the agent is bound to exercise his best skill and labor and a high degree of fidelity and good faith to secure for his principal the best price possible for the property to be sold, and in the other he is justified in using all means in his power not unlawfully to secure the property at the lowest price possible. *Morgenstern v. Hill*, 8 Misc. 356, 358; *Humphrey v. Eddy Transp. Co.* 107 Mich. 163; *Halsey v. Montelro*, 92 Va. 581, 583; *Dobson v. Racey*, 8 N. Y. 216; *Stettin v. Lamb*, 18 Neb. 619, 627.

The principle is that the law will not allow a man to act in a dual capacity. *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130.

And the moment he ceases to be the representative of his employer he places himself in a position towards his principal where his interests may come in conflict with those of his principal. No matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his services require and his duty to his principal demands. *Porter v. Woodruff*, 36 N. J. Eq. 174, 179; *Morgenstern v. Hill*, 8 Misc. 356, 358; *Dobson v. Racey*, 8 N. Y. 216.

The courts do not stop to inquire whether he has gained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, and they do not pause to speculate concerning the merits of the transaction,—whether the agent has been able so far to curb his natural greed as to take

no advantage,—but they pronounce the transaction void as against public policy. *Porter v. Woodruff*, 36 N. J. Eq. 174, 180.

So, the policy of the law is to prohibit a person from attempting to fill the two positions at the same time, and the principle applies in all cases alike, and not merely to those where the agent has been guilty of fraudulent conduct. *Morgenstern v. Hill*, 8 Misc. 356, 358.

And the law does not stop to speculate upon the probabilities that the agent has resisted temptation, as it removes the temptation by proclaiming in advance that he shall not acquire the property. *Moore v. Moore*, 5 N. Y. 256, 262.

The principle is founded upon the infallible declaration that no man can serve two masters, and as a rule of public policy is distinctly recognized. It forbids that anyone intrusted with the interest of either should in any manner make the business an object of personal interest to himself; and in such cases it matters not that no fraud was meditated and no injury done. *Finch v. Conrade*, 154 Pa. 326, 330.

The object of the principle is, not to compel restitution in case fraud has been committed, or an unjust advantage has been gained, but to elevate the agent to a position where he cannot be tempted to betray his principal, and under a less stringent rule fraud might be committed or unfair advantage taken; and yet owing to the imperfections of the best of human institutions the injured party might be unable either to discover it, or prove it in such manner as to entitle him to redress. *Porter v. Woodruff*, 36 N. J. Eq. 174, 180.

And if it is shown that the broker is the purchaser through another for the land of his principal he cannot recover any commissions. *Ryan v. Kahler* (Tex. Civ. App.) 46 S. W. 71, 72; *Armstrong v. O'Brien*, 83 Tex. 633; *Tower v. O'Neill*, 66 Pa. 332; *Bach v. Emerick*, 3 Jones & S. 548; *Hughes v. Washington*, 72 Ill. 84; *Stewart v. Mather*, 32 Wis. 344; *Gardner v. Ogden*, 22 N. Y. 327.

So, it will not be sufficient to show that the principal has received all that he directed the agent to ask, or that the amount received was all that could have been procured from a stranger, as the agent cannot act in a dual position as agent and principal. *Hammond v. Bookwalter*, 12 Ind. App. 177.

And if the broker does not disclose the name of his intending purchaser upon request his

Q. Did you not do something to prevent his obtaining the extension of the road into the timber?

A. I had a talk with Mr. Hughart and Mr. O'Brien.

Q. You had a talk with them for the purpose of preventing the extension, had you not?

A. I had a talk with them for the purpose of arranging for the extension in there at Mr. Monroe's request.

Q. Did you not talk with them to dissuade them or prevent them from making an extension of the road that would accommodate Mr. Canfield?

A. I don't know whether I did or not. I think perhaps maybe I may have said to them that Mr. Monroe did not want it known.

Q. Then you may have done what you could to prevent the Grand Rapids & Indiana Railroad Company from complying with any request that Mr. Canfield might

make for the extension of the road to the timber?

A. I don't know whether I did or not, sir.

On redirect examination plaintiff testified in reference to this matter:

Q. Counsel has called your attention to an arrangement with the G. R. & I. Co. with Messrs. Hughart and O'Brien, with reference to the extension of the G. R. & I. road to this timber. What did you do in reference to this matter?

A. I saw Mr. Hughart and O'Brien, to see if the road could be extended to the timber from Lake City for handling this tract of timber,—for bringing it out by rail to Muskegon or to Big Rapids, rather.

Q. Did you do anything or say anything to prevent him—Mr. Canfield—having the line extended there than you have already stated?

principal may assume a private speculation on the broker's part, and refuse to close the transaction without being liable for commissions. *Hayden v. Grillo*, 35 Mo. App. 647, 654.

If, in ignorance of such facts, the principal should pay the compensation, when informed of them he may recover it back as money paid under mistake of law. *McGar v. Adams*, 65 Ala. 106, 103.

And all the profits and advantages gained in the transaction belong to the principal, and without his assent he cannot acquire an interest in the subject-matter of the agency adverse to that of his principal. *Cottom v. Holliday*, 59 Ill. 176, 179.

When it appears that an agent has an interest in the contract negotiated by him on behalf of his principal, the burden is upon the party seeking to enforce the contract of showing that the agent made a full disclosure of his interest to his principal. *Smith v. Seattle*, L. S. & E. R. Co. 72 Hun, 202; *Dunne v. English*, L. R. 18 Eq. 524, 31 L. T. N. S. 75.

So, the rights of the principal will not be changed, nor the capacity of the agent enlarged, by the fact that the agent is not vested with a discretion, but simply acts under an authority to purchase a particular property at a specified price, or to sell a particular property at the market price, and no such distinction is recognized, neither can it be established without removing an important safeguard against fraud. *Porter v. Woodruff*, 36 N. J. Eq. 180.

If the broker by means of a fraudulent device procures the property for himself at less than its real value such transaction will be set aside. *Bookwalter v. Lansing*, 23 Neb. 291.

Strong presumptions of indirection and effort to evade the salutary principle forbidding an agent to stand in the conflicting relation of seller and purchaser arise, when very recently after the sale he is found to have acquired from the purchaser a beneficial interest in the property sold, and the presumption is that it is a duty the agent owes to himself to remove by clear and convincing evidence the absence of all concert or collusion, and to establish the fairness of the transaction. *McGar v. Adams*, 65 Ala. 106, 110.

In the case of a broker buying directly from his principal or obtaining any advantage over him in the transaction, it has been said that the law delivers the agent from temptation by a *presumptio juris et de jure*, which good intention 45 L. R. A.

tions are unavailing to repel. *Conkey v. Bond*, 36 N. Y. 427, *Affirming* 34 Barb. 276.

And it is necessary for the broker to prove that the transaction was made and is characterized by the utmost good faith, without misrepresentations, concealment, or suppression of any fact within the knowledge of the agent which might influence the principal, and the burden of proving the same rests upon the agent. *Porter v. Woodruff*, 36 N. J. Eq. 174, 180; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Jansen v. Williams*, 36 Neb. 869, 20 L. R. A. 207.

A broker should not be permitted to form an arrangement with a third party to purchase as partners, and his duties and obligations are such that he cannot there avail himself of the advantages given by his position to speculate off of his principal. *Reardon v. Washburn*, 59 Ill. App. 161.

If a broker enters into a secret agreement with a purchaser to purchase jointly, and the broker is to claim his commissions in part payment of the interest in the purchase, the broker acts in bad faith. *Finch v. Conrade*, 154 Pa. 326, 332.

And he cannot purchase by a combination with others. *McGar v. Adams*, 65 Ala. 106, 109.

And if he sells to a company in which he is interested as a shareholder and director, he is not entitled to commissions from his employer in respect to the sale. *Salomons v. Pender*, 8 Hurlst. & C. 839, 34 L. J. Exch. 95, 11 Jur. N. S. 432, 12 L. T. N. S. 267, 13 Week. Rep. 637.

So, in the case of a sale to a nominal purchaser for the benefit of such a company as a mere conduit through which his company ultimately purchases, none of which facts are communicated to his principal. *Humphrey v. Eddy Transp. Co.* 107 Mich. 163, 167.

And the same ruling holds in the case of a purchase in the name of an ostensible purchaser in order to conceal the broker's relation in the matter. *Bryan v. Kahler* (Tex. Civ. App.) 46 S. W. 71, 72.

So, where the broker finds a purchaser in a syndicate of which he himself is a member. *Hammond v. Bookwalter*, 12 Ind. App. 177, 181.

And the fact that only one of the brokers was interested in the purchase is sufficient to invoke the application of the rule unless it is also made to appear that the principal, knowing of the interest of such broker, specially undertook and

A. No, sir; I did not. Both Mr. Hughart and Mr. O'Brien said that Mr. Canfield had talked with them about extending the line in; but the road was too poor financially to extend it, and if it was extended for bringing out that timber somebody would have to put up the money; and thereby Mr. Monroe, for his company, arranged with the G. R. & I. road to advance certain moneys to extend the line into the timber, and that money was to come back in freights. My recollection is, it was somewhere from \$50,000 to \$75,000 money that was to be advanced.

On cross-examination plaintiff was asked further as to what he did for Mr. Canfield:

Q. I say, when you went to Mr. Canfield, before he agreed to pay you a commission, you were in a position where it was your duty to bring about a deal, if you could, without any commission from him?

A. Well, sir, I was satisfied from the talk with Mr. Canfield that I would have a commission from him when I made the arrangement with Mr. Monroe. . . .

Q. After making the agreement with Mr. Canfield, did you do anything to bring Mr. Monroe up in his price that you would not have done if you had had no agreement with Mr. Canfield?

A. No, sir; I don't know that I did.

Plaintiff further testified:

Q. While acting for the Thayer Lumber Company, you wanted to bring Mr. Canfield down in his price?

A. I wanted to bring Mr. Canfield down where a deal could be made. I had a talk with Mr. Canfield.

Q. And, acting for Mr. Canfield, you wanted to bring the Thayer Lumber Company up in price?

A. Yes, perhaps so.

agreed to compensate the brokers for making the sale. *Ibid.*

And even assuming that a sale may have been effected by a broker with a purchaser in good faith, yet if the broker, upon discovering that he can get a much increased price from another purchaser, and that the first purchaser is willing to surrender his bargain for a trifle, makes a deal whereby he procures an increased price, he is bound to disclose the facts to his principal and to give him the benefit of the advantage, and he cannot recover his commissions. *Bain v. Brown*, 56 N. Y. 285.

So, the broker's commissions were refused where, by means of fraudulent pretenses and statements to the proposed purchasers and to the husband of the principal, he secretly obtained a part interest in the property with the purchasers, even though the husband knew of his interest as a purchaser at the time the contract of sale was executed, but was not in possession of all the facts showing the broker's adverse interest. *Smith v. Tripls*, 2 Tex. Civ. App. 267.

And no commissions were allowed where the agent agreed with a party that if he would bring him a purchaser he would divide commissions with him, and such party agreed with another to purchase jointly, and a contract of purchase was taken in the name of such party, and the principal knew that they purchased on a joint account but nothing was said as to commission. *Morgenstern v. Hill*, 8 Misc. 856.

The court refused commissions to one of a committee of five elected by a club to procure land for its use, who, contrary to the understanding and arrangement between the club members, induced the vendor to pay a commission, but did not report the fact to the committee, and concealed it until it was found out, when he stated that he intended to give it to the club. *Redhead v. Parkway Driving Club*, 7 Misc. 275.

So, the rule extends to a case of a broker's clerk who has access to all the correspondence between the broker and the principal; and he will be chargeable as a trustee for the principal in case of a purchase made by him. *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192.

But while the law forbids the agent while acting as such from taking advantage of his principal by reason of his position, it does not forbid him from making a purchase direct from the principal of the thing he is employed to sell, 45 L. R. A.

where there is no concealment of the truth or fraud practised. *Hammond v. Bookwalter*, 12 Ind. App. 177, 181.

He must, however, acquaint the principal with all he knows as to the value of the property, etc. *Shepherd v. Hedden*, 29 N. J. L. 334, 337.

He must have disclosed all the facts concerning the interest he is to take in the purchase so that his principal may act with full knowledge. *Halsey v. Montelro*, 82 Va. 581, 583; *Humphrey v. Eddy Transp. Co.* 107 Mich. 163. Such transactions are never upheld unless it is clearly shown that there has been the most marked integrity on the part of the broker, that *uberrima fides* which removes all doubt respecting the fairness of the contract. *Porter v. Woodruff*, 36 N. J. Eq. 174, 184.

And the principal must have full knowledge of all the information. *Ruckman v. Bergholz*, 37 N. J. L. 437, 440; *McGar v. Adams*, 65 Ala. 106, 100; *Jansen v. Williams*, 36 Neb. 869, 20 L. R. A. 207.

But when the broker has found a purchaser he is no longer the agent of his principal, the seller. *Short v. Millard*, 68 Ill. 292.

And if the agency has terminated the broker has a right to deal in the property, and if, in such a case, his principal seeks to upset the sale, he must show that the interest acquired by the broker accrued during the continuance of the agency. *Walker v. Derby*, 5 Biss. 134, affirmed in the Illinois Supreme Court, Dec. Term, 1891, but no opinion filed.

So, the broker who, after the termination of the agency, procures an interest in the property purchased, is not bound to disclose the fact to his principal, and the nondisclosure of such fact does not show fraud or bad faith of itself. *Ibid.*

And if the broker makes a bona fide sale to a bona fide purchaser, and the principal has knowledge of such sale, and of the terms upon which it is made, and ratifies such sale, he may subsequently purchase the property from such party in the absence of a showing of fraud upon his principal. *Bookwalter v. Lansing*, 23 Neb. 291.

And when the relation of principal and agent between the broker and the principal ceases, and one of the brokers becomes a purchaser, a new contract must be entered into in order to enable the broker to occupy the dual position of prin-

Q. So that you were playing each against the other in that way, were you not?

A. Yes, sir.

It is settled in this state that a broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each be ignorant of his employment by the other. *Ranney v. Donovan*, 78 Mich. 318; *Montross v. Eddy*, 94 Mich. 105. But from the plaintiff's own testimony that is not the situation here. He first entered the employment of the Thayer Lumber Company, agreed upon a commission to come from that company, and agreed to act in its interest, and did so act during the whole time the

negotiations were pending. The parties were not left to make their own bargain without his aid or interference. He was, under the agreement with the Thayer Lumber Company, to negotiate the purchase for it, and testified that during the negotiations he was trying to get Mr. Canfield's price down; and it is apparent from his letters to Mr. Monroe and from his testimony that in the interest of the Thayer Lumber Company he was active in measures to ward off Mr. Canfield from obtaining an extension of the Grand Rapids & Indiana Railroad to the timber, and in his dealings with Mr. Dempsey. The general rule of agency is that an agent to buy or sell is bound to make the best bargain he can for his principal, and, if he takes any compensation from the other party, it becomes at once the property of his

principal and agent. *Hammond v. Bookwalter*, 12 Ind. App. 177.

So, the rule of law which prohibits the agent or broker from procuring any interest himself in the premises does not strictly apply to a case in which the principal himself is present and negotiates the sale. *Walker v. Derby*, 5 Blas. 134. Affirmed in Illinois Supreme Court, Dec. Term, 1891, but no opinion filed.

And where the state law prohibits the procurement of title for the benefit of others, in order to deprive a broker of compensation where this element appears, it must be shown that he was aware of the fact at the time, or had sufficient notice to put him on inquiry. *Walsh v. Hastings*, 20 Colo. 243.

XI. Double commissions.

a. General rule.

Where a real-estate broker is acting as agent for the vendor in the sale, and at the same time makes a bargain with the purchaser and asks commissions from him also, without disclosing his relations with the vendor from whom he is also getting commissions, he will not be entitled to recover the same, especially where it is evident that both the parties placed reliance upon his judgment and skill. *Collins v. McClurg*, 1 Colo. App. 348; *Manders v. Craft*, 3 Colo. App. 237, 238; *Bates v. Copeland, MacArthur & M.* 50; *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70; *Alexander v. North Western Christian University*, 57 Ind. 466; *Kronenberger v. Fricke*, 22 Ill. App. 550, 553; *Cottom v. Holliday*, 59 Ill. 176, 179; *Hampton v. Lackens*, 72 Ill. App. 442; *Stratton v. Samuel H. Jones Co.* 20 Ky. L. Rep. 1787; *Schwartz v. Yearly*, 81 Md. 270, 276; *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 113 Mass. 138, 16 Am. Rep. 459; *Follansbee v. O'Reilly*, 135 Mass. 80, 82; *Moore v. Mandlebaum*, 8 Mich. 443; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *McDonald v. Maltz*, 94 Mich. 172, 175; *Chapman v. Currie*, 51 Mo. App. 40; *Norman v. Roseman*, 59 Mo. App. 682; *Campbell v. Baxter*, 41 Neb. 729; *Rowe v. Stevens*, 53 N. Y. 621; *Carman v. Beach*, 63 N. Y. 97, 99; *Murray v. Beard*, 102 N. Y. 508; *Knauss v. Krueger Brew. Co.* 142 N. Y. 70, 74, Reversing 62 Hun, 46; *Abel v. Disbrow*, 15 App. Div. 536; *Carroll v. O'Shea*, 42 N. Y. S. R. 671; *Siegel v. Gould*, 7 Lans. 177; *Baer v. Koch*, 2 Misc. 334; *Jones v. Henry*, 15 Misc. 151; *Duryee v. Lester*, 75 N. Y. 442; *Platt v. Baldwin*, 2 N. Y. City Ct. Rep. 281; *Watkins v. Cousall*, 1 E. D. 45 L. R. A.

Smith, 65; *Vanderpoel v. Kearns*, 2 E. D. Smith, 170; *Dunlop v. Richards*, 2 E. D. Smith, 181, 182; *Pugsley v. Murray*, 4 E. D. Smith, 245, 246; *Pierce v. Thomas*, 4 E. D. Smith, 354; *Balnelmer v. Reichardt*, 55 How. Pr. 414, 416; *Atkinson v. Pack*, 114 N. C. 597, 603; *Bell v. McConnell*, 37 Ohio St. 399, 41 Am. Rep. 528, 529; *Everhart v. Searle*, 71 Pa. 256; *Finch v. Conrade*, 154 Pa. 326, 330; *Lynch v. Fallon*, 11 R. I. 311, 28 Am. Rep. 458; *Armstrong v. O'Brien*, 83 Tex. 635; *Shirland v. Monitor Iron Works Co.* 41 Wis. 162; *Meyer v. Hanchett*, 48 Wis. 246; *Orton v. Scofield*, 61 Wis. 382, 384; *Shepard v. Hill*, 6 Wash. 605, 608; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 271, 26 L. ed. 543; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984; *Hall v. Gambrill*, 92 Fed. Rep. 32, 37.

If the agency is not limited and the employment involves the duty of negotiating for his principal, the agent cannot serve two masters with adverse interests without informing each of the fact that they may know to what extent they may safely confide in his advice and follow his judgment. *Duryee v. Lester*, 75 N. Y. 442.

If the double agency is unknown to his principals, it is a breach of the agent's implied contract with each to use his best efforts to promote the interest of his principals, and operates, or is likely to operate, as a fraud upon both; and the law will not in such a case enforce the contract for compensation irrespective of the consideration whether the sale made was or was not advantageous to the party from whom compensation is claimed. *Duryee v. Lester*, 75 N. Y. 442, 444.

The rule applies alike to the case of an exchange of land. *Platt v. Baldwin*, 2 N. Y. City Ct. Rep. 281; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Duryee v. Lester*, 75 N. Y. 742, 8 N. Y. Week. Dig. 116.

If the broker procures a purchaser for whom he is also acting as agent without disclosing the fact to the principal, it constitutes such a fraud as precludes him from recovering any commissions. *Carman v. Beach*, 63 N. Y. 97, 99; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Clafin v. Farmers' & C. Bank*, 25 N. Y. 293; *Gardner v. Ogden*, 22 N. Y. 347, 78 Am. Dec. 192.

And the rule applies in cases where he is invested with the least discretion. *Knauss v. Krueger Brew. Co.* 142 N. Y. 70, 74, Reversing 62 Hun, 46.

It especially holds where the double employment is of a nature where, by possibility, the interest of the parties may be adverse. *Ibid.*

So, it applies if the broker has other and additional duties to perform, as where, in the

principal, the law not permitting the agent to allege that it was received otherwise than as agent. And generally no agent, in the course of his agency,—in the matter of his agency,—can be allowed to make any profit without the knowledge and consent of his principal. It is said in *Rice v. Davis*, 136 Pa. 442, that “the principle underlying the case that an agent for the sale of property cannot at the same time act as agent for the purchaser, or interest himself therein, and thus entitle himself to compensation from both vendor and vendee, is grounded on the infallible declaration that ‘no man can serve two masters.’” The evidence is undisputed and conclusive that the employment of plaintiff by the Thayer Lumber Company was not that of a middleman, and

he did not act as a middleman simply, but was employed to negotiate, and did negotiate in the interest of that company, even as late as January 6, 1896. In his letter to Mr. Monroe he says: “I started in to help you get this tract of timber, and no one else. . . . I am ready to assist you in the matter in your interest, the same as I have thus far.” The testimony of Mr. Monroe, which is undisputed, is: “We were to pay him a commission of \$10,000 in cash in case he negotiated the sale at a price satisfactory to us;” and the written contract made with Monroe provided: “It being the understanding that if we so purchase we are to get the property for the amount actually going to Mr. Canfield for the same.” It cannot be said, under these circumstances, that

course of negotiation, he is required by his employer to bring the other party to terms upon any particular point. *Wyckoff v. Bliss*, 12 Daly. 324, 327.

And it makes no difference whether the consideration is paid in money or land: double commissions will not be allowed. *Pugsley v. Murray*, 4 E. D. Smith, 245, 246.

Such contracts are absolutely void as being contrary to public policy. *Chapman v. Currie*, 51 Mo. App. 40, 43.

A broker employed to sell or exchange real estate does not act in good faith if he turns aside all propositions that are not accompanied with an additional retainer or commission. *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168, 169.

The case of *Bennett v. Kidder*, 5 Daly, 512, also supports the theory that the broker cannot recover commissions from both parties, and that if he is employed by the purchaser any agreement with the seller for commissions would be a fraud.

And the case of *Com. v. Cooper*, 130 Mass. 285, although an indictment for embezzlement, supports the holding that a broker has no right to put himself in a position antagonistic to the interests of his employer, and cannot make himself both buyer and seller, and that any custom to that effect unknown to the employer is against public policy and illegal. It relies upon the case of *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, *supra*, which expressly declares the doctrine.

By engaging with a second party the broker forfeits his compensation from the one who first employed him. *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528, 529.

A second employment by a broker will destroy the agency, and he cannot collect from either party. *Deutsch v. Baxter*, 9 Colo. App. 58; *Baer v. Koch*, 2 Misc. 334, 335; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Capener v. Hogan*, 40 Ohio St. 203; *Campbell v. Baxter*, 41 Neb. 729.

One who so acts is precluded from recovering compensation for his services. *Kronenberger v. Fricke*, 22 Ill. App. 550, 553; *Carman v. Beach*, 68 N. Y. 97.

And the mere fact of the discovery of no actual fraud or bad faith will not release a case from the general rule which exists in the cases of the double employment, and no recovery can be had against the party kept in ignorance, and the result is not made to turn on the presence or absence of design, duplicity, or fraud, but is a consequence of established policy. *De Steiger* 45 L. R. A.

v. Hollington, 17 Mo. App. 382, 389; *Scribner v. Collar*, 40 Mich. 375.

The broker acts in a dual capacity, and in a manner which shows bad faith toward his principal, although he claims that the amount paid to him by a purchaser is for the preference which he was to give the purchaser, and not by way of commissions. *Everhart v. Searle*, 71 Pa. 256.

And the broker's claim was disallowed where under his employment to find a builder he obtained a promise from the builder so introduced by him to give him a commission or compensation for his trouble in the matter without the knowledge of his original employers, although he testified that he did not expect any pay from them, as the recommendation of such builder by him was expected to, and did, have weight with the parties in his engagement. *Holcomb v. Weaver*, 136 Mass. 265.

The broker cannot extort a price from a purchaser with whom he has made an arrangement for commissions, which is not demanded by his other principal, the vendor, and then be entitled to a commission as for a service,—especially where the price has been fixed by the vendor; and it is no answer for him to say that the double employment was disclosed. *Phinney v. Hall*, 101 Mich. 451.

If a broker is employed by one party to make an exchange he cannot claim commissions from the other, who denies his agency, and also his employment as his agent, where the latter party states that he will pay no commissions, but that if an even exchange is effected the broker can have whatever he can make out of it,—especially where such broker at the time of the conversation has already effected an exchange of the property, and has in his possession an agreement to exchange which also contains a stipulation for payment of commissions by the first party which he has not disclosed to the latter party. *Wilson v. Webster*, 88 Iowa, 514.

And the broker's claim was refused in a case where he was employed by his principal to sell or exchange real estate with power to negotiate for the same on commission, in which the principal himself promised to assist him, and was also employed by a third person for a like purpose, and such employment was not known to either party, as he was not a mere middleman to bring the parties together. *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541, 542.

A broker who, while employed to sell, agrees to put the purchaser in communication with his principal, who is the owner of the property, so that he can make the purchase, in consideration that he, the purchaser, will convey to such broker one of the lots so purchased, cannot enforce the contract as it is illegal, as founded

the plaintiff was a mere middleman. In the case of *Everhart v. Searle*, 71 Pa. 256, it was said: "An agent to sell cannot become an agent to buy. . . . 'The ground on which the disqualification rests,' it was said in 8 Tomlin's Brown, 72, 'is . . . he that is intrusted with the interest of others cannot be allowed to make the business an object of interest to himself, because from a frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is intrusted. The danger of temptation from the facility and advantage for doing wrong which a particular situation affords does, out of the mere necessity, work a disqualification.' " We have seen

from the letter of plaintiff of January 4, 1896, to Monroe, that he "had tried hard to impress upon him [Canfield] that you [Monroe] would buy if the pine was reduced to where it should be." Certainly this was not the act of a disinterested middleman. It was the effort of the agent of the Thayer Lumber Company to get the defendant to a lower price. It was in keeping with his conduct during the entire negotiations. He was working in the interest of the Thayer Lumber Company. The request to charge should have been given. In this view of the case, no other question need be discussed. *The judgment must be reversed*, and a new trial ordered.

The other Justices concur.

upon a consideration in direct violation of the broker's duty to, and in fraud of the rights of, his principal, the seller. *Smith v. Townsend*, 109 Mass. 500; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 98 Am. Dec. 168.

And if a broker is secretly engaged by the intending purchaser to procure a purchase of the property for him, and under such arrangement he approaches the intending vendor, and negotiations are entered into which lead to a sale to such purchaser, the broker will not be entitled to recover his commissions from the vendor under a stipulation between himself and the purchaser that he is to look to the vendor for his commissions, where such vendor has no notice that he is in any way acting as agent for the intending purchaser as well as for himself. *Gunn v. Bank of California*, 99 Cal. 349.

If the testimony shows that the employment of the broker by the parties in a dual capacity is of such a character as to give the principal the right to rely upon him as a broker to serve him as against the interest of the other party to the exchange, he cannot recover double commissions. *Robinson v. Clock*, 38 App. Div. 67.

The broker's right to recover against the vendor was refused where the broker, representing the purchaser, called upon the vendor's husband, who acted as her agent, and made several offers, the last of which was accepted, and he did not show his employment by the vendor or by her husband. *Carroll v. O'Shea*, 42 N. Y. S. R. 871.

If it is shown that the broker, at the time he accepts the employment, is acting as agent for the other party, and that such fact is not disclosed, the agent will be entitled to have the question properly submitted to the jury, and an instruction which wholly ignores such question, and tells the jury that if the broker was requested by the defendant to sell his property and furnish a purchaser he was entitled to commissions wholly irrespective of whether he was at the same time secretly acting as the agent of the purchaser in respect to such matter is erroneous. *Kronenberger v. Fricke*, 22 Ill. App. 550, 553.

A requested instruction to the effect that a real-estate broker cannot recover commissions from a person for the sale of property if at the time he was in the employ of and acting for the buyer, should be given in an action to recover such commissions if it is shown that he was in fact acting in the interest of the purchaser, who after the transaction was completed offered him money for his services. *Blake v. Stump*, 73 Md. 160, 10 L. R. A. 103.

And it is error for the court to direct a verdict in his favor where he is the only witness on his own behalf, and there are suspicious

facts and circumstances, as such a case should be left or submitted to the jury for their determination. *Condit v. Still*, 44 N. Y. S. R. 284.

If the principal seeks to escape liability upon the ground of double commissions he must plead such fact. *Childs v. Ptomey*, 17 Mont. 502, 509.

Although the fact that the broker has been acting in a dual capacity has not been affirmatively pleaded, yet proof of it may be made where the answer denies the performance of the services. *Norman v. Reuther*, 25 Misc. 161; *Chatfield v. Simonson*, 92 N. Y. 209.

The defense that the broker has acted for both parties in effecting the sale or exchange of the property without the knowledge or consent of the defendant ought to be pleaded or raised upon the trial in the first instance, and it would seem that it cannot be raised upon appeal if not previously advanced, and a mere motion to dismiss the complaint upon the ground of no cause of action does not apprise the court of a specific defect sufficient to show it. *Abel v. Disbrow*, 15 App. Div. 536.

An allegation by a principal as a defense to an action for commissions that the agent or broker has acted in a dual capacity will not be sufficient to defeat the broker's right to commissions, where the broker shows positively that there was no agreement in regard to such commissions, and one of the brokers testifies that a commission was offered to him by the other party, but that he said he wanted to see the deal go through, and did not care whether he got any commission from him or not, and that he was to get commission from the principal. *Lebowitz v. Colligan*, 45 N. Y. Supp. 873.

Yet, the defense that the principal is not liable for commissions upon the ground that the broker has acted in a dual capacity and has withheld knowledge of that fact from his principal may be proved in an affirmative averment of the fact in the answer, or in the denial of the performance of the services for which compensation is claimed, on the theory that there is an implied agreement on the part of the agent or broker that he will render faithful services, which agreement is broken or violated by a secret agreement for compensation with the other party. *Smith v. Soosen*, 24 Misc. 706.

And the defense that the agent has fraudulently and without the knowledge of the principal received reward or compensation from the other parties to the transaction is a good defense to the action upon a note given by the principal for such commissions. *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70.

So, money which has been paid by one of the parties to an exchange to a broker on account of compensation may be recovered back by such

principal where the agent is acting in a double capacity without the knowledge or consent of such principal, and is to receive compensation from both parties. *Campbell v. Baxter*, 41 Neb. 729; *Cannell v. Smith*, 142 Pa. 25, 31, 12 L. R. A. 395.

b. Reasons for the rule.

The rule is based upon the doctrine that it is the duty of an agent for a vendor to sell the property at the highest price; and of the agent of the purchaser to buy it for the lowest. *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, 757; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Lloyd v. Colston*, 5 Bush. 587, *Tinsley v. Penniman*, 12 Tex. Civ. App. 591.

It is also founded upon the fact that the essence of the contract of the broker is to use his best skill and judgment to promote the interests of his employer. *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, 757.

And also upon the fact that he cannot exercise his whole duty to two principals whose interests in the subject-matter of the agency are conflicting. *Shepard v. Hill*, 6 Wash. 605, 608.

In making a bargain a broker cannot act with fairness if he expects to be paid by both parties, as he cannot faithfully discharge the duty he owes to one without a violation of duty to the other; and under such circumstances commissions should not be recovered from both. *Watkins v. Cousall*, 1 E. D. Smith, 65.

And from principles of public policy such an agent would not be allowed to recover commissions from either party. *Tinsley v. Penniman*, 12 Tex. Civ. App. 591; *Armstrong v. O'Brien*, 83 Tex. 648; *Deutsch v. Baxter*, 9 Colo. App. 58; *Manders v. Craft*, 3 Colo. App. 237, 238; *Cannell v. Smith*, 142 Pa. 25, 31, 12 L. R. A. 395; *Fitch v. Conrade*, 154 Pa. 326, 330.

It is against public policy and sound morality for a man to act as broker for both parties. *Cannell v. Smith*, 142 Pa. 25, 12 L. R. A. 395; *Addison v. Wanamaker*, 185 Pa. 536, 542; *Everhart v. Searle*, 71 Pa. 256; *Rice v. Davis*, 186 Pa. 439.

The rule that prohibits the agent from representing interests antagonistic to those of his principal stands upon the great moral obligation that one employed by another should be honest in the performance of his duties to his employer, and not let self-interest conflict with his integrity. *Hammond v. Bookwalter*, 12 Ind. App. 177.

So, law and morals alike forbid that a man shall be the agent of two persons and receive the pay from both in the transaction of business between them, where their interests are antagonistic, as he cannot, or at least he is not likely to, discharge his duty with fidelity to both. *Hammond v. Bookwalter*, 12 Ind. App. 177, 181; *Simonds v. Hoover*, 35 Ind. 412; *Cannell v. Smith*, 142 Pa. 25, 31, 12 L. R. A. 395.

It will not allow him to assume relations so essentially inconsistent and repugnant to each other. *Alexander v. North Western Christian University*, 57 Ind. 466; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, 757.

And even if the parties bargained for themselves they are entitled to the benefit, skill, knowledge, and advice of the agent, and at the same time to communicate with him without the slightest fear of betrayal. *Tinsley v. Penniman*, 12 Tex. Civ. App. 591; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Hampton v. Lackens*, 72 Ill. App. 442.

The broker cannot use his best skill and judgment in the interests of his principal when he acts for two parties whose interests are essentially adverse, and if he does so without their knowledge he is guilty of a breach of contract. *Hampton v. Lackens*, 72 Ill. App. 442.

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If an agent acts for both parties without informing them of the fact, he is guilty of a breach of contract and commits a fraud upon his principal in undertaking without his assent or knowledge to act for another, for the reason that he conceals an essential fact entirely within his own knowledge which he is bound in the exercise of good faith to disclose. *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, 757; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198, 204; *Pugsley v. Murray*, 4 E. D. Smith, 245; *Rupp v. Sampson*, 18 Gray, 398, 77 Am. Dec. 416; *Young v. Hughes*, 32 N. J. Eq. 372, 384; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Meyer v. Hanchett*, 39 Wis. 419.

In such cases he is guilty of a constructive fraud. *Shepard v. Hill*, 6 Wash. 605, 608.

The fact that the same person acts for both parties operates as a surprise on both, and is a breach of trust and confidence, where the intent of the agent so to act is concealed from the parties. *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, 757.

The rule arises from the fact that the relations are so essentially inconsistent and irreconcilable with each other that they cannot be performed by the same person. *Hampton v. Lackens*, 72 Ill. App. 442.

And the reason of the rule is that a due and sole regard to the interest of one of the parties would necessarily involve a total disregard of the interest of the other. *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368.

The rule also arises from the fact that the interests he attempts to represent are adverse to each other. *Atkinson v. Pack*, 114 N. C. 597, 603.

And also from the fact that the duties required in the two relations are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of discreet and faithful exercise of the trust. *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, 757.

The rule springs from the fact that it is impossible for the principal to have the fidelity and best services of the agent when he is employed by parties whose interests are antagonistic. *Deutsch v. Baxter*, 9 Colo. App. 58; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Everhart v. Searle*, 71 Pa. 256; *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Finnerty v. Fritz*, 5 Colo. 174.

It is based upon the ground of a necessary conflict of interest and duty. *Bates v. Copeland*, *MacArthur & M.* 50; *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66.

It also rests upon the incompatibility of the duties. *Manders v. Craft*, 3 Colo. App. 237, 238; *Patt v. Baldwin*, 2 N. Y. City Ct. Rep. 281; *Watkins v. Cousall*, 1 E. D. Smith, 65; *Vanderpoel v. Kearns*, 2 E. D. Smith, 170; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Pugsley v. Murray*, 4 E. D. Smith, 245.

It also arises from the fact that the duty of the broker is not performed where there is a secret agreement with the other side to render services, or for a commission upon the transaction, and where such an agreement has been made it bars any recovery by the agent for his services. *Norman v. Reuther*, 25 Misc. 161; *Carman v. Beach*, 63 N. Y. 97, 100; *Murray v. Beard*, 102 N. Y. 505, 508; *Empire State Ins. Co. v. American Cent. Ins. Co.* 138 N. Y. 446, 449.

And the rule is grounded on the infallible dec-

laration that no man can serve two masters, as one intrusted with the interest of either cannot make the business an object of personal benefit, and the question does not depend upon whether fraud was meditated or not, or injury done. *Finch v. Conrade*, 154 Pa. 326, 330; *Cannell v. Smith*, 142 Pa. 25, 81, 12 L. R. A. 395.

The broker cannot act with the highest degree of faithfulness and fidelity to the interest of the party he represents if he serves two masters. *Carroll v. O'Shea*, 42 N. Y. S. R. 671.

It makes no difference that such common agent was guilty of no actual wrong, as the court refuses to countenance such an employment, not for the sake of the principals, but for the sake of the law. *Chapman v. Currie*, 51 Mo. App. 40, 43.

The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it. *De Steigler v. Hollington*, 17 Mo. App. 382, 389; *Everhart v. Searle*, 71 Pa. 256; *Rice v. Wood*, 113 Mass. 183, 18 Am. Rep. 459.

It makes no difference if the principal was not in fact injured, that the agent intended no wrong, or that the other party acted in good faith. *Tinsley v. Penniman*, 12 Tex. Civ. App. 591. Approving *Armstrong v. O'Brien*, 83 Tex. 648.

And the result does not turn upon the presence or absence of design, duplicity, or fraud, but is a consequence of established policy. *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541, 542.

c. Custom or usage.

A usage of real-estate brokers to recover double commissions in the sale or exchange of property is unreasonable as it operates to prevent the faithful performance of the contracts of agency, and is contrary to good morals and sound policy, as sanctioning an unwarrantable concealment of facts essential to a contract, and as operating as a fraud on the parties who have a right to rely on the confidence reposed in their agents. *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756, 758; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458, 459; *Tinsley v. Penniman*, 12 Tex. Civ. App. 591.

And a broker employed to effect a sale, who effects an exchange and receives commissions from the party first employing him, cannot recover from the other party to the transaction, even upon an express promise or usage. *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 68.

But where the broker was unable to accomplish a sale at a certain price, and notified the principal of the fact and that he had a client who would exchange at a valuation, and the parties met and an agreement to exchange was effected, and the seller was represented by a lawyer, but nothing was said as to the relation of the brokers to him, although the seller knew at the time that he placed the property in his hands for sale that the other party was also a client of his, the court allowed the broker's claim for commissions under a custom existing in the city of New York to charge commissions against both sides in an exchange of property where there was no agreement or understanding to the contrary. *Haviland v. Price*, 6 Misc. 372, 374.

d. Pooling arrangements.

A pooling arrangement between brokers is not, strictly speaking, a double agency, although it is tantamount to it,—especially where the principal is deprived of the disinterested judgment and efforts of the broker in effecting to the best advantage to himself a sale or exchange of his

property. If a pooling arrangement is entered into between the brokers without the knowledge or sanction of their principals, they cannot recover commissions. *Norman v. Roseman*, 59 Mo. App. 682, 685.

XII. Exceptions to rule.

a. General.

If the party claiming commissions is not in the occupation of an agent employed to make a sale of land, his right to recover them does not come within the rule applicable to such cases. *Lyle v. Universal Land & Invest. Co.* (Tex. Civ. App.) 30 S. W. 723, 725.

And an offer made by an intending purchaser to pay the broker a commission and pay a certain sum for the property, communicated to the principal, where the parties are brought together thereunder, will not defeat the broker's right to recover from his principal when the sale falls through owing to the principal's evading the same and making new, dilatory excuses. *Auten v. Jacobus*, 20 Misc. 669, 21 Misc. 632.

So, after the agent's authority has ceased and another broker has been employed, he may then act on behalf of other persons, and advocate the superiority of their property without being liable for a breach of faith. *Schwartz v. Yearly*, 31 Md. 270, 276.

A broker, employed by his principal to sell certain property, who effects an exchange of real estate upon satisfactory terms, is entitled to a fair compensation for his services, even when, after the transaction is completed, the party with whom the exchange is effected pays the broker a certain amount for his services, and testifies that he has not previously employed him,—especially when there is no charge of bad faith. *Campbell v. Yager*, 32 Neb. 266.

But the question whether or not the broker has abandoned his agency is one of fact, and not of law, and therefore when a writing is adduced as containing evidence of certain facts, and different inferences may be drawn from it, it is for the jury, and not for the court, to draw the inferences. *Bass v. Jacobs*, 63 Mo. App. 393; *Mants v. Maguire*, 52 Mo. App. 136; *Primm v. Haren*, 27 Mo. 205.

b. Knowledge or consent.

Where both parties have notice that the broker is acting for, and is employed by, each of them, and with that certain knowledge they agree to pay his commissions, it is no defense to an action brought by the broker to recover such commissions that he is also receiving commissions from the other party, and in such a case it is not error for the court to refuse to dismiss the complaint on that ground. *Rowe v. Stevens*, 53 N. Y. 621; *Duryee v. Lester*, 75 N. Y. 442; *Manders v. Craft*, 3 Colo. App. 237, 238; *Alexander v. North Western Christian University*, 57 Ind. 466; *Rice v. Wood*, 113 Mass. 183; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *Chapman v. Currie*, 51 Mo. App. 40, 43; *De Steigler v. Hollington*, 17 Mo. App. 389; *Robinson v. Jarvis*, 25 Mo. App. 421, 426; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528, 529; *Capener v. Hogan*, 40 Ohio St. 203; *Jarvis v. Schaefer*, 105 N. Y. 289, 293; *Bonwell v. Auld*, 7 Misc. 447, 488; *Whiting v. Saunders*, 22 Misc. 539, Affirmed in 23 Misc. 332; *Lansing v. Bliss*, 86 Hun, 205, 209; *Pugaley v. Murray*, 4 E. D. Smith, 245; *Bonwell v. Howes*, 1 N. Y. Supp. 435; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 458; *Armstrong v. O'Brien*, 83 Tex. 635; *Meyer v. Hanchett*, 39 Wis. 419.

And the rule has been held to apply, no matter whether his services involve the exercise of discretion or not. *Whiting v. Saunders*, 22 Misc. 539, Affirmed in 23 Misc. 332.

And double compensation may be recovered where with full knowledge of the fact of such employment the party actually promised such payment. *Pugsley v. Murray*, 4 E. D. Smith, 245, 246; *Whiting v. Saunders*, 22 Misc. 539. Affirmed in 23 Misc. 332; *Lansing v. Bliss*, 86 Hun, 205, 206.

The validity of contracts for double agency when the principals have been fully advised and consented to such employment has been more directly affirmed in *Rowe v. Stevens*, 3 Jones & S. 189, 53 N. Y. 621; *Alexander v. North Western Christian University*, 57 Ind. 486; *Joslin v. Cowee*, 56 N. Y. 626; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Fitzsimmons v. Southern Exp. Co.* 40 Ga. 330, 2 Am. Rep. 577; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.* 34 Ohio St. 450, 32 Am. Rep. 380; *Pugsley v. Murray*, 4 E. D. Smith, 245.

Two parties may always by mutual consent, no matter how adverse their interests, make a third their agent. *Robinson v. Jarvis*, 25 Mo. App. 421, 426.

There must be a distinct arrangement between all persons concerned. *Dunlop v. Richards*, 2 E. D. Smith, 181, 182.

If the broker is acting solely as agent of the purchaser to buy, and not as the agent of the vendor to sell, he cannot recover against the latter: but if he receives the latter's property for sale, and his interest with the buyer or purchaser grows out of the fact that he has the property for sale, he may recover commissions from the vendor for the sale,—especially where such vendor has knowledge that the purchaser engaged the broker to look up the property for him, and his relations were fully disclosed to the parties. *Lorimer v. Boylan*, 98 Mich. 18.

A real-estate broker is not entitled to commissions from both parties, yet he will be entitled to commissions from one who purchases real estate with a knowledge that the broker has the property for sale as a broker, and is authorized to sell it at a price in advance of that at which the customer purchases it. *Geery v. Pollock*, 16 App. Div. 321.

And the broker of the vendor who, with the knowledge of his principal, acts as the agent of the purchaser in signing his name to the contract of sale, is entitled to recover agreed commissions from his principal. *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35.

It must be shown that the fact that he was so acting was known of, or assented to, by the parties, or it must be shown that the principal had knowledge that he was to receive a commission from the other party. *Norman v. Reuther*, 23 Misc. 161; *Manders v. Craft*, 3 Colo. App. 237, 238; *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Foliansbee v. O'Reilly*, 135 Mass. 80, 82; *Norman v. Roseman*, 59 Mo. App. 682, 685; *Chapman v. Currie*, 51 Mo. App. 40; *Campbell v. Baxter*, 41 Neb. 729; *Abel v. Disbrow*, 15 App. Div. 536; *Rowe v. Stevens*, 53 N. Y. 621; *Carman v. Beach*, 63 N. Y. 100; *Murray v. Beard*, 102 N. Y. 508; *Bennett v. Kidder*, 5 Daly, 512; *Wyckoff v. Bliss*, 12 Daly, 324, 327; *Baer v. Koch*, 2 Misc. 334, 345; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Pierce v. Thomas*, 4 E. D. Smith, 354; *Watkins v. Cousall*, 1 E. D. Smith, 65; *Balhelmer v. Reichardt*, 55 How. Pr. 414, 416; *Carroll v. O'Shea*, 42 N. Y. S. R. 671; *Atkinson v. Pack*, 114 N. C. 597, 603; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Capener v. Hogan*, 40 Ohio St. 203; *Everhart v. Searle*, 71 Pa. 256; *Cannell v. Smith*, 142 Pa. 25, 31, 12 45 L. R. A.

L. R. A. 395; *Addison v. Wanamaker*, 185 Pa. 536, 542; *Armstrong v. O'Brien*, 83 Tex. 635; *Meyer v. Hanchett*, 43 Wis. 246.

He must show that he so acted with the full knowledge and consent of both parties. *Tinsley v. Penniman*, 12 Tex. Civ. App. 591; *Armstrong v. O'Brien*, 83 Tex. 648; *Hampton v. Lackens*, 72 Ill. App. 442, 443.

The position must be disclosed and communicated. *Kronenberger v. Fricke*, 22 Ill. App. 550, 553; *Carman v. Beach*, 63 N. Y. 97; *Cannell v. Smith*, 142 Pa. 25, 12 L. R. A. 395; *Addison v. Wanamaker*, 185 Pa. 536, 542; *Everhart v. Searle*, 71 Pa. 256; *Rice v. Davis*, 136 Pa. 439; *Condit v. Sill*, 44 N. Y. S. R. 284; *Platt v. Baldwin*, 2 N. Y. City Ct. Rep. 281; *Watkins v. Cousall*, 1 E. D. Smith, 65; *Vanderpoel v. Kearns*, 2 E. D. Smith, 170; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Rowe v. Stevens*, 53 N. Y. 621; *Connell v. Smith*, N. Y. L. J. Sept. 14, 1891.

He must produce evidence of such knowledge, and promise to pay, before he can recover from both parties. *Pugsley v. Murray*, 4 E. D. Smith, 245, 246.

And when knowledge of every circumstance connected with his employment by either is communicated to the other, and free assent is given by each principal to the double relation of the agent or broker, his right to compensation cannot be denied on any just principles of morals or of law. *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528, 532.

The broker's claim to double commissions was denied in the case of *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459, as he could not prove that his double employment was known and assented to by both parties. The above case is distinguished from that of *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416, as there was no such fraud upon either party in the latter case as would make the contract void for illegality, and also upon the ground that in that case the performance of the contract was a certain specific act, namely, the introduction of the purchaser.

And even if the fact that the principal agreed to pay has been proved it is incumbent upon the broker to establish the knowledge and consent of the parties, and if he fails to do so he cannot recover. *Robinson v. Clock*, 38 App. Div. 67.

Where a real-estate broker, who had the property of one party in his hands for sale, opened negotiations with another customer, and the two owners were brought together, and an exchange was effected upon terms fixed by the owners at a meeting in the broker's office without any suggestion as to terms by the broker, who testified that the owners "knew he was acting for them both," the court affirmed the judgment in the broker's favor. *Cox v. Haun*, 127 Ind. 325, 327.

In *Meyer v. Hanchett*, 43 Wis. 246, the court intimated that there were cases which condemned a double agency upon the ground of public policy, even when exercised with the knowledge and consent of both principals, but did not in that case consider the soundness of such doctrine.

Yet, even in the absence of direct testimony showing that the principal knew that the broker was acting for the other party to an exchange, the fact that he was so acting would be necessarily inferable from the fact that the principal knew the business in which the broker was engaged, and also knew that he already had in his hands as broker the property of the other party to the exchange; and in such a case it is reasonable to infer that he does so with knowledge that if the broker rendered services to

both parties he will expect compensation from both. *Cox v. Haun*, 127 Ind. 325, 327, 19 Wash. L. Rep. 326.

And where both parties to the exchange make their own bargain when brought together by the broker, the fact that both parties had knowledge that each was to pay the broker is not fatal to a recovery in a suit for commissions. *Collins v. Fowler*, 8 Mo. App. 588.

In *Moore v. Grow*, 1 Pa. Super. Ct. 125, 128, 129, the broker's claim upon a promissory note given by the principal to him for commissions due upon an exchange of property in which the broker acted in a dual capacity with the full knowledge and consent of both parties was allowed, as the giving of the note was the deliberate act of the principal for what he regarded as a just claim.

So, the broker's claim was allowed in *Rowe v. Stevens*, 58 N. Y. 621, affirming 3 Jones & S. 191, upon an exchange, as both parties placed their property in the hands of the broker with notice that he was employed by the other, and with such knowledge each agreed to pay him his commissions.

And if the broker shows that the principal "knew the whole ins and outs of the case from beginning to end" the principal may prove his ignorance of the double employment, as the rule is that the broker cannot recover in case of a double employment unless it appears that both parties were fully informed that he was acting for both and assented to such employment. *Condit v. Sill*, 44 N. Y. S. R. 284.

In *Smith v. Soosen*, 24 Misc. 706, the court refused to disturb the verdict of the court below in the broker's favor, as the broker did not notify his principal of the fact of the double employment, and also upon the ground that the question was not within the issues as there was no affirmative plea upon that ground stated in the answer and the defendant did not put in issue the performance of the services alleged in the complaint.

The case of *Ralsin v. Clark*, 41 Md. 158, 20 Am. Rep. 66, establishes the principle that the broker cannot recover of a party who last employed him, even though the double employment was known to both parties and the party first employing him had paid his commissions.

In the case of *Pugsley v. Murray*, 4 E. D. Smith, 245, there is an intimation that the rule that a broker cannot recover commissions from both parties only applies where the broker conceals the double employment.

Some cases rest the invalidity of the contract for double commissions upon the broad ground of public policy, and hold that it cannot be enforced even against a party who, knowing that the broker is already employed, promises expressly to pay him for his services. The case of *Everhart v. Searle*, 71 Pa. 256, is one of this line.

In that case the court disallowed the broker's action for double commissions. It did not appear that the other party was informed by the broker of his employment by the defendant principal, and the representatives of the other party continued to confer freely with him and raise the price of their land so as to bring it up to or near the price which the defendant principal had put upon his estate, and it appeared that in doing this the broker had co-operated with the other parties and had told the defendant principal that it was a nice piece of land to build on, but did not state to him that the price was erroneously inflated. The case showed the defendant principal was a mere instrument in the hands of the broker.

The nonliability of a second employer who contracts with a broker with knowledge of his 45 L. R. A.

first employment is maintained in many cases. *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Smith v. Townsend*, 109 Mass. 500; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Bollman v. Loomis*, 41 Conn. 581; *Everhart v. Searle*, 71 Pa. 256; *Morison v. Thompson*, L. R. 9 Q. B. 480, 43 L. J. Q. B. N. S. 215, 30 L. T. N. S. 869, 22 Week. Rep. 859. In these cases, however, there is a strong intimation, if not distinct announcement or holding, that a recovery can be had by such a broker when he acts with the knowledge and consent of both principals.

If the second employer has knowledge of the first engagement then both he and the agent are guilty of a wrong committed against the first employer, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer; and in such a case it is no answer that the second employer, having knowledge of the first employment, should be held liable on his promise because he could not be defrauded of the transaction as the contract itself is void as against public policy and good morals, and both parties thereto are *in pari delicto*, and the law will leave them as it finds them, the maxim being *Ex dolo malo non oritur actio*. *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528, 529.

In this case the court inclined to the opinion that the decided current of authority was in favor of the validity of such contracts where the consent of both principals to such double agency was clearly proved, although it admitted that such transaction should be regarded with suspicion, but where full knowledge and consent of all parties in interest was clearly shown no rule of public policy or principle of sound morality would seem to be violated, the court leaning to the opinion that public policy rather required that such contracts fairly entered into by competent parties should be enforced where no public law had been violated, and no corrupt purpose or end was sought to be accomplished, even though such agent might not be able to serve each of his masters with all his skill and knowledge, as he could render each a service entirely free from falsehood and fraud.

Although there may be some conflict as to the right of a real-estate broker to recover where he has acted as agent for both parties with full knowledge that he is so doing, yet the authorities are uniform in holding that he cannot recover where he withholds the knowledge of such relation. *Humphrey v. Eddy Transp. Co.* 107 Mich. 163, 167; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541; *People, Plugger, v. Overysel Twp.* Bd. 11 Mich. 222; *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 180; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Wadsworth v. Adams*, 138 U. S. 380, 34 L. ed. 984; *Brock v. Barnes*, 40 Barb. 532, 533.

In *Meyer v. Hanchett*, 43 Wis. 248, the question whether such an agency was consistent with public policy though exercised with the consent of both parties was not fully decided by the court, although it was decided that mere knowledge of such agency without actual consent on the part of the principals would not entitle the agent to commissions.

And if it is shown that the principal has no knowledge of the fact that the broker is getting a commission from the parties adversely interested, and expects a commission from them, which consideration virtually places him upon their side of the trade, the principal will be entitled to a reversal of the judgment in the broker's favor,—especially where it manifestly appears that the commission he was to obtain

from the other parties was not a mere gratuity bestowed upon him after the consummation of the sale, but was a consideration exacted by him from said parties before he would allow the trade to be consummated with his principal. *Tinsley v. Penniman*, 12 Tex. Civ. App. 591.

In a case in which it was not shown that the broker's employment of the other party, or the fact that he was to receive compensation from that party, was known to the defendant principal, it was held that the court committed no error in dismissing his action to recover commissions upon an exchange of property. *Robinson v. Clock*, 38 App. Div. 67.

c. Mere middleman.

It is a mistake to suppose that an ordinary real-estate broker occupies the same position as an agent employed to buy or sell specific property, for such a broker is generally a middleman employed to bring the principals together, and give them an opportunity to effect an exchange of property. *Cox v. Haun*, 127 Ind. 325, 327, 19 Wash. L. Rep. 328; *Pape v. Wright*, 116 Ind. 502; *Vinton v. Baldwin*, 88 Ind. 104, 45 Am. Rep. 447; *Alexander v. North Western Christian University*, 57 Ind. 466; *Rowe v. Stevens*, 53 N. Y. 621; *Rupp v. Sampson*, 16 Gray. 398, 77 Am. Dec. 416; *Barry v. Schmidt*, 57 Wis. 772, 46 Am. Rep. 35; *Stewart v. Mather*, 32 Wis. 544; *Herman v. Martineau*, 1 Wis. 156, 60 Am. Dec. 368.

And if the broker or agent is a mere middleman whose business is to bring the parties together that they may make their own bargain, there is no valid reason why he may not stipulate for commissions from each party. *Atkinson v. Pack*, 114 N. C. 597, 603.

Where there is an agreement to pay a middleman for services of value rendered, honestly entered into, it cannot be avoided on the ground that another person with distinct and independent interest has agreed by a separate contract to pay for the same services, and if the broker only undertakes to bring the parties together so that they may make a trade if they choose without his interference in the contract itself as the agent of either party he is entitled to compensation from both on an arrangement from each. *Fritz v. Finnerty* (Colo.) 10 Cent. L. J. 487, 488; *Mullen v. Keetsleb*, 7 Bush, 253; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Scribner v. Collar*, 40 Mich. 875, 29 Am. Rep. 541; *Ranney v. Donovan*, 78 Mich. 318, 329; *Collins v. Fowler*, 8 Mo. App. 588; *Childs v. Ptomey*, 17 Mont. 502, 509; *Shepherd v. Hedden*, 29 N. J. L. 334; *Moses v. Bierling*, 31 N. Y. 462; *Haydock v. Stow*, 40 N. Y. 363, 368; *Duryee v. Lester*, 75 N. Y. 442; *Rowe v. Stevens*, 53 N. Y. 621; *Jarvis v. Schaefer*, 105 N. Y. 289; *Haviland v. Price*, 6 Misc. 372, 374; *Bonwell v. Auld*, 9 Misc. 65; *Jones v. Henry*, 15 Misc. 151; *Southack v. Lane*, 23 Misc. 515, 517; *Martin v. Bliss*, 57 Hun, 157, 160; *Wyckoff v. Bliss*, 12 Daly, 324, 327; *Siegel v. Gould*, 7 Lans. 177; *Barnard v. Monnot*, 33 How. Pr. 440; *Balheimer v. Reichardt*, 55 How. Pr. 414, 416; *Bell v. McConnell*, 37 Ohio St. 396, 41 Am. Rep. 528, 529; *Lynch v. Fallon*, 11 R. I. 311, 23 Am. Rep. 468; *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368; *Hardy v. Stonebraker*, 31 Wis. 640; *Stewart v. Mather*, 32 Wis. 344; *Grant v. Hardy*, 33 Wis. 668; *Barry v. Schmidt*, 57 Wis. 172, 46 Am. Rep. 35; *Orton v. Scofield*, 61 Wis. 382, 384; *Hooper v. California*, 155 U. S. 648, 657, 39 L. ed. 297, 301, 5 Inters. Com. Rep. 610.

If there is no opportunity for the violation of good faith on the part of the broker, and his employment by one of the parties is entirely

consistent with his duty to the other party by whom he is also employed, and no discretion or control is vested in him, and the parties make their own bargain, he can earn commissions from both parties; and the test of such cases is whether the interest of one of the parties for whom the persons act is antagonistic to that of the other party, for if they are antagonistic he cannot be said to act with the sole regard to the interest of his principal. *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368.

If the price and terms of the sale are fixed by the principal himself with the purchaser it is of no importance to the principal, the seller, whether the broker was in the employ of the purchaser even for a compensation. *Moutross v. Eddy*, 94 Mich. 100; *Donohue v. Padden*, 93 Wis. 20, 22.

The mere fact that a broker renders some services to the purchaser will constitute no defense to an action to recover compensation from the seller, where the latter makes the price and receives the full amount stipulated for in the contract, and is to receive no more in any event, even where it is expressly agreed that he is not to receive any commission whatever from the purchaser, as it is no part of his contract with the seller to fix the price of the property. *Donohue v. Padden*, 93 Wis. 20, 22; *Orton v. Scofield*, 61 Wis. 382.

The rule that an agent acting for both parties and for each without the knowledge of the other can collect commissions from neither, applies only to agents *stricti juris*, and not to middlemen. *Manders v. Craft*, 3 Colo. App. 237, 238.

And it is only when the employment of a broker is that of an agent with discretionary authority from his principal in the matter of such employment that he cannot accept employment from another whose interests conflict with those of his principal. *Pollatschek v. Goodwin*, 17 Misc. 587, 590; *Knauss v. Krueger Brew. Co.* 142 N. Y. 70; *Empire State Ins. Co. v. American Cent. Ins. Co.* 138 N. Y. 446; *Haviland v. Price*, 6 Misc. 372; *Bonwell v. Auld*, 9 Misc. 65.

A broker employed merely as a middleman is not an agent for either party to buy or sell, but stands indifferent between them and there is no conflict of duty in the case, and he is not, therefore, an adverse party, and may recover commissions from both. *Siegel v. Gould*, 7 Lans. 177; *Fritz v. Finnerty* (Colo.) 10 Cent. L. J. 487, 488; *Duryee v. Lester*, 75 N. Y. 452.

In such cases the brokers act as mere middlemen without discretion in making any of the terms of the sale or exchange, or to conclude either of them in any other respect, and such terms are fixed and arranged without reliance upon the brokers by the parties themselves acting for themselves. *Pollatschek v. Goodwin*, 17 Misc. 587, 590.

And there is no violation of duty in such a case in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other. *Knauss v. Krueger Brew. Co.* 142 N. Y. 70, 74, *Reversing* 62 Hun, 46.

And the mere fact that he received the right to act from or through another middleman or turns the matter over into the hands of another broker, upon a contract with him to share half the price obtained by such broker over and above the price fixed by him with his principal, as the selling price, will not render the transaction void as against public policy, and is no defense to the contract made by him with his principal. *Ranney v. Donovan*, 78 Mich. 318, 329; *Stewart v. Mather*, 32 Wis. 344; *Hardy v. Stonebraker*, 31 Wis. 640.

A contract by a broker for double commis-

sions is not illegal where there is nothing in such contract which the law condemns as between the parties, and it does not violate any obligation or duty of the broker towards the principal. *Dearing v. Sears*, 19 N. Y. S. R. 325, 327.

But his services must be limited to bringing together such parties as, without his interference, have agreed upon an exchange of the property with reference to which such agent procured them to meet, and even this limited right of compensation does not exist as against a party who in advance did not know of and assent to the agent's dual employment. *Strawbridge v. Swan*, 43 Neb. 781; *Campbell v. Baxter*, 41 Neb. 729, followed. To the same effect, *Ormes v. Dauchy*, 13 Jones & S. 85; *Rowe v. Stevens*, 53 N. Y. 621; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756; *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Bell v. McConnell*, 37 Ohio St. 401, 41 Am. Rep. 528.

If the broker is to make no bargain for the sale of the property, and is only to bring the buyer and seller together, and he does so and they make their own bargain, he is a mere middleman, and can recover compensation from both under a contract so made. *Green v. Robertson*, 64 Cal. 75.

The broker's commissions were allowed in a case in which he was employed to purchase the property, and was to have a commission for so doing, and after he had found a party willing to sell, and had made the offer to him, and the same had been accepted, he made an arrangement with the seller for a commission also, as he had no discretion as to the price, and the terms were fixed by the purchaser whose interest was not affected by his accepting a commission from the seller. *Jones v. Henry*, 15 Misc. 151.

In *Ranney v. Donovan*, 78 Mich. 318, 329, the broker was simply a go-between or middleman, and the court placed his right to recover expressly upon the ground that no confidence was reposed in him by either party that he would exert his skill and judgment to get the land at the lowest price or sell it for a larger sum, as all he did was to bring the parties together, and they made their own bargain.

And in *Montross v. Eddy*, 94 Mich. 100, 105, all that the broker had to do was to find a purchaser at a sum fixed and agreed upon, and neither his efforts nor judgment were to be employed to get a greater price; he therefore acted as middleman and was entitled to a reasonable compensation for his services, as he merely brought the parties together to make their own bargain. In this case the court relied upon its previous decision in *Renney v. Donovan*, 78 Mich. 318.

And where the broker was employed by the authorized agent of the principal, as he "understood he had customers," the broker's commissions were allowed in an action against the broker to recover moneys in his hands which he claimed to be entitled to retain as his commissions on the sale, as it was to be assumed that the principal had knowledge of the fact that the broker was the agent of his "customers," and that he consented thereto, and that as the prices fixed by the principal were absolute between himself and the broker, the broker was neither required nor expected to sell the lots for any more than the fixed price, and it was not his duty to sell the lots for a higher price, but his agreement was to sell at a fixed price, and no confidence or trust was reposed in the broker. *Alexander v. North Western Christian University*, 57 Ind. 406, 476.

So, a case in which the broker does not act 45 L. R. A.

as such for the purchaser, and his arrangement is simply to buy the property at a fixed price, and it makes no difference whether the price is paid to the owner of the property or paid to someone else, or whether a portion of it is paid to the broker by the owner for procuring a sale and in which the broker is not called upon to exercise any discretion in favor of the principal, nor is the latter entitled to the benefit of all his skill or judgment in the case, is not one of those cases where a party acting as a broker loses his right to compensation from one party if he accepts commission from the other. *Felbel v. Kahn*, 29 App. Div. 270; *Knauss v. Krueger Brewing Co.* 142 N. Y. 70.

In *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416, the verdict of a court below in favor of the agent or broker was sustained, upon the distinct ground that the jury found that the principal's promise to pay was given, not for services in his employ as a broker, but for the performance of a certain specific act, namely, the introduction of the purchaser to him, and the court considered that, so far as the mere performance of such an act was concerned, it could make no difference to the principals whether the broker was in the employ and pay of the other party or not, and it was not such a fraud upon the other party, though concealed from him, as to render his contract with the principals void for illegality. *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168.

The real ground of the decision in this case was that the broker was not an agent to buy or sell, but only acted as a middleman to bring the parties together in order to enable them to make their own contracts, in which position he stood entirely indifferent between them, and held no such relations in consequence of his agency as rendered his action adverse to the interests of either party.

The exceptional character of the cases must, however, clearly appear before they are exempted from the general principle; but the cases are nearly, if not quite, uniform that where the double employment exists and is not known no recovery can be had against the party kept in ignorance, and the result is not made to turn upon the presence or absence of design, duplicity, or fraud, but is a consequence of an established policy. *McDonald v. Maltz*, 94 Mich. 172; *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541.

The rule is that the broker cannot recover where he negotiates the exchange and in some degree influences the parties to make the trade, and thereby contributes some influence in the matter. *Lloyd v. Colston*, 5 Bush, 587; *Hobart v. Sherburne*, 66 Minn. 171.

The broker's claim was denied in *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168, as in that case the broker was employed generally to promote the object for which his principal sought his aid, and to which the interest of the opposite party were adverse. The case is therefore distinguishable from *Rupp v. Sampson*, 16 Gray, 398, 77 Am. Dec. 416, *supra*.

XIII. As affecting purchaser.

If the purchaser is only able to carry out the contract by means of an unlawful device the broker cannot recover commissions upon the sale. *Zittle v. Schlesinger*, 46 Neb. 844.

But the mere fact that the broker's position is concealed from the purchaser for the reason that he does not want to deal with any agents, but to trade directly with the owner, is not alone sufficient to debar his right to commissions in the absence of either dishonesty or want of good faith towards the purchaser, it not appearing that the price of the property

was enhanced because of such commissions. *McCampbell v. Cavis*, 10 Colo. App. 242.

In *McDonnell v. Rigney*, 108 Mich. 276, the broker's claim for commissions was disallowed as the testimony showed that by the arrangement between the broker and the principal the broker was to make colorable subscriptions for lots for the purpose of inducing others to buy, and the nature of the transaction between them was concealed from the purchasers or from the proposed buyers, as such arrangement was contrary to the policy of the law and sound morals, and such contracts could not be enforced as they were grounded in turpitude, and were opposed to upright and fair dealing and to public policy.

XIV. Miscellaneous cases.

If upon an exchange of land it should subsequently turn out that the title to the land taken by the principal was defective or that the deal failed, before the principal can recover commissions paid to his broker he must show that he acted in bad faith and concealed information which he possessed as broker in regard to the transaction. *Lockwood v. Halsey*, 41 Kan. 166.

The mere fact that a broker lends the proposed purchaser a sum of money with which to make the first payment is not of itself a fraud upon the principal such as will alter his position and bar his right to recover commissions for finding a purchaser. *Lawson v. Thompson*, 10 Utah, 462.

XV. Burden of proof.

The burden is cast upon the principal to prove fraud on the part of the broker in inducing an acceptance of the contract, or other wrong done by him which causes a failure on the part of the purchaser to perform his contract. *Greene v. Hollingshead*, 40 Ill. App. 195, 197.

But when the transaction is seasonably challenged, a presumption of its inabillity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly and in the richest of faith imparted to his principal all the information concerning the property possessed by him. *Collins v. McClurg*, 1 Colo. App. 348.

And where the confidential relation of principal and agent exists, the *onus* is upon the agent to show that the transaction was fair and equitable, that he gave all the advice within his knowledge pertaining to the subject of the sale, and the value of the property, and that there was no suppression or concealment which might have influenced the conduct of his principal. *Ibid*.

And the burden of establishing the perfect fairness of the contract is upon the broker. *Condit v. Blackwell*, 22 N. J. Eq. 481, 487; *Parkist v. Alexander*, 1 Johns. Ch. 394; *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 91; *Huguenin v. Baseley*, 14 Ves. Jr. 272; *Lowther v. Lowther*, 13 Ves. Jr. 102; *Hobart v. Sherburne*, 66 Minn. 171, 173, *supra*, IX. E. W.

MISSOURI SUPREME COURT.

Frederick J. CORNWELL *et al.*, *Respts.*,
v.

George W. WULFF, *Appt.*

(.....Mo.....)

1. A provision that a trustee of a married woman shall convey the premises to her husband, his heirs or assigns, if she dies without having disposed of the property or directed its disposal by will or otherwise, does not prevent her from taking an absolute equitable fee simple under the deed which creates the trust, where it conveys to the trustee, his heirs and assigns forever, in trust for her separate use, free from her husband's control and debts, and subject to disposal as she shall direct or request, or shall by will or other writing direct or appoint.
2. An absolute power of disposition in an instrument conveying land carries with it a full power in the real estate itself.
3. Equitable estates are covered by the same rule of descents that covers the devolution of legal estates.
4. Under a trust to permit a married woman to occupy land and to receive the rents and income, and to execute conveyances as she directs, and protect the title or allow the name of the trustee to be used for that purpose, the estate vests in her heirs on her death.

NOTE.—As to the effect of power of disposal to make an estate absolute, see also *Peckham v. Lego* (Conn.) 7 L. R. A. 419, and note; *McCullough v. Anderson* (Ky.) 7 L. R. A. 836, and note; *Bills v. Bills* (Iowa) 8 L. R. A. 696; and *Snider v. Baer* (Pa.) 13 L. R. A. 359. 45 L. R. A.

5. The equitable estate of a cestui que trust is an equitable fee simple, where the trustee or feoffee to use has the entire fee-simple estate at law.

6. There cannot be a valid conditional limitation or executory devise where the executory limitation is conjoined with an absolute power in the first taker or primary devisee to defeat and cut off the further estate or interest by alienation of the entire fee in his lifetime.

(*Marshall, Sherwood, and Brace, JJ., dissent.*)

(December 23, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for St. Louis County in favor of plaintiff in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. L. F. Parker, for appellant:

The deed from Yeates to Goodlett was a conveyance to uses, and prior to the adoption of the statute of uses a fee might be limited upon or after a fee in such a conveyance, though such a limitation would have been void if contained in a common-law conveyance.

2 Kerr, Real Prop. ed. 1695, § 1635, p. 1541, § 1655, p. 1563, § 1659, p. 1566, § 1663, p. 1569; Spence, Eq. Jur. ed. 1846, p. 455; 2 Pom. Eq. Jur. ed. 1892, pp. 982, 983, note; 1 Hilliard, Real Prop. 4th ed. § 18, p. 402.

The effect of the statute of uses was to execute the use, confidence, and trust "after such quality, manner, form, and condition" as the beneficiary had in equity prior to its adoption; and hence, under the statute of uses, a fee may be limited upon or after a fee in a conveyance to uses.

Sheppard's Touchstone, ed. 1840, p. 424; Tiedeman, Real Prop. 2d ed. §§ 449, 484; 4 Kent, Com. 13th ed. 126; 2 Bl. Com. Cooley's 3d ed. pp. 332, *334; Spence, Eq. Jur. ed. 1846, pp. 480, 481; Gray, Perpetuities, §§ 32, 54; 1 Fearne, Contingent Remainders, ed. 1845, pp. 381, 382, note *a*; Wilson, Springing Uses, p. 9; Smith, Executory Interest, ed. 1857, pp. 50, 51, *149, 150; 2 Washb. Real Prop. 5th ed. pp. 669, 670, *284, 285; 1 Hilliard, Real Prop. 4th ed. §§ 17, 18, pp. 408, 409; 2 Greenl. Cruise, Real Prop. ed. 1850, p. 422, *345; Sanders, Uses and Trusts, ed. 1857, p. 149; Haynes, Outlines of Equity, 5th ed. p. 43; Challis, Real Prop. p. 124, *136; 20 Am. & Eng. Enc. Law, pp. 904-909, 918-920, 947-955; *Straat v. Uhrig*, 56 Mo. 482; 2 Minor, Inst. pp. 176, 738; *Yore v. Yore*, 63 Fed. Rep. 645.

Messrs. Thomas P. Bashaw, Eber Peacock, and H. G. Herbel for respondents.

Gantt, P. J., delivered the opinion of the court:

This is an action of ejectment for certain lands in St. Louis county. The plaintiffs recovered judgment for possession and rents and profits in the circuit court, and defendant appeals. This is the second appeal in the cause. The first will be found reported in 126 Mo. 355. The purpose of this appeal is to have this court review its opinion and judgment in *Cornwell v. Orton*, 126 Mo. 355, and overrule that case, and incidentally to overrule *Green v. Sutton* (decided in 1872 by the supreme court) 50 Mo. 186. The earnestness of counsel for appellant, and the thorough brief and argument which he presented, no less than the admirable tone thereof, are such that we feel impelled to review our former opinions, and examine anew the grounds upon which they were based. The common source of title was in Robert A. Yeates, and both parties claim under a deed executed by said Yeates and wife on the 15th day of October, 1859, to John A. Goodlett, as trustee, which deed is in these words (omitting the acknowledgment and certificate of record, which are in due and lawful form): "This deed, made and entered into this 15th day of October, 1859, by and between Robert A. Yeates and Sophie Yeates, his wife, of," etc., "parties of the first part, and John A. Goodlett, of," etc., "party of the second part, and Catherine Cornwell, wife of James Cornwell, of," etc., "party of the third part, witnesseth: That the said parties of the first part, in consideration of the sum of thirty-one hundred and seventy-two and ¹⁰/₁₀₀ dollars, to them in hand paid by the said party of the second part, receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, and conveyed, and by these presents do 45 L. R. A.

grant, bargain, sell, and convey, unto the said party of the second part, and his heirs and assigns, a certain tract or parcel of land, situated," etc., "to have and to hold the same, with all the rights, privileges, and appurtenances thereto belonging or in any wise appertaining unto him, the said party of the second part, his heirs and assigns, forever, in trust, however, to and for the sole and separate use, benefit, and behoof of said Catherine Cornwell, wife of said James Cornwell. And the said John A. Goodlett, party of the second part, hereby covenants and agrees to and with the said Catherine Cornwell that he will suffer and permit her, without let or molestation, to have, hold, use, occupy, and enjoy the aforesaid premises, with all the rents, issues, profits, and proceeds arising therefrom, whether from sale or lease, for her own sole use and benefit, separate and apart from her said husband, and wholly free from his control or interference, and from his debts, in such manner as she may think proper, and that he will at any and all times hereafter, at the request and direction of the said Catherine Cornwell, expressed in writing, signed by her or by her authority, bargain, sell, mortgage, convey, lease, rent, or otherwise dispose of said premises, or any part thereof, and will pay over the rents, issues, profits, and proceeds thereof which may come into his hands, and not otherwise liable, to her, the said Catherine Cornwell, in such manner as she shall in writing direct or request, and that he will, at the death of the said Catherine, convey or dispose of the said premises, or such part thereof as may then be held by him under this deed, and all profits and proceeds thereof, in such manner, to such person or persons, and at such time or times as the said Catherine Cornwell shall by her last will and testament, or any other writing signed by her or by her authority, direct or appoint, and in default of such appointment then that he will convey said premises to said James Cornwell, his heirs or assigns." It was then admitted by both parties (1) that the defendant is now in the possession of the property, and was at the institution of this suit; (2) that Mrs. Catherine Cornwell died intestate, December 23, 1860, without having made any conveyance or appointment of said real estate under said conveyance in her lifetime; (3) that James Cornwell died December 25, 1889, and the plaintiffs are Mrs. Catherine Cornwell's children and grandchildren, and heirs of James Cornwell; (4) that the plaintiffs Frederick J. Cornwell and Catherine Holmes, wife of James C. Holmes, are the children of Catherine Cornwell, and that Charles J., Frederick J., and Benjamin S. Cornwell, infant plaintiffs, are the children of Benjamin Cornwell, who died prior to the institution of this suit, and who was the son of Catherine Cornwell, and these plaintiffs are represented in this suit by their next friend, Helen V. Cornwell, plaintiff, and widow of said Benjamin Cornwell, deceased, who was duly appointed their next friend in this case prior to the institution of this

suit; (5) that James Cornwell and Catherine Cornwell were husband and wife at and prior to the date of the deed of Yeates to Goodlett; (6) that plaintiffs are the only heirs at law of Catherine Cornwell; (7) that the value of the monthly rents and profits of the premises is, and since James Cornwell died has been, \$10. Whereupon plaintiff rested. The defendant then asked the court to declare that under the pleadings and the evidence the plaintiff was not entitled to recover, which the court refused to do, and defendant excepted at the time. Defendant offered and read in evidence a decree of the St. Louis land court, rendered at the March term, 1862 in a case wherein James Cornwell was plaintiff and John A. Goodlett was defendant, by which decree the court required said Goodlett to convey to James Cornwell the premises described in the deed from Yeates to Goodlett, as provided in the final clause in said deed. Defendant then offered and read in evidence a deed from John A. Goodlett, as trustee, to James Cornwell, dated May 21, 1862, conveying the same property pursuant to said decree. Defendant then offered and read in evidence a warranty deed from James Cornwell to Peachey A. Garriott, dated January 31, 1867, conveying the same property. Defendant then offered and read in evidence a warranty deed from Peachey A. Garriott and wife to Hans Tyson and George W. Wulff, dated July 26, 1887, conveying the same property. Defendant then offered and read in evidence a quitclaim deed from Hans Tyson to George Wulff, dated September 21, 1887, conveying the same land. And this was all the evidence. The court found for the plaintiffs, and rendered judgment accordingly. Within four days defendant filed his motion for new trial, alleging as grounds that the court erred in refusing to declare that plaintiff was not entitled to recover, and in finding for the plaintiffs under the evidence, when the finding should have been for the defendant. This motion was overruled, and the defendant excepted at the time; and during the same term, and on August 30, 1895, defendant was given sixty days within which to file his bill of exceptions; and on October 28, 1895, defendant filed his bill of exceptions, preserving all exceptions above noted; and during the same term of court at which said judgment was rendered the defendant duly perfected his appeal to this court.

As already remarked in the accompanying statement, the deed of Robert Yeates, the common source of title, has been twice construed by this court, in *Cornwell v. Orton*, 126 Mo. 355, and *Cornwell v. Wulff*, 126 Mo. 355. In those cases it was held that the said deed created an absolute equitable fee simple in and to the land in controversy in Mrs. Catherine Cornwell, and at her death it descended to her heirs, subject to the curtesy of her husband, James Cornwell, and at his death, on the 25th of December, 1889, they were entitled to the possession thereof. It is that construction of said deed which is now, for the third time, challenged by de-

fendant. On the former occasions it was insisted, as now, by defendant—First, that the deed only created a life estate in Mrs. Cornwell, with a power of appointment only, and that, as she failed to appoint, the trustee was authorized to convey the remainder to Mr. Cornwell, as covenanted by the trustee; second, that, granting that the deed created an equitable fee in Mrs. Cornwell, this deed was a conveyance to uses, and the feoffor to use had a right to, and did, provide for the vesting of a fee simple upon the fee simple granted Mrs. Cornwell upon her failure to appoint as permitted by the deed. Essential to any intelligent discussion of this deed, it must be first determined what equitable estate Mrs. Cornwell took under the deed, as to duration,—whether for life or in fee simple. The words of the grant convey the land to the trustee and his heirs and assigns, to have and to hold the same with all the rights, privileges, and appurtenances, unto him, and his heirs and assigns, forever, in trust, however, to and for the sole and separate use and benefit of Mrs. Cornwell, and the words of the covenant of said trustee are that she shall have the full use and occupancy of said land, with all rents, issues, and products, for her own sole use and benefit, and with full power to bargain, sell, mortgage, convey, lease, rent, or otherwise dispose of said premises, etc. Now it is a fundamental principle that equitable estates are governed by the same rules as legal estates, as to duration; otherwise, inextricable confusion must result. Omitting, for the present, all discussion of the claim that the covenant of the trustee constitutes a conditional limitation over to James Cornwell, the husband, it must, we take it, be entirely plain that, in the absence of that clause in the deed, the trustee acquired the entire fee-simple estate in the land, leaving no reversion whatever in the grantor, Yeates, and that he took said fee in trust for the sole use and benefit of Mrs. Cornwell, and with an unlimited and absolute right in her to take and hold the possession of said lands, free from any molestation on the part of said trustee, and receive all and every beneficial interest to be derived therefrom, and with full power to sell, mortgage, or dispose of, in any manner she saw fit. In other words, it cannot be controverted, we think, that Mrs. Cornwell took exactly as large an equitable estate in these lands as her trustee or feoffee to her use held in law for her benefit, to wit, an equitable fee simple. *Webster v. Cooper*, 14 How. 499, 14 L. ed. 515. No principle is more securely imbedded in the law of the state than that, in the construction of instruments conveying land, an absolute power of disposition carries with it a full power in the real estate itself. *Rubey v. Barnett*, 12 Mo. 5, 49 Am. Dec. 112; *Norcum v. D'Onch*, 17 Mo. 98; *Green v. Sutton*, 50 Mo. 186. This court, in *Rubey v. Barnett* and *Green v. Sutton*, also approved the rule laid down in *Jackson, Livingston, v. Robins*, 16 Johns. 587, in which the court of errors of New York said: "We lay it down as an incontrovertible rule

that, where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life only by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion."

As pointed out in *Cornwell v. Orton*, 126 Mo. 355, that rule has been modified, particularly in the construction of wills, in this state, by subsequent decisions, to this extent only, that it no longer is necessary that the life estate should be created by express words, but, if it is the clear intention from the whole will that the first taker is to have but a life estate, the added power of disposition will not convert it into an absolute ownership. *Lewis v. Pitman*, 101 Mo. 281; *Munro v. Collins*, 95 Mo. 33; *Harbison v. James*, 90 Mo. 411; *Redman v. Barger*, 118 Mo. 568. There are no words in this deed which expressly limit Mrs. Cornwell's use to her life only, nor are there any words which indicate an intention to so limit her use in said lands. This is a deed of bargain and sale, and not a gratuity, and it is a wholesome and familiar rule that it shall be construed most favorably to the bargainee. We confidently assert that no adjudicated case can be found in which a more unlimited, unrestricted power of sale, coupled with a beneficial interest in the estate granted, is vested in the first grantee than was conferred upon Mrs. Cornwell by this deed. Moreover, there is nothing in the habendum that squints at a limitation of the equitable fee simple created in her by the granting clause of the deed. Nor is there a single limitation over by the grantor, by way of remainder or conditional limitation, to any other person or persons. It goes without saying that, if this conveyance is to be tested by common-law principle, having created an estate in fee simple in Mrs. Cornwell, any attempt to create a remainder thereafter would be void. 2 Bl. Com. 164; 1 Fearn, Contingent Remainders, 4th Am. ed. 12; 2 Thomas's Co. Litt. 126, and note B; *Green v. Sutton*, 50 Mo. 186. If it is to be considered a trust, nothing can be plainer than that, upon Mr. Cornwell's death, the trust, being an executed trust, ceased when the occasion for its creation ended, to wit, the protection of her equitable fee during coverture, and thereupon her estate devolved upon her heirs at law, subject to her husband's curtesy, just as if it had been a legal estate. *McTigue v. McTigue*, 116 Mo. 138; *Roberts v. Moseley*, 51 Mo. 282; *Pitts v. Sheriff*, 108 Mo. 110. It is elemental that equitable estates are governed by the same rule of descents that governs the devolution of legal estates, and, if this were not so, great confusion would result. 1 Perry, Tr. § 357; *Cushing v. Blake*, 30 N. J. Eq. 689. When, therefore, it is determined that Mrs. Cornwell, by the terms of the deed itself, took an equitable estate in fee simple in

these lands, it follows that, upon her death, it descended to her heirs, the plaintiffs in this case, subject to the curtesy of her husband. But, more than that, by the statute of uses of Missouri, but for the fact that she was a married woman, and at that time not *sui juris*, the whole beneficial interest would have been executed in her during her life in fee simple, with absolute power to convey and dispose of, and at her death no estate whatever would have remained in the trustee, Goodlett. An examination of the deed will convince the most skeptical that the grantor or feoffor to uses imposed no duties whatever upon Mr. Goodlett, the trustee, which could in any manner interfere with Mrs. Cornwell's complete enjoyment or alienation of these lands. On the contrary, the sole duty devolved upon him was to passively permit the legal estate to remain in him during her coverture, and to do and perform whatever Mrs. Cornwell might direct him to do. That he so construed the deed is evidenced by the fact that he did not even formally accept the trust, did not sign the deed, and never made a deed to James Cornwell until compelled by the decree of the land court to do so. There is not a line or word which confers upon him the slightest discretion in the devolution of said estate. It is a perfect example of a dry, executed trust, except that it is for a married woman.

The English and American reports are replete with well-considered cases which draw the distinction between executed and executory trusts. *Wright v. Pearson*, 1 Eden, 119; *Boswell v. Dillon*, Dru. 291; *Cushing v. Blake*, 30 N. J. Eq. 689; 1 Perry, Tr. § 359. Lord Chancellor Sugden, in *Boswell v. Dillon*, Dru. 291, points out the distinction in these words: "By the term 'an executory trust,' when used in its proper sense, we mean a trust in which some further act is directed to be done. Executory trusts, in this way, may be divided into two classes: One in which, though something is required to be done (for example, a settlement to be executed), yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made, and the court has nothing to do but to follow out and execute the intentions of the party as appearing in the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending upon the same words. The other species of executory trusts is where the testator, directing a further act, has imperfectly stated what is to be done. In such cases the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves." "All trusts," says Lord St. Leonards, "are in a sense executory, because a trust cannot be executed except by conveyance, . . . but this is not the sense which a court of equity puts upon the term 'executory trusts.'" *Egerton v. Brownlow*, 4 H. L. Cas. 210. In *Cushing v. Blake*, 30 N. J. Eq. 689, the chancellor says, with the unanimous approval of the

whole court: "In this case the trusts upon which the trustee was required to hold the estate were definitely and perfectly expressed, . . . and he had no duties to perform but to hold and convey accordingly." *Pugh v. Hayes*, 113 Mo., *loc. cit.* 432. "The trusts are such as are regarded as executed trusts in a court of equity, and the estates created by the trust, and all the incidents connected therewith, are the same as would arise in law upon a legal conveyance expressed in the same language." Accordingly, the husband, as in this case, upon issue born capable of inheriting and the death of Mrs. Cornwell, was entitled to his curtesy. So that, whether we regard this deed as creating in Goodlett, the trustee, an estate by way of bargain and sale, to the sole use of Mrs. Cornwell, in fee simple, or that the use was created in the bargainee, Goodlett (*Guest v. Farley*, 19 Mo. 147), upon her death the equitable estate devolved upon her heirs as an executed trust, and the trustee had no discretion left in him to convey to any other persons than her heirs, who became the *cestui que trustent*. *McTigue v. McTigue*, 116 Mo. 138.

But it is argued by respondents that the trust created was what is denominated a "dry trust." Such a trust arises, says Perry, in his work on Trusts (§ 520), "when property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of law. In such case the *cestui que trust* is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyance of the legal estate as he directs." In such case the duty of the trustee is simple: (1) To permit the *cestui que trust* to occupy and receive rents and incomes of the estate; (2) to execute such conveyances as the *cestui que trust* directs; (3) to protect the title, or allow his name to be used for that purpose. Now, this is just the character of trust which was created in Mr. Goodlett for Mrs. Cornwell, had she been a *feme sole* or *sui juris*. *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swayne*, 83 Ill. 336; *Kirkland v. Coe*, 94 Ill. 400. The duties imposed upon the trustee were such, and only such, as the law would have required at his hands, leaving to her the absolute control over the beneficial interest, together with a right to call for the legal title. But, being a married woman at the time of its creation and at her death, it has been ruled that the statute of uses did not vest the legal estate in her during her life or coverture, but in her trustee for her sole use and benefit. *Dean v. Long*, 122 Ill. 458; *Perry*, Tr. 4th ed. § 310, 310a, and cases cited. But when she becomes discoverd, or dies, the statute executes the use in her, or her heirs. *Roberts v. Moseley*, 51 Mo. 282; *Pitts v. Sheriff*, 108 Mo. 110; 2 Minor, Inst. 737, 739; 2 Thomas's Co. Litt. 574, note A; *Dean v. Long*, 122 Ill. 458.

When this case was here on former occasions, we ruled that the deed created an equi-

table fee simple in Mrs. Cornwell, which, upon her death, descended to her heirs at law, the plaintiffs in the case; that the trust was an executed one; that, therefore, Mrs. Cornwell took the same estate in duration as in a legal estate, which, under our statute, would most clearly have been a fee simple, in law, but for the intervention of the trustee; that the estate so granted to her was subject to the same incidents, properties, and consequences as belong to similar estates at law; and that it was not competent to limit a remainder upon it, seeing that such a limitation would be repugnant to the grant to Mrs. Cornwell. Learned counsel now concedes that if this covenant of Mr. Goodlett, the trustee, is to be construed as creating a remainder, then it must fail, because a remainder cannot be limited after a fee simple; but he urges that it can be upheld as a conditional limitation of a fee upon a fee, under the statute of uses. All the learning upon this subject has been brought in review to show that, under our statute of uses, which is but a rescript of the statute of uses (27 Hen. VIII., chap. 10), a fee simple may be limited upon a fee simple. Under the statute of uses, and, indeed, before that statute, a species of limitations known as "shifting or springing uses" had been recognized, which permitted ulterior estates to be created, to arise upon the defeasance of prior estates in the same property, contrary to the strict rules of the common law. The courts, after the passage of the statute of wills (32 Hen. VIII.), following the analogies furnished in conveyances to uses, and in support of the intention of the testator, gradually came to recognize the validity of limitations not permitted in conveyances at common law. In this way originated what lawyers denominate "executory devises," whereby a fee may be limited after a fee. That this could be done was finally settled in England, in the case of *Pells v. Brown*, Cro. Jac. 590, a case which Lord Kenyon, in *Porter v. Bradley*, 3 T. R. 145, declares has ever since been regarded as "the foundation, and, as it were, Magna Charta, of this branch of the law." Far be it from me to question this doctrine, as declared in that case. The philosophy of that case, as I understand it, and as I find it interpreted by the courts since, is that, although the prior estate is denominated a "fee," because it may last forever, it is nevertheless a "base or determinable fee," because it is liable to be defeated by the happening of the contingency upon which it is limited. 2 Minor, Inst. 772e. Thus, in *Pells v. Brown*, the devise was in fee to Thomas and his heirs, forever, and, if he die without issue in the lifetime of William, his brother, then to William and his heirs. The court all agreed that this was a good devise of the fee to William by way of that contingency, not by way of immediate remainder; for they all agreed it could not be by remainder, "as if one deviseth land to one and his heirs, and, if he die without heir, that it shall remain to another, it is void and repugnant to the estate, for one fee cannot be in remainder after another,

for the law doth not expect the determination of a fee by his dying without heirs, and therefore cannot appoint a remainder to begin upon determination thereof, . . . but by way of contingency and by way of executory devise to another, to determine the one estate, and limit it to another, upon an act to be performed or in failure of performance thereof," etc. Just such a case was *Chew v. Keller*, 100 Mo. 362. In that and like cases the right of the ulterior devisee cannot be cut off or divested by any act of the primary devisee. His estate is not subject to the will of the first taker, but depends upon the event of life or death, or other contingency not within the control or volition of the first taker. In *Fearne*, on Contingent Remainders, 418, the author says: "The great and essential difference between the nature of a contingent remainder and that of an executory devise (and that, indeed, which renders it material to distinguish the one from the other in their creation) consists in this: That the first may be barred and destroyed or prevented from taking effect by several different means, . . . whereas it is a rule that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited."

The question presented here, and argued now for the first time, is this: Can there be a valid conditional limitation or executory devise where the executory limitation is conjoined with an absolute power in the first taker or primary devisee to defeat and cut off the further estate or interest by alienation of the entire fee in his lifetime, and whether it makes any difference as to the rights of the ulterior grantee or devisee whether this power to alien has or has not been exercised? Whatever preconceived notions we may have, I take it this question, being one so seriously affecting property rights, should be determined by the adjudicated law, and we should not be swayed from the law because some grantor, deviser, or conveyancer has attempted to do what the settled rules of law will not permit. *Hogan v. Welcker*, 14 Mo. 177; *Brown v. Rogers*, 125 Mo., *loc. cit.* 398. Appealing, then, to the decided law and recognized authority, we find Chancellor Kent, in his Commentaries (4 Kent, Com. 12th ed. 270), declaring: "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same, in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will." "A valid executory devise cannot subsist under an absolute power of disposition in the first taker."

It was urged in argument that this doctrine rested upon the great name of Kent. If so it has no ignoble origin; but, as we shall presently see, this is not true, though his recognition of the rule has, no doubt, greatly added to its stability. We have the testimony of the court of appeals of New York, in *Van Horne v. Campbell*, 100 N. Y. 287, 53 Am. Rep. 166, to the effect that, beginning with *Jackson, Brewster, v. Bull*, 10 Johns. 19, and down to *Van Horne v. Campbell*, there is an unbroken line of authorities in that state reasserting, following, and adopting the rule as announced by Chancellor Kent. It has been assailed in New York, as in this case; but the court of appeals held that the question must be considered as closed in New York. It has received the unqualified indorsement of Chief Justice Savage and Justices Cowen and Denio, and of all save one member of the court, in *Van Horne v. Campbell*. In Massachusetts, in *Idle v. Idle* (1809) 5 Mass. 500, the same doctrine was announced by Chief Justice Parsons, several years before *Jackson, Brewster, v. Bull* was decided; and it has been reaffirmed in *Gifford v. Choate*, 100 Mass. 343; *Kelley v. Meins*, 135 Mass. 231; *Joslin v. Rhoades*, 150 Mass. 301; *Kent v. Morrison*, 153 Mass. 137, 10 L. R. A. 756; *Foster v. Smith*, 156 Mass. 379. In *Fisher v. Wister*, 154 Pa. 65, *Jackson, Brewster, v. Bull*, came under review, and all the learning on the subject was re-examined, and the doctrine approved. The validity of the rule announced by Kent has been repeatedly recognized and followed in Illinois. *Fairman v. Beal*, 14 Ill. 244; *Welsch v. Belleville Sav. Bank*, 94 Ill. 203; *Wolfer v. Hemmer*, 144 Ill. 554. Kentucky, in an able opinion by Chief Justice Harges, in *Ball v. Hancock*, 82 Ky. 108, a case strikingly like the one at bar, approves Kent's statement of the law and *Jackson, Livingston, v. Robins*, 16 Johns. 588. The court of appeals of Maryland, in *Combs v. Combs*, 67 Md. 11, citing Chief Justice Parsons in *Idle v. Idle*, and quoting Chancellor Kent's declaration, that "we are obliged to say that an absolute ownership or capacity to sell in the first taker, and a vested right by way of executory devise in another, which cannot be affected by such alienation, are perfectly incompatible estates, and repugnant to each other, and the latter is to be rejected as void," said: "Both of these great jurists cited and relied upon the case of *Atty. Gen. v. Hall*, Fitzg. 314, decided by Lord Chancellor King, assisted by the master of the rolls and Chief Baron Reynolds, and quoted with approval by Lord Hardwicke in *Flanders v. Clark*, 1 Ves. Sr. 9. These, assuredly, are authorities of great weight. We think they ought to be considered as settling the law." In *Hossey v. Hossey*, 37 N. J. Eq. 21, the chancellor relied upon 4 Kent, Com. 270, and *Idle v. Idle* (1809) 5 Mass. 500, to the effect that a valid executory devise could not subsist with an absolute power of disposition in the first taker. In *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1089, the Supreme Court of the United States unanimously cite and follow *Jackson, Brewster,*

v. *Bull* and *Ide v. Ide*, and adopt Chancellor Kent's text (4 Kent, Com. 271). In Alabama, *Flinn v. Davis*, 18 Ala. 132, and *McRee v. Means*, 34 Ala. 349, assert that the law is too well settled to be controverted that an absolute power of disposition in the first taker defeats a limitation over. And so it will be found in Maine (*Ramsdell v. Ramsdell*, 21 Me. 288), and in Virginia (*Melson v. Cooper*, 4 Leigh, 508; *Riddick v. Cohoon*, 4 Rand. (Va.) 547), and in Georgia (*Cook v. Walker*, 15 Ga. 459), and in Indiana (*Tower v. Hartford*, 115 Ind. 186). In a word it may be asserted that, as late as 1893, there could be found but two American cases, outside of Missouri, which disputed the authority of *Ide v. Ide* and *Jackson, Breuster, v. Bull*; and these were *Hubbard v. Rawson* (1855) 4 Gray, 247, and *Andrews v. Royce* (1857) 12 Rich. L. 536; and neither of these cases has been followed in their respective states.

This brings us to inquire, now, as to the state of the law in this state. In *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112, Judge Scott said: "It has always been held that an absolute power of disposition over property conferred by will, not controlled by any provision or limitation, amounted to an absolute gift of the property. A power to dispose of a thing as one pleases must necessarily carry along with it a full property in it." He cites with approbation *Jackson, Livingston, v. Robins*, 16 Johns. 587. In *Gregory v. Cowgill*, 19 Mo. 415, Judge Scott cites *Ide v. Ide*, 5 Mass. 500, with approval. But in *Wead v. Gray*, 78 Mo. 59, this court, after deciding that the first taker took an absolute estate, referred to the clause giving a remainder over to a designated charity and a niece of the testator, and said: "The limitation over was void as an executory devise. Mr. Redfield, in his work on Wills, vol. 2, p. 278, says: 'It is a settled rule of American, as well as English, law, that where the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment along certain specified persons or classes, any estate over is void, as being inconsistent with the first gift,'"—citing *Ide v. Ide*, 5 Mass. 500. Here is a clear, distinct recognition and approval of the case decided by Chief Justice Parsons. Prior to that, however, in *State, Haines, v. Tolson*, 73 Mo. 320, this court held that the attempt to limit by executory devise after an absolute fee simple was void on the ground that "the limitation was repugnant to the devise and therefore void." Those two cases were afterwards cited with approval in *Munro v. Collins*, 95 Mo. 33, but distinguished from the latter as to the facts. And see *Hardy v. Clarkson*, 87 Mo. 171. It may be well to remark, now and here, that those cases in which this court has construed the estate of the first taker to be only a life estate (and there are many such), have nothing to do with this question, which is predicated on the proposition that the first taker takes an unconditional fee, and the attempt then is to limit another fee after the first.

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Turning, now, to another class of cases, in which the conveyances were deeds, instead of wills, and we find the same doctrine announced in *Green v. Sutton*, 50 Mo. 186. The deed in that case was in all substantial respects similar to the deed under construction, save and except that in that deed there were words in the granting clause of the deed which attempted to create a limitation over, after Mrs. Green's death, whereas, in this deed, there are no such words to be found, save in the unsigned covenants of the trustee. On the main proposition, Judge Bliss held, first, that, the deed having conveyed a fee simple to the trustee, it was unnecessary to use the word "heirs" in connection with Mrs. Green's name; that she took an unlimited power of disposal, and the attempted limitation over was void. He asks: "Was the use unlimited? If so, the attempted limitation is void, and the rule is not a technical one. It cannot matter whether the wife held the legal estate, or whether or when the use was executed in her. It is just as impossible to limit an unlimited use as to have a remainder, when the whole is given." *Green v. Sutton*, in its different aspects, has been approved in many subsequent cases. Thus, in *Tremmel v. Aleiboldt*, 75 Mo. 255, it was unanimously said of a like deed: "By the terms of the deed under consideration the entire estate was vested in the wife, and no remainder was or could be created by the covenant of the trustee to convey the property to her legal heirs at her death, in default of appointment or other disposition thereof by her during her life. *Green v. Sutton*, 50 Mo. 186." In *Cook v. Couch*, 100 Mo. 29, it was said: "The general rule is that a devise of an estate generally or indefinitely, with a power of disposition over it carries a fee. *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112; *Green v. Sutton*, 50 Mo. 186." And, to same effect, see *Lewis v. Pitman*, 101 Mo. 291. In *Wood v. Kice*, 103 Mo. 338, the proposition announced by Judge Bliss in *Green v. Sutton*, that a married woman was not restricted in disposing of her separate estate to the specific mode detailed in the deed to her use, was affirmed. It was cited with approval in *Reinders v. Koppelman*, 68 Mo., loc. cit. 491, 30 Am. Rep. 802. *Green v. Sutton* was decided in 1872. It announced a rule of property. Nearly one hundred volumes of the decisions of this court have since been promulgated, without any doubt of its soundness having been expressed. It seems to me a serious matter to say now that it was wrongly decided. The writer had no hesitancy in following it in *Cornwell v. Orton*, 126 Mo. 355, and the report of that case will show that it was not questioned as authority by counsel. *Evans v. Folks*, 135 Mo. 397. We find, then, that the doctrine announced by Chief Justice Parsons, and followed by Chancellor Kent, has met the approval of nearly every appellate court in the land, this court among the others. This court has so recently construed the counterpart of this deed to convey an equitable fee simple in the wife, in the case of *McTigue v. McTigue*, 116 Mo. 138, that I re-

frain from further discussion of this point. Much stress was laid upon *Straat v. Uhrig*, 50 Mo. 482, as holding a contrary doctrine. Judge Adams says of the deed in that case: "The consideration moved from the wife, and the object of the deed was, no doubt, to settle the property on her, to be at her absolute disposal during her lifetime, with power in her to dispose of the property by will, or by any writing signed by her or by her authority, to be carried into effect by the trustee after her death. By the terms of the deed there was a springing contingent trust created in favor of the children." I submit that the deed in that case created an absolute equitable fee in Mrs. Pemberthy, with an added power of alienation in fee, and that the attempted limitation over was void. That case has never been referred to since in any opinion of this court, and has never been approved. It cites no authority, and is clearly out of line with the cases already cited and discussed.

The deed of Yeates must be construed as it is written. Its granting clause is short and unambiguous. It is as follows: "That the said parties of the first part [Yeates and wife], in consideration of the sum of thirty-one hundred and seventy-two and $\frac{40}{100}$ dollars, to them in hand paid by the said party of the second part [John A. Goodlett], receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said party of the second part, and his heirs and assigns, a certain tract or parcel of land, situated," etc., "to have and to hold the same, with all the rights, privileges, and appurtenances thereto belonging or in any wise appertaining, unto him, the said party of the second part, his heirs and assigns, forever, in trust, however, to and for the sole and separate use, benefit, and behoof of said Catherine Cornwell, wife of said James Cornwell." Here the granting clause ends. Nowhere within the four corners of this deed can be found one word by which Yeates and wife conveyed, granted, or limited any portion of their estate in said lands over to the use of any other person upon the happening of the condition that Mrs. Cornwell had not conveyed said land in her lifetime. Goodlett, the trustee, did not join in the said deed at the time of its execution, and, if he had, his covenant, voluntarily imposed, could not and did not enlarge his own powers, so that he could defeat the trust imposed upon him to hold the fee simple in said lands for the benefit of Mrs. Cornwell. His covenant as grantee, moreover, did not create, or assume to create, another use in James Cornwell. The power to limit the duration of the estate which he was conveying belonged to the grantor, Yeates, and nowhere in said deed has he conveyed any estate to the use of James Cornwell, or to anyone else save Mrs. Cornwell, and to her he gave an unlimited use. So that, however entertaining the discussion of counsel as to the right to limit a fee by way of use, it has no place in the judicial construction of the meaning and effect

of this deed. Dr. Minor, whose invaluable Institutes counsel has so often invoked in his brief and argument, lays it down as a settled principle that, in the limiting of estates under the statutes of uses, the same words are required as at common law, save and except where the statutes, as in Virginia and Missouri, dispense with the necessity of the word "heirs" in creating an estate of inheritance. Rev. Stat. 1845, p. 219, chap. 32, § 2; Rev. Stat. 1889, § 8834. They are no longer necessary. Certainly it will not be seriously contended that the mere covenant of the trustee, who never signed this deed, would have destroyed the operative and controlling words of the grant, which, as we have seen, vested in the trustee, Goodlett, a fee simple, in trust for Mrs. Cornwell, who was at the time a married woman. The covenant of the trustee, even if he had signed the deed and accepted the trust, would not have had a greater effect than a habendum, which this court has held may be entirely rejected if repugnant to the granting clause of the deed. *Major v. Buckley*, 51 Mo. 227.

As the other points involved in *Cornwell v. Orton*, 126 Mo. 355, are no longer urged, the judgment of the Circuit Court, having been in strict conformity to our former judgments, is affirmed.

Burgess, Robinson, and Williams,
JJ., concur.

Marshall, J., dissenting:

Ejectment for 10 acres in the north part of lot 3 of a survey and subdivision of the W. $\frac{1}{2}$ of the N. W. corner of section 12, township 44, range 5 E., in St. Louis county. Robert A. Yeates is the common source of title. Plaintiffs claim as the heirs at law of Catherine Cornwell, and defendant claims as grantee, by mesne conveyances, of James Cornwell, deceased, husband of Catherine Cornwell. On October 15, 1859, Yeates and wife executed and delivered to John A. Goodlett, trustee, the following deed: "This deed, made and entered into this 15th day of October, 1859, by and between Robert A. Yeates and Sophie Yeates, his wife, of," etc., "parties of the first part, and John A. Goodlett, of," etc., "party of the second part, and Catherine Cornwell, wife of James Cornwell, of," etc., "party of the third part, witnesseth: That the said parties of the first part, in consideration of the sum of thirty-one hundred and seventy-two and $\frac{40}{100}$ dollars, to them in hand paid by the said party of the second part, receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said party of the second part, and his heirs and assigns, a certain tract or parcel of land, situated," etc., "to have and to hold the same, with all the rights, privileges, and appurtenances thereto belonging or in any wise appertaining, unto him, the said party of the second part, his heirs and assigns, forever, in trust, however, to and for the sole and separate use, benefit, and behoof of said Catherine Cornwell, wife of said

James Cornwell. And the said John A. Goodlett, party of the second part, hereby covenants and agrees to and with the said Catherine Cornwell that he will suffer and permit her, without let or molestation, to have, hold, use, occupy, and enjoy the aforesaid premises, with all the rents, issues, profits, and proceeds arising therefrom, whether from sale or lease, for her own sole use and benefit, separate and apart from her said husband, and wholly free from his control or interference, and from his debts, in such manner as she may think proper, and that he will at any and all times hereafter, at the request and direction of the said Catherine Cornwell, expressed in writing, signed by her or by her authority, bargain, sell, mortgage, convey, lease, rent, or otherwise dispose of said premises, or any part thereof, and will pay over the rents, issues, profits, and proceeds thereof which may come into his hands, and not otherwise liable, to her, the said Catherine Cornwell, in such manner as she shall in writing direct or request, and that he will, at the death of the said Catherine, convey or dispose of the said premises, or such part thereof as may then be held by him under this deed, and all profits and proceeds thereof, in such manner, to such person or persons, and at such time or times as the said Catherine Cornwell shall by her last will and testament, or any other writing signed by her or by her authority, direct or appoint, and in default of such appointment then that he will convey said premises to said James Cornwell, his heirs or assigns." On the trial in the circuit court the parties made the following admissions: "(1) That the defendant is now in possession of the property, and was at the institution of this suit; (2) that Mrs. Catherine Cornwell died intestate, December 23, 1860, without having made any conveyance or appointment of said real estate under said conveyance in her lifetime; (3) that James Cornwell died December 25, 1889, and the plaintiffs are Mrs. Catherine Cornwell's children and grandchildren, and her heirs at law, and are also the only children and heirs of James Cornwell; (4) that the plaintiffs Frederick J. Cornwell and Catherine Holmes, wife of James C. Holmes, are the children of Catherine Cornwell, and that Charles J., Frederick L., and Benjamin S. Cornwell, infant plaintiffs, are the children of Benjamin Cornwell, who died prior to the institution of this suit, and who was the son of Catherine Cornwell, and these plaintiffs are represented in this suit by their next friend, Helen V. Cornwell, plaintiff, and widow of said Benjamin Cornwell, deceased, who was duly appointed their next friend in this case prior to the institution of this suit; (5) that James Cornwell and Catherine Cornwell were husband and wife at and prior to the date of the deed of Yeates to Goodlett; (6) that plaintiffs are the only heirs at law of Catherine Cornwell; (7) that the value of the monthly rents and profits of the premises is, and since James Cornwell died has been, \$10." Defendant read in evidence a decree of the St. Louis land court, rendered at the March term, 1862, in the 45 L. R. A.

case of James Cornwell, plaintiff, against John A. Goodlett, defendant, directing the defendant to convey the property in controversy to the plaintiff, and the deed made in pursuance thereto, and mesne conveyances from Cornwell to Wulff. The circuit court rendered judgment for plaintiff, in conformity to the opinion of this court when this case was here on former appeal (*Cornwell v. Orton*, 126 Mo. 355, and *Cornwell v. Wulff*, 126 Mo. 355), and defendant appealed.

The true construction of the deed above set out determines the rights of the respective parties. Plaintiffs contend that the deed conveyed a fee-simple estate to Catherine Cornwell, and that, as a fee cannot be limited on a fee, the direction to the trustee to convey to James Cornwell, in default of a disposition by Mrs. Cornwell by deed or will, being repugnant to the creation of the fee in Mrs. Cornwell, is void. Defendant claims—First, that the limitation to James Cornwell is good as a conditional limitation, and that, although the deed created an equitable fee simple in Mrs. Cornwell, the limitation of a fee to James Cornwell after the termination of the estate of the first taker is valid in equity; and, second, that under the decisions in this state the intention of the grantor must be observed in preference to any mere technical construction, and that to give effect to that intention the estate of Mrs. Cornwell must be construed as a mere life estate, and that of Mr. Cornwell the fee limited upon the life estate.

Formerly there was a difference between the rules for the construction of wills and deeds. A deed required words of inheritance to pass the fee, while in a will no such formality was necessary. Now, under our statute (Gen. Stat. 1865, chap. 108, § 2; Wagner, Stat. 1365; Rev. Stat. 1879, § 4004; Rev. Stat. 1889, §§ 8634, 8912, they stand on the same footing, and a grant or devise by name carries the fee, without the term "heirs" or words of inheritance (*Green v. Sutton*, 50 Mo., *loc. cit.* 192; and especially *Waddell v. Waddell*, 99 Mo., *loc. cit.* 345). The true rule of construction of deeds and wills is that the intention of the grantor or deviser shall be observed, unless it conflicts with some inflexible rule of law. In *Hogan v. Welcker*, 14 Mo., *loc. cit.* 185, Napton, J., said: "If a deed admit of two constructions, one of which will support and the other defeat the intent, the construction which will uphold the deed must be adopted, unless some inflexible rule of law interfere." In *Small v. Field*, 102 Mo., *loc. cit.* 122, Sherwood, J., said: "And in construing wills, the polar star of construction or exposition of a will—the meaning, the intention, of a testator—is never to be lost sight of. Single words, single clauses, will not be considered singly; but the whole instrument, its general scope and design, as gathered from its four corners, will be taken into consideration, in connection with the surrounding circumstances, when properly admissible, in order that the intention of the testator may, if possible, prevail." In *Chiles v. Bartleson*, 21 Mo. 346, Leonard, J., said: "The inten-

tion of the testator is plain enough. The whole will must be read together, and effect given to every clause of it, and the words used are to be understood in the sense indicated by the whole instrument." In *Carr v. Dings*, 58 Mo., loc. cit. 406, Vories, J., said: "By a technical construction of the language used in the will, the bequest to the children might be so limited; but in construing wills the intention of the testator is the object to be attained, and in order to ascertain this object it frequently becomes necessary to look at the whole will, by which it will sometimes become necessary to qualify particular clauses, so as to bring them in harmony with the general intention, as the same may be indicated by other clauses." In *Munro v. Collins*, 95 Mo., loc. cit. 37, Brace, J., said: "It will not be necessary, in order to determine this question, to consult authorities outside of our own state, and in examining them it will be well to remember that courts, in the construction of wills, endeavor never to lose sight of that leading canon: to ascertain, if possible, the true intent and meaning of the testator in any given case, as the same can be gathered from the whole context of the will, viewed in the light of the circumstances under which it was made, and aim to give effect to that meaning, unless some positive legal principle forbids." In *Redman v. Barger*, 118 Mo., loc. cit. 573, Brace, J., said: "The first and last inquiry in the construction of a will is, What was the intention of the testator? To that intent technical rules must yield, and to it other canons of legal hermeneutics must be subordinated." In the light of these principles we approach the crucial question in the case, to wit, Did the deed from Yeates to Gooddlett vest a fee in Catherine Cornwell? or did it vest in her only a life estate, notwithstanding the power of disposal given to her? or did it create a fee in her, with a conditional limitation over to her husband?

The previous adjudications in this state cannot be harmonized. On the one hand, it has been held by this court that, if a deed or will gives an absolute power of disposal, a fee is created, and, as a fee cannot be limited upon a fee, a limitation over in such an instrument is void for repugnancy, and that it is only in cases where the absolute power of disposal is qualified by express words, limiting the first estate to a life estate, that a limitation over is valid or effectual. Scott, J., in *Rubey v. Barnett*, 12 Mo., loc. cit. 7, 49 Am. Dec. 112; Scott, J., in *Norcum v. D'Ench*, 17 Mo. 98; Bliss, J., in *Green v. Sutton*, 50 Mo., loc. cit. 191, 192 (concurring in by Wagner, J., but Adams, J., expressing no opinion); Hough, J., in *State, Haines, v. Tolson*, 73 Mo., loc. cit. 326; Hough, J., in *Tremmel v. Kleiboldt*, 75 Mo., loc. cit. 258; Henry J., in *Wead v. Gray*, 78 Mo. 59; Black, J., in *Cook v. Couch*, 100 Mo. 29. On the other hand, it has been held by this court that it is not necessary that the life estate be created by express words, but that if an intention of the grantor or deviser, as gathered from the whole instrument, to limit the estate of the first taker to a life estate be evi-

dent, the superadded power of disposal to the first taker will not raise the estate to a fee, nor defeat the limitation over. Leonard, J., in *Chiles v. Bartleson*, 21 Mo. 344; Vories, J., in *Carr v. Dings*, 58 Mo. 400; Adams, J., in *Straat v. Uhrig*, 58 Mo. 482; Ray, J., in *Russell v. Eubanks*, 84 Mo., loc. cit. 82; Ray, J., in *Bean v. Kenmuir*, 86 Mo., loc. cit. 666; Ray, J., in *Harbison v. James*, 90 Mo. 411; Brace, J., in *Munro v. Collins*, 95 Mo. 33; Brace, J., in *Redman v. Barger*, 118 Mo. 568; Black, J., in *Lewis v. Pitman*, 101 Mo. 281. Of the cases last referred to, the following have been cited approvingly in the following cases: *Chiles v. Bartleson*, 21 Mo. 344, by Black, J., in *Cook v. Couch*, 100 Mo. 29, and in *Emmerson v. Hughes*, 110 Mo. 630, though they were not followed by the judge in either instance; *Carr v. Dings*, 58 Mo. 400, by Henry, J., in *Wead v. Gray*, 78 Mo. 64, though he distinguishes the two cases; by Henry, J., in *Russell v. Eubanks*, 84 Mo. 86; and by Sherwood, J., in *Small v. Field*, 102 Mo., loc. cit. 123; *Munro v. Collins*, 95 Mo. 33, by Black, J., in *Lewis v. Pitman*, 101 Mo., loc. cit. 293, and by Sherwood, J., in *Small v. Field*, 102 Mo., loc. cit. 122; *Harbison v. James*, 90 Mo. 411, by Macfarlane, J., in *Jarboe v. Hey*, 122 Mo. 348. It is plain, therefore, that there is a most unusual and deplorable conflict of authority in our own state upon this question. It may fairly be said that the first group of cases follows the lead of Parsons, Ch. J., in *Ide v. Ide*, 5 Mass. 500, and of Chancellor Kent, in 4 Kent, Com. 14th ed. *270, and is in line with *Jackson, Brewster, v. Bull*, 10 Johns. 19; *Jackson, Livingston, v. Robins*, 16 Johns. 537; *Pells v. Brown*, Cro. Jac. 590; *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1089; *Van Horne v. Campbell*, 100 N. Y. 287, 53 Am. Rep. 166; *Fisher v. Wister*, 154 Pa. 65; *Ball v. Hancock*, 82 Ky. 108; *Oushing v. Blake*, 30 N. J. Eq. 689; *Wright v. Pearson*, 1 Eden, 119; *Boswell v. Dillon*, Dru. 291; *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swayne*, 83 Ill. 336; *Dean v. Long*, 122 Ill. 458; *Gifford v. Choate*, 100 Mass. 343; *Kent v. Morrison*, 153 Mass. 137, 10 L. R. A. 756; *Combs v. Combs*, 67 Md. 11; *Howsey v. Howsey*, 37 N. J. Eq. 21; *Melson v. Cooper*, 4 Leigh, 408; *Riddick v. Cohoon*, 4 Rand. (Va.) 547; *Cook v. Walker*, 15 Ga. 459. All of these cases proceed upon the principle that the intention of the grantor or deviser must be observed, but that a life estate must be created in express terms, or the power of disposal will create a fee, and that an absolute power of disposal may be limited by the creation of a life estate in express terms, and in such event the limitation over will be good. On the contrary, the second group of Missouri cases cited is bottomed upon the decision of the Supreme Court of the United States in the case of *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322, where the will gave the property with the absolute right of disposal thereof to the first taker, "remainder of the said estate, after her decease, to be for the use of the said Jesse Goodman." No life estate was created by express words. In construing the

absolute power of disposal, the court said: "The operation of these words, when standing alone, cannot be questioned. But, suppose the testator had added the words, 'during her life.' These words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words to the use and benefit, and to a disposal for the life of the wife. . . . The words, then, are susceptible of such limitation. It may be imposed on them by other words. . . . If this would be true, provided the restraining words, 'for her life,' had been added, why may not other equivalent words, others which equally manifest the intent to restrain the estate of the wife to her life, be allowed the same operation. The words, 'remainder of the said estate, after her decease, to be for the use of the said Jesse Goodman,' are, we think, equivalent [words]. They manifest with equal clearness the intent to limit the estate given to her to her life, and ought to have the same effect. They are totally inconsistent with an estate in the wife which is to endure beyond her life." The second group of cases is in line with *Flinn v. Davis*, 18 Ala. 132; *McRee v. Means*, 34 Ala. 349; *Ramsdell v. Ramsdell*, 21 Me. 288; *Andreus v. Roye*, 12 Rich. L. 536; *Hubbard v. Rawson*, 4 Gray, 247; *Brant v. Virginia Coal & I. Co.* 93 U. S. 326, 23 L. ed. 927; *Norris v. Beyea*, 13 N. Y. 273; *Tyson v. Blake*, 22 N. Y. 558; *Brasher v. Marsh*, 15 Ohio St. 103; *Burt v. Heron*, 66 Pa. 400; *Dohoney v. Taylor*, 79 Ky. 124; *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745; *Malim v. Keighley*, 2 Ves. Jr. 333; *Wright v. Atkins*, 17 Ves. Jr. 255; *Hall v. Otis*, 71 Me. 326; *Fox v. Rumery*, 68 Me. 121; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Cook v. Ellington*, 59 N. C. (6 Jones, Eq.) 371; *Re Wood*, 36 Cal. 75; *Knight v. Knight*, 3 Beav. 148; *Prior v. Quackenbush*, 29 Ind. 475; *Richardson v. Palmer*, 38 N. H. 218; *Yore v. Yore*, 63 Fed. Rep. 645.

The first group of cases, like the rule in *Shelley's Case*, establishes an absolute rule of law, while the second group establishes a rule of intention or of construction to reach and carry out the grantor's or deviser's intention. The first group professes to respect the will of the grantor or deviser, but requires him, by an inflexible rule, to express his intention by limiting the estate of the first taker to a life estate in express terms, employing the identical words of the rule. The second group also respects the intention of the grantor or deviser, but gathers that intention from the four corners of the instrument, and regards any equivalent words that clearly express the intention as of as much force as the words "life estate." Technically and strictly speaking, when property is granted or bequeathed to a person with full power to dispose of the same in any manner the grantee or devisee chooses to employ, it involves the idea of absolute ownership; for the *jus disponendi* implies a fee-simple estate, and, logically, one who has given all he has to another has 45 L. R. A.

nothing more to give to a third party. This was the reason underlying the old doctrine that a fee could not be limited on a fee. Yet the cases first above grouped admit a relaxation or modification of this original doctrine, so as to permit an absolute gift to be limited to a life estate, provided the set phrase "for life" is made to qualify the absolute title. If this is permissible because it effectuates the intention of the grantor, what logic is there in requiring the grantor to express his intention in set or stereotyped language, and in refusing to observe that intention when clearly expressed in equivalent terms? In either event the qualification imposed on the absolute ownership (or power of disposal, which is the equivalent of absolute ownership), by limiting the estate of the first taker to one for life, must be construed that he has power to dispose of the estate only during his life, but that after his death the remainder, or what is left, is to go to the expectant owner. And, if this is true, what difference does it make in what words this intention is expressed? In both cases the old, inflexible rule is equally softened, modified, and made more elastic. In our day there is not the undefined apprehension about tenures that formerly disturbed the placid dreams of our English predecessors in the law. In all other respects our laws, as to pleading and practice, as to proceedings and remedies, and as to interpretation and construction, have been softened and broadened, and made plainer and simpler; and it is hard to give a reason why we should tread with leaden heel with respect to conveyances, or try to hamper our real-estate transactions with gauges and measures which do not fit our conditions. If the maxims of interpretation first hereinbefore referred to are applied, the second group of cases will be found to be in consonance with them. If the latest enunciations of this court are to be observed as the law, the second group of cases must be followed. If we are to be governed by the rules of *stare decisis*, we are hopelessly lost, unless we treat the second group as overruling the first group. It is a most singular circumstance that none of these conflicting decisions have noticed this conflict in our state, or in terms overruled the prior inconsistent cases. It cannot be said that these decisions have established a rule of property in our state, unless the second group, being the later utterances, have done so. The wonder is that greater confusion has not already arisen. As if to mark more plainly the discrepancy in this regard, this court has had before it two cases wherein the deeds under consideration were identical with the deed involved in this case, and in the first case (*Straat v. Uhrig*, 56 Mo. 482), Adams, J., held that it created a life estate only in the first taker, and that the fee passed to the remainderman, while in the second (*Tremmel v. Kleiboldt*, 75 Mo. 255), Hough, J., held that it vested a fee-simple estate in the first taker, and that the limitation over was void, for repugnancy.

It is a noteworthy fact that the last of the first group of cases, *Cook v. Couch*, 100 Mo.

29, was decided by Black, J., in which he cited and commented upon the prior cases, without attempting to reconcile them or overrule the conflicting ones, and decided the case in hand according to the doctrine of the first group, and that the next time the question was presented to this court in *Lewis v. Pitman*, 101 Mo. 281, Black, J., wrote the opinion of the court, and again referred to both classes of cases, and followed the later or second group of cases, practically, though not expressly, overruling those of the first group, and said: "If we follow the common-sense reading of the will from first to last, it seems to us there is no difficulty in discovering its true purpose and meaning as to the personal property, . . . and that is this: 'The testator gives all of it to his wife, with the right and power in her to carry on the manufacturing business, or to dispose of the same, as to her may seem best, with the further qualification that whatever she has remaining at her death shall go to the children. Thus interpreted, does the will violate any rule of law? It is claimed by the appellant that it does, and this for the reason that where there is a devise of property, with an absolute power of disposal in the first taker, a subsequent limitation over is void. We shall not review the many authorities cited in support of this proposition of law. It may be conceded that a devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee. *Green v. Sutton*, 50 Mo. 186. But there is a wide difference between that class of cases and those where there is a devise for life with a power of disposition. Where an express life estate is created, an added power of disposition does not convert the estate into a fee. *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112; *Gregory v. Cowgill*, 19 Mo. 416; *Reinders v. Koppelmann*, 68 Mo. 482, 30 Am. Rep. 802. Nor is it necessary that the life estate should be created in express terms. If it is the clear intention, from the whole will, that the first taker is to have but a life estate, then the added power of disposition will not convert the estate into one of absolute ownership. Thus, in the case of *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322, the testator gave to his wife all of his personal estate, 'to and for her own use and benefit and disposal absolutely,' the remainder of said estate, after her decease, to be for the use of the said Jesse Goodman.' It was held the wife took but a life estate, and that for the reason that the will as a whole disclosed a clear intent to make a present provision for the wife and a future provision for the son. In *Wead v. Gray*, 78 Mo. 62, it was said that *Smith v. Bell* is an exceptional case, and has not been followed in this state. *Smith v. Bell* was cited with approval, and liberal quotations made from it, in the recent case of *Harbison v. James*, 90 Mo. 411. In that case the testator gave all of his property, real and personal, to his wife, with 'the right to sell and reinvest, as she may desire, any part of the same, for her separate use and benefit, and at her death I desire that any portion of my estate remaining undis-

posed of shall go to my three daughters.' There was no express life estate created in the wife in that case, and yet it was held, notwithstanding the power of disposition, that she had but a life estate. The intention of the testator, so clearly expressed, was allowed to prevail. Although a life estate is not created in express terms, still an added power of disposition will not convert it into an absolute estate, if, upon a consideration of the whole will, it is clear the testator intended to give a life estate only. This is the deduction to be made from *Smith v. Bell* and *Harbison v. James*, and they have the support of other well-considered cases. *Giles v. Little*, 104 U. S. 291, 26 L. ed. 745; *Siegnwald v. Siegnwald*, 37 Ill. 435; *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102. If the first taker is to have but a life estate, then it matters not whether this appear from express words creating a life estate or from a consideration of the whole will. What difference can it make in which form the testator expresses his intention, so that it is clearly expressed? There may be, and are, many cases where the added power of disposition will turn the scale; but if it is the intention of the testator to give the first taker a life estate only, notwithstanding the power of disposition, then that intention ought to prevail. This is the common-sense view of the matter, and it has the support of well-considered judgments."

The court was then composed of Ray, Ch. J., and Sherwood, Black, Brace, and Barclay, JJ., and they all concurred. It is patent, therefore, that, if the doctrine of the first group of cases had been followed, the conclusion reached by the learned judge would have been exactly the reverse; and it is manifest that he had both groups of cases in his mind, for he referred to cases belonging to each, and that upon fuller and maturer consideration he concluded that the better rule, founded upon the better reason and logic, was that announced by the second group of cases, and so he followed the "common-sense view of the matter," effectuated the intention of the deviser, and discarded the old, inflexible rule, which measured every man's intentions by a set phrase, which was formerly held to be the only words in the English language a party could employ to effectively express his intention. This case must therefore be regarded as settling the law in this state up to 1890, when it was decided. Afterwards, in 1893, the question came again before this court, in *Redman v. Barger*, 118 Mo. 568, and Brace, J., delivering the opinion of the court, cited and approved *Lewis v. Pitman*, 101 Mo. 281; *Munro v. Collins*, 95 Mo. 33; *Harbison v. James*, 90 Mo. 411; *Russell v. Eubanks*, 84 Mo. 83; *Bean v. Kenmuir*, 86 Mo. 660, and *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322. This decision was concurred in by Black, P. J., and Barclay and Macfarlane, JJ., being all the judges of division No. 1. It follows that *Lewis v. Pitman* is still the law in this state, unless it has been overruled by *Cornwell v. Orton*, 126 Mo. 355. That case stands squarely upon the doctrine of the first

group of cases, and follows the old iron-clad rules of interpretation. It refers to *Lewis v. Pitman*, *Munro v. Collins*, *Harbison v. James*, and *Redman v. Barger*, but contains no suspicion of intention to overrule them or to distinguish them. It simply follows the earlier cases, and subscribes to the harsh rule upon which they were bottomed.

The case at bar involves the same deed that was construed in *Cornwell v. Orton*, 126 Mo. 355, and this case was decided on former appeal, by division No. 2 of this court, at the same time and upon the faith of the *Orton Case*. It is here a second time before the court in banc, and we are asked to review and reverse the decision on former appeal. If we adhere to the decision in *Cornwell v. Orton*, 126 Mo. 355, it is our plain duty, in the condition of the law in our state as hereinbefore pointed out, to overrule *Lewis v. Pitman* and its kindred cases. On the other hand, if we reverse *Cornwell v. Orton*, it is our duty to ourselves and to the bench and bar of the state to expressly overrule *Green v. Sutton* and its kindred cases; for it is not to be tolerated that two distinct and diametrically opposed lines of decisions on the same principle shall be allowed to stand. It cannot be denied that the rigidity and inflexibility of the common-law rule that a fee could not be limited upon a fee, and that an absolute power of disposal in the first taker created a fee in him, and made the limitation over void for repugnancy, has been relaxed in America, and that all the cases in both groups, and the cases from other states upon the same subject, cited in support of each group, concede that words which would create an absolute fee—simple estate, if standing by themselves, may be qualified or limited by other words in the same instrument, so as to create only a life estate in the first taker, and vest a fee in remainder. The only practical difference between the two classes of cases is what words shall be deemed sufficient to so limit what would otherwise be an absolute fee. If the power to qualify or limit at all be conceded, which the common law denied, as it is conceded by all the American cases and text writers, and if the purpose to be thus subserved is the effectuating of the grantor's or deviser's intention, it logically follows that it can make no difference what the words of qualification or limitation employed may be, so long as they clearly express the intention of the grantor or deviser, and that it is a solecism to concede the right to qualify, but to refuse to enforce the intention unless it is couched in terms arbitrarily required by the courts. If the opinion in *Lewis v. Pitman*, 101 Mo. 281, had been written for the case at bar, it could not have fitted it more completely than it does. All of the elements presented and decided in that case are involved here. We have here the conveyance, with absolute power of disposal, whether by deed or will, and not qualified by

any express life estate, but superadded a clear intention of the grantor that whatever is left of the estate after the first taker's death, or undisposed of by her, was to vest in James Cornwell, manifesting, therefore, most conclusively, a desire and intention to provide for Mrs. Cornwell during her life, and after her death for Mr. Cornwell. These are clearly equivalent words, and are just as effectual as if an express life estate had been granted to Mrs. Cornwell, with a remainder in fee to Mr. Cornwell. The reason upon which the common-law rule rested, that an absolute power of disposal created a fee, and made the limitation over void for repugnancy, was that it was thus placed in the power of the first taker to cut off the limitation by disposing of the estate and the reason underlying the modern American doctrine, where the absolute fee is qualified by words creating only a life estate in the first taker, is that the first taker's power to dispose must be construed to be limited to the right he had in the estate,—the life estate,—and that, if he disposed of his life interest, the remainder would vest immediately upon his death in the person for whom the grantor or deviser intended to provide, and so it is not within the power of the first taker to defeat the remainder, and hence there is no repugnancy, and therefore the principle upon which the common-law rule rested is not violated.

The only remaining question, then, is, How shall this intention be voiced in words,—by the words "for life only," or by equivalent words pregnant with the same idea and expressive of the same intention? One theory is purely arbitrary and technical; the other is common sense. Between the two, all reason and logic, all precedents for the construction of all laws, contracts, and dealings of mankind, are on the side of the rule laid down in *Lewis v. Pitman*, 101 Mo. 281, and the second group of cases. This being true, that case and its kindred cases should be hereafter regarded as the law in our state, and *Green v. Sutton*, and its kindred cases, should no longer be followed. It follows that the deed to Goodlett was a conveyance in trust for Mrs. Catherine Cornwell for life, with power in her to dispose of her life interest, and a remainder in fee to James Cornwell. It also follows that it was not a mere naked, dry trust, and that the use was not executed in Mrs. Cornwell under the statute of uses, even if the statute of uses applies to the second use, which Scott, J., in *Guest v. Farley*, 19 Mo. 147, held the statute of uses never was intended to do, saying: "The statute only executes the first use. A use upon a use is no estate at law; it is only a trust, a creature of courts of equity."

The judgment of the circuit court should therefore be reversed.

Sherwood and Brace, JJ., concur.

ALABAMA SUPREME COURT.

Daniel C. ROBINSON *et al.*, *Appts.*,
v.

George W. STONE *et al.*

W. H. PIERCE *et al.*, *Appts.*,
v.

Daniel C. ROBINSON *et al.*

George W. STONE, *Appt.*,
v.

Daniel C. ROBINSON *et al.*

(.....Ala.....)

1. Recitals in a deed by a trustee showing an application of the purchase money in contravention of the trust do not preclude the purchaser from establishing by parol evidence that the money was properly applied.
2. A deed by a trustee to a third person in contravention of the trust is not void as matter of law, but the legal title will pass to the purchaser subject to the right of the *cestui que trust* to go into a court of equity and disaffirm the sale or have the purchase price brought in and secured for his benefit.
3. Staleness will bar a suit by remaindermen under a deed of trust who delay for forty years to institute proceedings to set aside a conveyance by the trustee in breach of the trust and to establish their title, although the life tenant still lives, since all their rights will be cut off by the deed unless preserved by a decree in equity.

(Coleman, J., *dissents.*)

(June 29, 1898.)

PETITION for modification of a decree affirming a decree of the City Court of Montgomery in equity in favor of defendants in a suit brought to establish an interest in remainder in certain real estate. *Modification granted.*

APPEALS by defendants from judgments of the Circuit Court for Montgomery County in favor of plaintiffs in actions brought to recover real estate. *Reversed.*

The facts are stated in the opinion.

Mr. W. A. Gunter, for Robinson *et al.*:

The statute of uses vests the legal estate in the remaindermen, subject to the future uses raised under the power duly exercised. 1 Sugden, Powers, pp. 1-106; 2 Washb. Real Prop. *125, 300 *et seq.*

Even if the whole legal title was in Welsh, he estopped himself by his deed from suing to recover the land, and the right of the remaindermen did not arise until the death of Mary Jane Robinson.

No adverse possession or laches could exist, since each is founded on a neglect to sue for what is wrongfully withheld.

NOTE.—On the question of the effect of a deed by a trustee in breach of trust the above case is an unusually important one. The briefs, as well as the opinions, furnish many authorities. As to the adverse possession of land as affecting L. R. A.

Lawson v. Lay, 24 Ala. 184; *Wyatt v. Rambo*, 29 Ala. 510, 68 Am. Dec. 89; *Pickett v. Doe*, *Pope*, 74 Ala. 122.

The remaindermen are just as much under the protection of the law as the purchaser, and it is incumbent upon the latter to show affirmatively that he has succeeded in a lawful manner to the former's title, and any hiatus in the process of reasoning by which that result is sought to be established leaves the conclusion without its necessary basis.

Woodstock Iron Co. v. Fullenwider, 87 Ala. 584; *Doe, Pope*, v. *Pickett*, 65 Ala. 487, 74 Ala. 122; *Tyler, Ejectment*, pp. 102, 568, 569, 885; 2 *Wharton*, Ev. §§ 1334-1357; *Allen v. DeGroodt*, 98 Mo. 159; *McCorry v. King*, 3 *Humph.* 267, 39 Am. Dec. 173; *Wood, Limitations of Actions*, p. 528, note.

If the possession is consistent with the superior title, no title beyond that proved is to be presumed against such superior title, even though a possession of twenty years be shown.

2 *Wharton*, Ev. §§ 1334, 1353; *Lawson*, *Presumptive Ev.* 276, 277; *Bailey*, *Onus Probandi*, 257.

Where a power with a condition is complied with for form's sake, but in substance is departed from, and the whole transaction is founded in fraud, the execution will be a nullity at law as well as in equity.

Doe, Willis, v. *Martin*, 4 T. R. 40; 2 *Sugden*, Powers, *180; *Cholmeley v. Paxton*, 3 *Bing.* 207, 5 *Bing.* 48, 10 *Barn. & C.* 564, 3 *Russ. Oh.* 565, 1 *Russ. & M.* 418, 1 *Clark & F.* 60.

When a conditional power is given to deal with another man's title and estate, there is an implication that not only forms must be strictly complied with, but that honesty and fair dealing shall also be observed; and a departure from the power is fatal.

Jackson, Bowers, v. *Crafts*, 18 *Johns.* 110; *Harris v. Strodt*, 132 N. Y. 392; *Russell v. Russell*, 36 N. Y. 581, 93 *Am. Dec.* 540; *Allen v. DeWitt*, 3 N. Y. 276; *Syracuse Sav. Bank v. Holden*, 105 N. Y. 415; *Scholle v. Scholle*, 113 N. Y. 261.

The possession was not adverse to the remaindermen, because they had no right until the death of the life tenant; and thus such possession has no tendency to establish an execution of the power.

2 *Washb. Real Prop.* 278; 2 *Wharton*, Ev. §§ 1334, 1353; *Lawson*, *Presumptive Ev.* 276, 277; *Bailey*, *Onus Probandi*, 257.

Messrs. Sample & Gunter, also for Robinson *et al.*:

There is no such thing as a purchaser without notice when the claim or title is founded on a quitclaim deed. Such a deed puts all purchasers thereunder on inquiry,

ing remaindermen during a trust, see also *Gindrat v. Western Railway of Ala. (Ala.)* 19 L. R. A. 839, with which is a note on the general question of adverse possession against remaindermen and owners of future estates.

and stamps the possession transmitted thereby as suspicious.

O'Neal v. Seizas, 85 Ala. 84; *Barclift v. Lillie*, 82 Ala. 319; *Derrick v. Brown*, 66 Ala. 162; *Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622; *May v. LeClaire*, 11 Wall. 217, 20 L. ed. 50; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618.

The noncompliance with the formality required by the power, and the violation of the purpose for which alone a conveyance could be made by the trustee, were stamped as infirmities in the very face of the title, so far as the remainder was concerned.

Austin v. Willis, 90 Ala. 421; *Johnson v. Thweatt*, 18 Ala. 741; *Dudley v. Witter*, 46 Ala. 664; *Thames v. Rembert*, 63 Ala. 566; *Shorter v. Frazer*, 64 Ala. 74; *Gale v. Mensing*, 20 Mo. 461, 64 Am. Dec. 201.

A power to sell for reinvestment must be exercised for that purpose, otherwise its exercise is a nullity to all having notice of its violation.

Champlin v. Haight, 10 Paige, 275; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. ed. 651; *Ballett v. Collins*, 10 How. 174, 13 L. ed. 376; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; *Oliver v. Piatt*, 3 How. 333, 11 L. ed. 622; *Emigrant Co. v. Wright County*, 97 U. S. 343; *American Emigrant Co. v. Wright County*, 24 L. ed. 915; *May v. LeClaire*, 11 Wall. 217, 20 L. ed. 50; *Dawson v. Ramser*, 58 Ala. 573; *Huckabee v. Bilkinsly*, 16 Ala. 418, 50 Am. Dec. 183; *Gale v. Mensing*, 20 Mo. 461, 64 Am. Dec. 200.

A trustee cannot, by any act of his own, denude himself of his character of trustee until he has performed his trust.

Note to Gale v. Mensing (Mo.) 64 Am. Dec. 200; *Lamar v. Pearre*, 82 Ga. 354.

The power not being exercised for the purpose required in the deed, the conveyance of Welsh and Mary Jane Robinson was void, except as to the life estate of Mary Jane Robinson.

Green v. Green, 23 Wall. 486, 23 L. ed. 75; *Champlin v. Haight*, 10 Paige, 275; *Wormley v. Wormley*, 8 Wheat. 421, 5 L. ed. 651; *Gaines v. Chew*, 2 How. 619, 11 L. ed. 402; *Smith v. Ayer*, 101 U. S. 320, 25 L. ed. 955; *Long v. Long*, 62 Md. 33.

The idea that there is any presumption of law arising from the lapse of twenty years and more, of possession by and under the life tenant, is without foundation.

Allen v. DeGroodt, 98 Mo. 159, 14 Am. St. Rep. 628 *et seq.*, note; *McCorry v. King*, 3 Humph. 267, 39 Am. Dec. 173; *Jackson, Swartwout, v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433.

Laches *per se* is never imputed for a period less than the statute of limitations.

Long v. Long, 62 Md. 69; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; *Lamkin v. Reese*, 7 Ala. 170; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 588, 23 L. ed. 329; *Badger v. Badger*, 2 Wall. 87, 17 L. ed. 836; *Harwood v. Cincinnati C. Air Line R. Co.* 17 Wall. 79, 21 L. ed. 558; *Marsh v. Whitmore*, 21 Wall. 178, 22 L. ed. 482; *Vigers v. Pike*, 8 Clark & F. 650; *Wentworth v. Lloyd*, 32 Beav. 467; 45 L. R. A.

Hollansbe v. Kilbreth, 17 Ill. 522, 65 Am. Dec. 691; *Olegg v. Edmondson*, 8 DeG. M. & G. 787; *Prendergast v. Turton*, 1 Younge & C. Ch. Cas. 98; *Loucery v. Davis* (Ala.) 8 So. 79; *McCorry v. King*, 3 Humph. 267, 39 Am. Dec. 173.

The right to file a bill to remove a cloud upon a title is given to a person for his benefit exclusively, and not out of regard to the rights of the person having the pretended title.

Tyson v. Brown, 64 Ala. 249.

Whoever heard that because a person may proceed in equity to remove a cloud before there is any actual wrong, and before his right at law accrues, he must do so, and that if he chooses to wait until he may proceed at law on the accrual of his right, he will be met with a presumption adverse to his claim?

Mettler v. Miller, 129 Ill. 630; *McCorry v. King*, 3 Humph. 267, 39 Am. Dec. 173; *Allen v. De Groodt*, 98 Mo. 159.

The deed would be invalid on its face as to the remaindermen, and no bill to remove a cloud would lie.

Rea v. Longstreet, 54 Ala. 291; *Camp v. Elston*, 48 Ala. 81; *Daniel v. Stewart*, 55 Ala. 278; *Lockett v. Hurt*, 57 Ala. 198; *Florence v. Paschal*, 50 Ala. 28; *Mitchell v. Spence*, 62 Ala. 450; *Tyson v. Brown*, 64 Ala. 244.

Messrs. Gunter & Gunter for Robinson *et al.*, on rehearing:

The remainders were not equitable.

Doe, Willis, v. Martin, 4 T. R. 40; *Cook-erell v. Cholmeley*, 1 Clark & F. 60, 3 Bing. 207, 1 Russ. & M. 418; *Losey v. Stanley*, 147 N. Y. 560.

But if they were, Welsh conveyed a legal estate to a third party, who had full notice of the "equitable limitations affecting his title," and these equitable limitations attend the legal title wherever it is conveyed, and all such conveyances were void in equity.

1 Perry, Tr. § 321; Underhill, *Trusts & Trustees*, p. 485, and note 2; *Tyler v. Her-ring*, 67 Miss. 169.

Trust property may be followed by the owner as long as it can be traced and identified until it falls into the hands of bona fide purchasers for value without notice.

28 Am. & Eng. Enc. Law, p. 88, and notes; 27 Am. & Eng. Enc. Law, pp. 250, 251 *et seq.*, and notes; *Wolfe v. State*, 79 Ala. 206, 58 Am. Rep. 590; *National Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 26 L. ed. 693; *Pennell v. Deffell*, 4 De G. M. & G. 372; *May v. LeClaire*, 11 Wall. 217, 20 L. ed. 50.

The conveyances, then, bearing on their face full and express notice that they were not made in pursuance, but in plain fraud, of the trust, did not *per se* affect the rights of the remaindermen in equity.

If Welsh had been the mere donee of a power to sell, the conveyances in fraud of the power would not have affected the right to sue for and recover the property within ten years after the death of the life tenant. Because powers must be at least substantial-

ly complied with, and because no cause of action would accrue to the remaindermen until the falling in of the life estate.

Doe, Willis, v. Martin, 4 T. R. 40; *Pickett v. Doe, Pope*, 74 Ala. 122; *Doe, Pope, v. Pickett*, 65 Ala. 487; *Smith v. Cooper*, 59 Ala. 494; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 78, notes; *Allen v. DeGroodt*, 98 Mo. 159, 14 Am. St. Rep. 628, notes.

Can anyone assign a reason why the statute of limitations, or laches, will run against an equitable right, when they will not against the corresponding legal right?

2 Perry, Tr. § 860; 2 Story, Eq. Jur. § 1520.

If the conveyance of the legal title is made with notice to the purchaser of the equitable limitation on that title, and that the conveyance is not made to subserve that interest but to defraud it, the equitable limitation remains in all respects unaffected and the legal title still stands, as it stood before, in an attitude of strict servitude to the equitable interest.

1 Lewin, Tr. 246; 2 Lewin, Tr. 864; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 266, notes; *Underhill, Trusts & Trustees*, 485, and notes; *Jones v. Shaddock*, 41 Ala. 262; *Lee v. Lee*, 67 Ala. 406; 2 Spence, Eq. Jur. 197; 27 Am. & Eng. Enc. Law, 1st ed. pp. 250, 251; 28 Am. & Eng. Enc. Law, p. 88; *Wilson v. Moore*, 1 Myl. & K. 127.

Laches is of two kinds, one, the mere lapse of time; the other, "acquiescence in special conditions and circumstances which render it inequitable to enforce the demand."

Ashurst v. Peck, 101 Ala. 508; *Gallihier v. Cadwell*, 145 U. S. 372, 36 L. ed. 740; *Rives v. Morris*, 108 Ala. 527.

The first is a defense peculiar to equity, and is the equitable bar raised by that court against stale demands in analogy to the statute of limitations where there is no statute applicable.

2 Story, Eq. Jur. § 1520.

This period in this class of laches is never shorter than the period of the statute of limitations to corresponding legal rights, and is judicially fixed at twenty years after the accrual of the cause of action.

It has no application to reversioners and remaindermen until their right of action accrues.

2 Perry, Tr. §§ 850, 860; 1 Lewin, Tr. 379; 2 Lewin, Tr. 923; 12 Am. & Eng. Enc. Law, 1st ed. p. 568; 13 Am. & Eng. Enc. Law, 1st ed. p. 720; *First Nat. Bank v. Nelson*, 106 Ala. 542; *Scruggs v. Decatur Mineral & Land Co.* 86 Ala. 173.

The second kind of laches is a species of estoppel, in which the lapse of time is only one of the ingredients, or facts, making out the defense.

This kind must be made out with all the certainty of a plea founded upon the special conditions which render the claim inequitable.

Ashurst v. Peck, 101 Ala. 508; *First Nat. Bank v. Nelson*, 106 Ala. 535; *Gallihier v. Cadwell*, 145 U. S. 372, 36 L. ed. 740. 45 L. R. A.

In all cases in which lapse of time is used as an argument against relief which otherwise would be just, the validity of the defense must be tried upon principles substantially equitable.

Lindsay Petroleum Co. v. Hurd, L. R. 5 P. C. 239; *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1279; *Gallihier v. Cadwell*, 145 U. S. 368, 36 L. ed. 738.

No special conditions are here set up showing the inequity of permitting the remaindermen to recover.

The law says to a party whose rights have been invaded that he may select between certain rights or remedies.

Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328.

If property is stolen and sold, the owner has an option to pursue his property or abandon it; abandonment can be imputed only from the operation of the statute of limitations, or from the presumption or prescription after twenty years of undisturbed use.

If the property stolen or taken tortiously belongs to A for life with remainder to B, the statute and laches would run against A from date, and against B from the accrual of his right. The fact that B might, during the life of A, institute *quia timet* proceedings of any sort, and that he had an election to do so or not. (*Ramey v. Green*, 18 Ala. 771; *Lyde v. Taylor*, 17 Ala. 270; 1 Brickell, Dig. 684, § 650), cannot affect his right to assert his claim to the property within the period of the statute of limitations after the death of A.

The option to institute *quia timet* proceedings for his own security is not within the rule of election, which must be made in a reasonable time and against which laches may be imputed, because its exercise, *vel non*, only concerns the remainderman in the assertion of his original property right when his right to possession accrues.

If A holds a legal title limited in equity to B for life with remainder to C with a special authority to sell for a single purpose, a sale in open fraud of this purpose is utterly ineffective in equity against the remainderman, unless and until it is confirmed.

Unless the circumstances are such that the proceeds of such a sale have been, with the knowledge of the remainderman, appropriated to his benefit, no option would be presented to the remainderman to choose between inconsistent rights, and there would be no right to infer consent to such a sale and an abandonment of property when there was neither obligation nor necessity to speak. There was no necessity for his own security, because the fraud was shown on the face of the deed.

Shorter v. Frazer, 64 Ala. 74.

If the remaindermen chose to rely on the notice, in the chain of title of the fraud in the sale, as sufficient to keep the cloud, from the mere transfer of the legal title, from affecting their equity, the court cannot impute to them a confirmation of the fraud and an

abandonment of their rights in remainder, because they were not more prudent.

Woodstock Iron Co. v. Fullenwider, 87 Ala. 584, 13 Am. St. Rep. 78, notes; *Allen v. DeGroot*, 98 Mo. 159, 14 Am. St. Rep. 628, notes; *Goodman v. Winter*, 64 Ala. 434, 38 Am. Rep. 13.

Unless the equitable remainderman affirms the conveyance of the legal title as a bar to his equity, his right remains unaffected.

Goodman v. Winter, 64 Ala. 434, 38 Am. Rep. 13.

That this was a legal remainder, and not an equitable, though it cannot, as we understand the law, make any difference whether it was a legal or equitable remainder, see—

Ferrand v. Wilson, 4 Hare, 344; *Osbrey v. Bury*, 1 Ball & B. 53; *Goodman v. Winter*, 64 Ala. 434, 38 Am. Rep. 13; 2 Spence, Eq. Jur. 574.

In *Losey v. Stanley*, 147 N. Y. 560, a case in every respect like this, the court held the remainders to be legal, while here they are equitable.

When there is a divided ownership, as a life estate and remainder, limitations and laches cannot operate against the remainder until the termination of the life estate, although in the meantime *quia timet* proceedings may be instituted for the security, when necessary, of the future right.

Ramey v. Green, 18 Ala. 770; *Goodman v. Winter*, 64 Ala. 434, 38 Am. Rep. 13.

No party to an illegal or fraudulent contract can claim any benefit from it, and all persons who obtain possession of trust funds (or property) with a knowledge that their title is derived from a breach of trust will be compelled to restore such trust property.

2 Lewin, Tr. §§ 857-864; *Gray v. Lewis*, L. R. 8 Eq. 526; *Wilson v. Moore*, 1 Myl. & K. 127; *Hill v. Simpson*, 7 Ves. Jr. 152; *May v. LeClaire*, 11 Wall. 217, 20 L. ed. 50; *LeNeve v. LeNeve*, 1 Ambl. 436, 2 Lead. Cas. in Eq. 109; *Wimbish v. Montgomery Mut. Bldg. & L. Assn.* 69 Ala. 575.

Messrs. Pettus & Pettus, W. S. Thornton, Alexander T. London, and Phares Coleman, for Stone and Pierce:

When real estate is conveyed by deed, will, or mortgage, and power is given to the grantee to sell and convey, a fee in the real estate so conveyed is thereby vested in such grantee. In other words, the legal title passes by such conveyance. This, for the obvious reason that to convey a fee the grantor must himself be the owner of a fee. No one can convey a greater legal title in lands than he himself possesses.

Blagrove v. Blagrove, 4 Exch. 549; *Doe, Keen, v. Walbank*, 2 Barn. & Ad. 554; *Watson v. Pearson*, 2 Exch. 581; *Shaw v. Weigh*, 2 Strange, 798; *Gibson v. Montfort*, 1 Ves. Sr. 485; *Watkins v. Frederick*, 11 H. L. Cas. 358; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Fisher v. Fields*, 10 Johns. 505; *Cleveland v. Hallett*, 6 Cush. 403; *Hawkins v. Chapman*, 36 Md. 83; *Spessard v. Rohrer*, 9 Gill, 261; *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183; 1 Perry, Tr. § 315; 18 Am. & 45 L. R. A.

Eng. Enc. Law, p. 904, note 1; *Carrigan v. Drake*, 36 S. C. 354; *Goodrich v. Proctor*, 1 Gray, 569.

It is unimportant that the power of disposition is contingent or discretionary. The legal title still vests.

Gibson v. Montfort, 1 Ves. Sr. 485.

Lewin on Trusts, 3d Am. ed. p. 250, says: "A trust to sell, even on a contingency, confers a fee simple as indispensable to the execution of the trust."

Even a mortgage, with power of sale, vests the legal fee in the mortgagee.

Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 679; *Toomer v. Randolph*, 60 Ala. 356; *Slaughter v. Doe, Swift*, 67 Ala. 496; *Farris v. Houston*, 74 Ala. 162; *Garland v. Watson*, 74 Ala. 323; *Coffey v. Hunt*, 75 Ala. 236; *Kelly v. Longshore*, 78 Ala. 203; *Richardson v. Dunn*, 79 Ala. 167.

The legal title being in the trustee, passed by his deed (Mrs. Robinson concurring by joining in the deed) to the purchaser Wright. This is none the less so because the purchase money was paid to Mrs. Robinson instead of the trustee. For it is thoroughly settled that a conveyance from the trustee will pass the legal title, although made in breach of the trust. In such case the purchaser becomes charged with the trusts by construction, and the remedy of the *cestui que trust* is, not to recover the land, but to charge it in the hands of the trustee by appropriate proceedings in equity. The *cestui que trust* is as powerless in a court of law after a conveyance as before, for no change is made that invests him with the legal estate, and it is only the legal estate of which a court of law can take cognizance.

Huckabee v. Billingsly, 16 Ala. 414, 50 Am. Dec. 183; *Dawson v. Ramser*, 58 Ala. 573; *Milhaus v. Dunham*, 78 Ala. 48; *Hairs-ton v. Dobbs*, 80 Ala. 589; *Gale v. Mensing*, 20 Mo. 461, 64 Am. Dec. 197; *May v. LeClaire*, 11 Wall. 217, 20 L. ed. 50; *Canoy v. Troutman*, 29 N. C. (7 Ired. L.) 155; *Dawson v. Hayden*, 67 Ill. 52; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336; *Bank of United States v. Benning*, 4 Cranch, C. C. 81; *Koester v. Burke*, 81 Ill. 436; *Hannibal & St. J. R. Co. v. Green*, 68 Mo. 177; 1 Perry, Tr. § 328; 2 Perry, Tr. § 814; *Stall v. Cincinnati*, 16 Ohio St. 169.

But the conveyance affects materially the equitable rights of the *cestui que trust* or remainderman. The original trustee stands discharged, except as to accountability for the breach. The trust, which before the conveyance had been an express trust, remains no longer an express trust. It is changed into a trust by construction, in the hands of the purchaser. As regards the right to enforce it, it remains the same; but the changed character of the trust changes the time within which it must be enforced. Against the trust while it was express, the statute of limitations did not run, and the doctrine of prescription did not apply. But both the statute and prescription

may be invoked by the purchaser—the constructive trustee.

Townshend v. Townshend, 1 Bro. Ch. 550; *Bonney v. Ridgard*, 1 Cox, Ch. Cas. 145; *Beckford v. Wade*, 17 Ves. Jr. 87; *Lockey v. Lockey*, Prec. in Ch. 518; *Collard v. Hare*, 2 Russ. & M. 675; *Cholmondeley v. Clinton*, 2 Jac. & W. 190; *Atty. Gen. v. Fishmongers' Co.* 2 Beav. 158, 5 Myl. & C. 15; *Andrew v. Wrigley*, 4 Bro. Ch. 125; *Portlock v. Gardner*, 1 Hare, 594; *Lewin*, Tr. 2d Am. ed. 580.

Purchasing the property from the trustee, Welsh, and obtaining his conveyance and the written assent of Mrs. Robinson, there was a strict compliance with the requirements of the power, except that the purchase money was recited to have been paid to Mrs. Robinson, instead of Welsh, the trustee. The title having been in Welsh, and conveyed by him to Wright, this payment to the wrong person could not invalidate the deed as a transfer of title.

Wright, having participated in the misappropriation of the funds, received and held the title of the property subject to that charge—an implied trust. Anyone succeeding to his right can occupy no higher ground than he stood on, in consequence of the notice his deed furnished of the improper payment of the purchase money to Mrs. Robinson instead of Welsh. Such were the rights and such the liabilities of the parties and of the property, when viewed from the original standpoint. The right of the beneficiaries to complain of this breach of trust originated then and there, and limitation and prescription against its assertion commenced to run at that time. The present actions are therefore barred.

Rhodes v. Turner, 21 Ala. 210; *Gantt v. Phillips*, 23 Ala. 276; *Lay v. Lawson*, 23 Ala. 377; *Barnett v. Tarrence*, 23 Ala. 463; *Harvey v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344; *McArthur v. Carrie*, 32 Ala. 75, 70 Am. Dec. 529; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Blackwell v. Blackwell*, 33 Ala. 57, 70 Am. Dec. 556; *Wyatt v. Scott*, 33 Ala. 313; *Austin v. Jordan*, 35 Ala. 642; *Roundtree v. Brantley*, 34 Ala. 551, 73 Am. Dec. 470; *Nelson v. Goree*, 34 Ala. 580; *Harrison v. Heflin*, 54 Ala. 552; *Goodwyn v. Baldwin*, 59 Ala. 127; *Fleming v. Gilmer*, 35 Ala. 62; *Harrison v. Harrison*, 39 Ala. 489; *Philippi v. Philippi*, 61 Ala. 41; *Molton v. Henderson*, 62 Ala. 426; *Marston v. Rowe*, 39 Ala. 722; *Worley v. High*, 40 Ala. 171; *Baker v. Prewitt*, 64 Ala. 551; *Garrett v. Garrett*, 69 Ala. 429; *White v. Hutchings*, 40 Ala. 253, 88 Am. Dec. 766; *Kirby v. Kirby*, 40 Ala. 492; *Walker v. Crawford*, 70 Ala. 567; *Matthews v. McDade*, 72 Ala. 377; *McCartney v. Bone*, 40 Ala. 533; *Foster v. Chamberlain*, 41 Ala. 158; *Kelly v. Hancock*, 75 Ala. 229; *Doe, Gosson, v. Ladd*, 77 Ala. 223; *Ware v. Curry*, 67 Ala. 274; *Holt v. Wilson*, 75 Ala. 58; *Smith v. Gillam*, 80 Ala. 296; *Long v. Parmer*, 81 Ala. 384; *Bozeman v. Bozeman*, 82 Ala. 389; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; *Ross v. Goodwin*, 88 Ala. 390; *Duncan v. Williams*, 89 Ala. 341; *Wernborn v. Austin*, 82 Ala. 498; *Davis v. Mem-*
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phis & C. R. Co. 87 Ala. 633; *Lansden v. Bone*, 90 Ala. 446; *Knabe v. Burden*, 88 Ala. 436; *Temple v. Glenn*, 91 Ala. 245; *Lowery v. Davis* (Ala.) 8 So. 79; *Jackson, Swartwout, v. Johnson*, 5 Cow. 74, 15 Am. Dec. 433; *Bradstreet v. Clarke*, 12 Wend. 603; *Andrews v. Sparhawk*, 13 Pick. 400.

Where the purchaser paid full value and was guilty of no fraud, the mere fact that the money was paid to a person other than the trustee will not constitute a breach of trust, when it appears that the trustee ratified and sanctioned the payment by joining officially in the conveyance.

Norman v. Towne, 130 Mass. 52; *Hope v. Liddell*, 21 Beav. 183; *Townsend v. Warren*, 1 Jones & L. 221, note (a); *Bowen v. Evans*, 2 H. L. Cas. 257; Ala. Code, § 1843; *Bonney v. Ridgard*, 1 Cox, Ch. Cas. 145; *Lockey v. Lockey*, Prec. in Ch. 518; *Collard v. Hare*, 2 Russ. & M. 675; *Cholmondeley v. Clinton*, 2 Jac. & W. 190; *Atty. Gen. v. Fishmongers' Co.* 2 Beav. 158, 5 Myl. & C. 15; *Portlock v. Gardner*, 1 Hare, 594; *Ashton v. Atlantic Bank*, 3 Allen, 217.

Messrs. Pettus & Pettus, for George W. Stone, on rehearing:

Whenever there is an estate for life in one person, and an estate in remainder or in reversion in another, whether such estate be created by deed, or will, or the law, and there is a power to sell the fee, and such sale is made, though defectively, during the life estate, and the purchaser holds open, notorious, and uninterrupted possession for more than twenty years, claiming the fee, the remainderman or reversioner is barred, though he sue the day after the life tenant dies.

Lowery v. Davis (Ala.) 8 So. 79; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; *Lansden v. Bone*, 90 Ala. 446; *Matthews v. McDade*, 72 Ala. 377; *Doe, Gosson, v. Ladd*, 77 Ala. 223; *Melvin v. Proprietors of Locks & Canals*, 17 Pick. 255.

The deed from Falconer to Welsh, trustee, did not create a "dry trust," or a trust "for the mere benefit of third persons."

Code of 1886, § 1831; *You v. Plinn*, 34 Ala. 409.

This deed was made for the use and benefit of Mrs. Robinson, a married woman, for life at least. And, in such cases where a trust is created for the benefit of a married woman, the statute does not execute the trust.

Harton v. Harton, 7 T. R. 652; *Hawkins v. Luscombe*, 2 Swanst. 391; *Magniac v. Thompson*, Baldw. C. C. 363, 7 Pet. 348, 8 L. ed. 709; *Perry, Tr. § 310*; *Rice v. Burnett*, Speers, Eq. 583, 42 Am. Dec. 336.

The trustee had power to sell the fee; so he must have retained the title.

In case the property is conveyed to a trustee, for the use of a married woman, for life, with remainder to her children, the trustee holds the entire legal title during the life estate (not the title of the life estate only); and at the death of the life tenant the statute executes the trust, or terminates the legal title of the trustee, and vests the legal title in the remaindermen, then.

Perry, Tr. § 320; *Greenwood v. Coleman*, 34 Ala. 150; 4 Kent, Com. 310, note; *Rogers v. Gibson*, 1 Ves. Sr. 485; *Schaffer v. Lavretta*, 57 Ala. 14; *Huckabee v. Billingsly*, 16 Ala. 418, 50 Am. Dec. 183; *Gunn v. Barrow*, 17 Ala. 743; *Powell v. Glenn*, 21 Ala. 458; *Witter v. Dudley*, 36 Ala. 135; *Jones v. Reese*, 65 Ala. 134; *Grimball v. Patton*, 70 Ala. 626; *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; *Christian v. American Freehold Land Mortg. Co.* 92 Ala. 130; *Bercy v. Lavretta*, 63 Ala. 374; *Stein v. Gordon*, 92 Ala. 532; *Connell v. Cole*, 89 Ala. 381.

The possession of Wright, and those claiming under him, was adverse to the trustee, and as it continued to be open, notorious, and continuous for more than thirty-six years, ripened into a perfect title at law and in equity.

Molton v. Henderson, 62 Ala. 426; *Smith v. Gillam*, 80 Ala. 296; *Smilie v. Biffle*, 2 Pa. 52, 44 Am. Dec. 156; *Colburn v. Broughton*, 9 Ala. 359.

Head, J., delivered the opinion of the court:

On the 30th day of April, 1847, John Falconer, in consideration of \$900 paid by Mary Jane Robinson, bargained, sold, and conveyed, by deed in fee, with warranty, unto Thomas Welsh, the lands in controversy, situate in the city of Montgomery, Alabama, "in trust and for the sole and separate use and benefit of the said Mary Jane Robinson during her natural life, and, at her death, to the issue of the said Mary Jane Robinson, by her marriage with her present husband, Seth Robinson, free from all liability for the debts, contracts, of her present or any future husband, with the power to bargain and sell and such assurances to make of the same to any person, on request of said Mary Jane Robinson, in writing, and invest the proceeds of the sale thereof in such property as the said Mary Jane Robinson may select, and the same to be held subject, in like manner, to the uses and trusts hereinbefore stated." On the 30th day of January, 1854, as the deed recites, said "Thomas Welsh, trustee for Mary Jane Robinson, for and in consideration of \$3,000 to the said Mary Jane Robinson in hand paid, by Nathaniel H. Wright, the receipt whereof is hereby acknowledged," by deed in fee, with warranty, granted, bargained, sold, enfeoffed, and confirmed unto the said Nathaniel H. Wright a certain part of said lands. This deed was signed and sealed by "Thomas Welsh, Trustee," and by said Mary Jane Robinson. At the same time, Seth Robinson, the husband of said Mary Jane, executed a quitclaim deed to said premises to said Wright. By mesne conveyances from Wright, this property was, in March, 1873, duly conveyed to the defendant George W. Stone, vesting in him all the title of the said Wright. Immediately after the execution of the Welsh deed to Wright, in 1854, he (Wright) took possession of the granted premises, as rightful owner; and he and those succeeding to his right and possession, including the defendant Stone, have since 45 L. R. A.

held independent and adverse possession thereof. On the 1st day of June, 1858, the said Thomas Welsh and his wife, by deed, quitclaimed all right, title, and interest in the remaining portion of said lands to said Seth Robinson; and, at the same time, Seth Robinson and his wife, the said Mary Jane Robinson, for and in consideration of \$3,500 paid by Mary C. Pierce to the said Seth Robinson, conveyed the same by deed, in fee, with warranty, to said Mary C. Pierce, who went into immediate possession as owner, and held independent adverse possession thereof, until her death, in 1889. The said Mary Jane Robinson died in December, 1889. On the 5th day of August, 1890, a bill was filed in the chancery court by the remaindermen created by the Falconer deed, against the devisees of said Mary C. Pierce, and against the said George W. Stone, setting up alleged breaches of trust on the part of Welsh, the trustee, known to and participated in by the said several purchasers from him, and known to the said Stone, in that the purchase money was not in either case received and invested by Welsh, as trustee, as required by the terms of the trust, but that the same was suffered to be received, and was received, in the one case by Mrs. Robinson, and in the other by her husband; and the bill avers that he (Welsh) died many years ago, without leaving any estate, and without ever having received anything whatever for or on account of the said sales of said trust property, and without ever making, and without anyone else making, any reinvestment whatever of the proceeds of either of said sales. The prayer was that complainants be decreed to be entitled to said lands; that the several holders thereof be required to convey the same to them; and that an account of the value of the use and occupation of said property since the death of said Mary Jane Robinson be taken, and the defendants decreed to pay the same, and for general relief. The respondents set up, in bar, *inter alia*, laches of complainants, and staleness of demand. The cause coming on for hearing before us, on appeal, upon consideration of the questions and line of argument then prominently addressed to our attention, we reached the conclusion that the complainants were invested with the legal title to the premises, and had an adequate remedy at law; and we accordingly dismissed the bill. Upon the application of respondents for a modification of our opinion, holding that the legal title was in the complainants, the case was again elaborately argued by counsel, upon briefs, and new considerations brought to our attention, which now convince us that our former opinion was erroneous in the respect above stated, and that the application for a modification of it ought to be granted. We will proceed presently to give our reasons for this conclusion. After that decision, real actions were instituted by the complainants in the circuit court, and prosecuted to verdicts and judgments in their favor; and from those judgments appeals were prosecuted to

this court, and are now before us. We have before us also the said application for a modification of the former opinion in the equity cause.

The opinion we now hold is that the conveyances executed by Welsh, the trustee, though infected with palpable breaches of trust, apparent upon the faces of the conveyances themselves, were yet, in the view of a court of law, valid executions of the trust, passing the legal title in fee to the premises to the grantees, respectively, leaving a resort to a court of equity, as the appropriate and only remedy of the beneficiaries of the trust for redress of the breaches of trust committed by Welsh and his vendees. The first questions are: What title did Welsh, as trustee, have when he conveyed to Wright and Pierce? Was it a fee or less estate? If there is an axiom in the law, it must be regarded as axiomatic, in the construction of active trusts, that the trustee (not a bare donee of a power), irrespective of the estate the instrument purports to convey, will take thereunder precisely that *quantum* of legal estate which is necessary to the discharge of the declared powers and duties of the trust, no more and no less; so that, if the instrument imports a larger estate than is thus essential, it is cut down to the measure of the exigencies of the trust, as, where the conveyance to the trustee is in fee, and the trusts require only a life estate in the trustee, only a life estate is vested in him; and if the conveyance is, in terms, of a life estate, and a fee in the trustee is necessary, his estate is expanded or enlarged into a fee; or, to quote Mr. Lewin: "First, wherever a trust is created, a legal estate sufficient for the execution of the trust shall, if possible, be implied;" and, "secondly, the legal estate limited to the trustee shall not be carried further than the complete execution of the trust necessarily requires." All commentators and adjudged cases, including a number of our own decisions, concur in these propositions; and, as the principle is not disputed in this case, we will not take the time to cite them. It is also a rule, upon which all are agreed, that whatever be the limitations of the instrument, and whatever estate the trustee takes, in the beginning, the legal estate in the trustee is divested out of him, and passed into the *cestui que trust*, upon the instant that the duties and powers of the trust, from any cause, cease to be active, or cease to require a legal title in the trustee. Again, it will not be questioned that a power to sell the estate in fee, conferred upon the trustee by the terms of the trust, invests him with the legal title in fee; for the principle is not only self-evident, but is so expressly declared in all authorities upon the subject. And this is so even where the trust to sell is on a contingency. 1 Lewin, Tr. 213 (3); *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183. As where the sale is to be upon request of another person, and the trustee was never actually called upon to exercise the power of sale. 27 Am. & Eng. Enc. Law, p. 115, note. In this volume, beginning at 45 L. R. A.

page 107, will be found a full discussion of these subjects, collecting a great many authorities, with copious extracts from adjudged cases; and in a note of over thirty pages, in *Tyler v. Herring* (Miss.) 19 Am. St. Rep. 206 (67 Miss. 169), Mr. Freeman sums up the law, collating scores of cases, upon well-nigh every question which can arise in reference to estates of trustees, their powers and duties, and the manner and effect of their execution, supporting the principles above laid down and others which will be relied upon in this opinion.

It is also laid down, and nowhere disputed, that, "where an estate is given to trustees, in fee, upon trusts that do not exhaust the whole estate, and a power is superadded which can only be exercised by the trustees conveying in fee simple, the trustees will take the fee, and the estate conveyed by them will be sustained by the fee in them, and not by the mere power." 1 Perry, Tr. § 316. This describes the Falconer deed, in question. The conveyance to Welsh was, in terms, in fee. The active duty, apart from the power to sell, was to preserve the equitable separate estate of Mrs. Robinson during her life. If the deed had stopped there, Welsh would have taken no greater estate than for her life, for that would have limited the necessity for a trust; and, such a trust not affecting the estate in remainder, the legal estate in remainder in fee, dependent upon the precedent life estate, would have at once vested in the designated remaindermen by operation of the statute of uses. But there was the superadded power to sell the fee, and this retained the entire estate in the trustee; and in him that title must have remained until he divested himself of it by grant; or, not having granted it, until the death of Mrs. Robinson, when her request for the exercise of the power would have become impossible; or until, by the death of the trustee, or the processes of a court of equity, in the exercise of its supervision of trustees, or by contract of all parties concerned, the estate should have been devolved upon another.

Then, the inquiry arises, What has become of this fee-simple title so vested in Welsh, the trustee? The case shows that during the life of Mrs. Robinson, upon her request, in writing, manifested by her signing and sealing the deed in the one case, and actually joining in the deed in the other, Welsh, the trustee, upon valuable considerations, by his deeds, respectively, granted, bargained, sold, and conveyed to Wright and Pierce, respectively, his entire title and estate in the premises,—in the one case with the usual covenants of warranty, etc., and the other by quitclaim. In the deed to Wright he expressly declares, upon its face, that he conveys as trustee; in that to Pierce the law imputes the act to that capacity for the reason that he had no pretense of connection with the land, or estate therein, except as trustee. The law to this effect is not disputable. *Doe, Gosson, v. Ladd*, 77 Ala. 223; *Tyler v. Herring* (Miss.) 19 Am. St. Rep. note on page 292 (67 Miss. 169). See full

discussion of the question in *Gindrat v. Montgomery Gaslight Co.* 82 Ala. 596. Mr. Lewin (*221) says: "It may be stated as a general rule that the legal estate in the hands of the trustee has, at common law, precisely the same properties and incidents as if the trustee were the usufructuary owner." He proceeds to give numerous illustrations of the rule, and, reaching *225, says: "A trust estate, whether real or personal, may, at law, be conveyed, assigned, or encumbered by the trustee like a beneficial estate; and, if there be cotrustees, each may exercise the like powers of ownership over his own proportion. Thus, if lands be vested in trustees as joint tenants, each may, at law, receive the rents, and each may, at law, sever the joint tenancy by a conveyance of his share." He also shows that a devise by the trustee of the trust estate will, at law, pass his title to the devisee. But, of course, all such dispositions are subject to the equitable rights of the *cestui que trust*. Thus, the same author says, at *572: "In a court of law, the trustee, as the absolute proprietor, may, of course, exercise all such powers as the legal ownership confers; but, in equity, the *cestui que trust* is the absolute owner, and the question we have to consider in this place is how far the trustee may deal with the estate without rendering himself responsible in the forum of a court of equity." He then proceeds to set forth, at length and in detail, the rights, powers, and liabilities of the trustee, in a court of equity. Mr. Perry says: "As a general rule, the legal estate in the hands of a trustee has at common law precisely the same properties, characteristics, and incidents as if the trustee were the absolute beneficial owner. The legal title vests in him, together with all the appurtenances and all the covenants that run with the land. The trustee may sell and devise it or mortgage it, or it may be taken on execution. It may be forfeited, and it will escheat on failure of heirs, and so it will descend to heirs on the death of the trustee. All these properties and incidents attach to the legal estate at common law, whether in the hands of a trustee or of an absolute owner; but these incidents do not generally interfere with the proper execution of the trust, for all conveyances and all encumbrances made or imposed upon the estate by the trustee, for other purposes than those of the trust, or in breach of the trust, are utterly disregarded by a court of equity, whatever may be the effect of such conveyances or encumbrances in a court of common law. And as the trustee may, in a court of law, as a general rule, deal with the legal estate in his hands as if he was the absolute owner, so the *cestui que trust* in a court of equity may deal with the equitable estate in him. He is the beneficial and substantial owner, and, in the absence of any disability,—that is, if he is *sui juris*,—he may sell and dispose of it; and any legal conveyance of it will have, in equity, the same operation upon the equitable estate as a similar conveyance of the legal estate would have at law upon the legal estate." 45 L. R. A.

gal estate." 1 Perry, Tr. 3d ed. § 321. Hill, Trustees, *175, 282, 283, state the same doctrine; 2 Washb. Real Prop. *45, *et seq.*, the same. See also Tiffany & B. Trusts & Trustees, 824 *et seq.*, 50 Am. Dec. 183.

In *Huckabee v. Billingsly*, 16 Ala. 414, Huntington executed to Harrell a deed in trust to secure a debt due to Harrell, and secondarily to secure debts due to the Branch Bank at Mobile. Without the debts to the bank being paid, the trustee, in plain contravention of the trust, executed to the trustor, Huntington, a quitclaim deed in consideration of the payment of the Harrell debt. Afterwards, in strict pursuance of the power of sale contained in the trust deed, he (the trustee) sold the property to the plaintiff, and executed to him his deed thereto. The court held that the quitclaim of the trustee to the trustor divested the title of the former, and revested it in the latter, and that the action of trespass to try titles, founded on the subsequent deed of the trustee to the plaintiff, under the power, could not be maintained. Chief Justice Collier discussed the subject at length, saying, *inter alia*, that "a trust estate, whether real or personal, may, like a beneficial estate, be conveyed, assigned, or encumbered by the trustee, at law. As the dry legal estate in the hands of the trustee is affected by the operation of law, and may be disposed of by the act of the trustee, precisely in the same manner as if it were vested in him beneficially, so it confers upon him all the legal privileges, and subjects him to all the legal burdens, that are incident to the usufructuary possession. Thus, he may sue at law respecting the trust estate; the *cestui que trust*, though the absolute owner in equity, is regarded in a court of law in the light of a stranger." See also *Herbert v. Hanrick*, 16 Ala. 581. In *McBrayer v. Cariker*, 84 Ala. 50, Chief Justice Brickell said: "The general rule, insisted on by appellant, may be conceded that at law the trustee, clothed with the legal title, unless restrained by the terms of the trust, may convey, assign, or encumber the trust estate; and, if the *cestui que trust* is injured, he must resort to a court of equity for relief,"—citing *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183. But in that case the conveyance by the trustee relied upon was made after the active duties of the trustee, under the terms of the deed, had terminated, if, indeed, the trust had ever been an active one,—a question which the court said it was unnecessary to decide; and it was correctly held that the trustee had no title to convey at the time he executed his deed. The authorities are uniform that after all power in the trustee to perform an active duty, under the peculiar terms of the trust ceases, his title, which was commensurate only with the duty, also ceases, and thereafter he can convey none, to another. *Comby v. McMichael*, 19 Ala. 747; *Doe, Gosson, v. Ladd*, 77 Ala. 223. In *Hairston v. Dobbs*, 80 Ala. 589, the executor of a will was given "full power to purchase and sell any property he may think necessary and

proper, . . . or to dispose of any property for the benefit of my estate." He sold and conveyed lands of the estate to Dobbs. Held that, though the conveyance may have been made in payment of an individual debt due by the executor to Dobbs (a palpable breach of trust), yet the conveyance passed the legal title to the latter, and the devisees could not for that reason maintain ejectment against that deed. The court confined the devisees to their appropriate remedies for the breach of the trust; and hence these devisees were remaindermen.

Mr. Freeman, in his note, *supra* (Tyler v. Herring, 19 Am. St. Rep. 267, 67 Miss. 169, citing many authorities, states the rule thus: "Where the rules of a law upon the subject have not been modified by statute [which he subsequently shows is the case in New York, Michigan, Wisconsin, Minnesota, Kansas, California, and Dakota], all conveyances by a trustee, whether to an innocent purchaser or not, and whether in contravention of the trust or not, operate upon the legal title, and vest it in the grantee. This conclusion," he says, "necessarily followed from the refusal of the common law to recognize trusts or equitable titles, for, unless such trusts or titles were to be considered, there was no reason why the trustee should not convey to whomsoever he pleased. His conveyance was therefore valid at law, and the rights of the beneficiary could be protected only by his seeking redress in equity, and compelling the grantee to respect and to execute the trust, as the original trustee should have done." As stated above, in New York and the other states mentioned, the rule is changed by statute; and it is declared that where the trust is expressed in the deed to the trustee, creating the estate, every transfer or other act of the trustee, in contravention of the trust, is absolutely void. Discussing these statutes, Mr. Freeman observes: "The doubts most likely to arise concerning the signification of these statutes are: First, Do they mean that inhibited conveyances shall be deemed void in law, as well as in equity? and, second, if void both at law and in equity, are they also void when, upon their face, they appear to be made pursuant to the authority conferred on the trustee? And the fact of their being in contravention of the trust must be established by extrinsic evidence; and knowledge of this fact cannot be brought home to the grantee or his successors in interest." He then proceeds to the New York decisions construing the statute, holding the inhibited conveyances to be void, both at law and in equity, against purchasers with or without notice that the title, powers, and duties of the trustee are unaffected by the conveyance, and he continues to be trustee to the same effect as if the conveyance had not been made. A case—the counterpart of *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183,—is cited where it was held, under the operation of the statute, that the reconveyance to the trustor by the trustee was absolutely void. See the cases collated in the note *supra*. We

have no such statute. The common law upon the subject obtains with us in all its vigor, except as to the descent of trust estates.

Notice the analogies which we meet with in almost everyday experience. A mortgagee is invested with the legal title to land, in trust, for the sole purpose of securing his debt. His power to sell for that purpose is required to be exercised, after strictly-defined formalities; yet his bare deed to the premises, or a transfer of the mortgage with apt words to convey the land, passes the legal title to the land, though there be entire disregard of the prescribed formalities. And, if the condition of the mortgage be not performed by the mortgagor to the very day, payment of the mortgage debt thereafter (until the rule was changed by a recent statute in this state), did not operate to retransfer the title to the mortgagor, and his only remedy was in equity. A vendor of land who receives full payment of the purchase money, and puts the purchaser in possession without a conveyance, stands as a constructive trustee of the vendee, and, clothed with the dry legal title, may eject the vendee at law. The vendee's only remedy is in equity. A trustee of an express trust, purchasing at his own sale, commits an open and conclusively prejudicial breach of his trust; yet his purchase discharges the express trust, and converts him into a constructive trustee, of which character the *cestuis que trust* may avail themselves by a proceeding in equity seasonably begun,—within two years under our rulings, unless there be special circumstances justifying greater delay. Countless instances might be given demonstrating the universal rule of the common law that trustees clothed with the legal title by virtue of the trust, and having and claiming no other estate in the premises, and professing to convey no other, pass that title by their grants, without any regard, in a court of law, to the nature, object, or purposes of the trust, or conformity to their requirements. Indeed, it required a statute in this state to prevent the descent of that title to the heirs of the trustee. Code 1886, § 1848. In the objects and requirements of the trust are centered the equitable rights of the *cestuis que trust*; and in a court of equity alone can they enforce them, or redress their breach. A moment's reflection discovers, as a logical necessity, that the very doctrine itself of the validity of trustees' conveyances, in a court of law, implies its application to conveyances in contravention of the trusts; for, if a conveyance be in conformity to the trust, no question of its validity can possibly arise. It is absolutely valid and unassailable, both at law and in equity. And it seems needless to argue that, so far as the validity of the conveyance in a court of law is concerned, it is wholly indifferent how the breach is manifested,—whether shown upon the face of the trustee's deed, or to be established by extrinsic averment and proof. The breach, whatever its nature, being immaterial, as affecting the legal conveyance, its existence

or nonexistence is not a matter of inquiry. Thus, it is impossible to find a case anywhere where the trustee was *sui juris*, and was confessedly clothed with the legal title, and his deed was not immoral and void, as offensive to public policy, that his conveyance was assailed, except because it was in contravention of the trust; and in every such case, at law, which our research discloses (and we have spared no pains in that behalf), with one exception, to which we will refer, the parties complaining were remitted to their remedies in equity. See the Alabama cases above referred to; also, the numerous authorities in point collected upon the briefs of counsel, to which we add, *Taylor v. King*, 6 Munf. 358, 8 Am. Dec. 746; *Coae v. Blandin*, 1 Watts, 533, 26 Am. Dec. 83; *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336; *Gale v. Mensing* (Mo.) 64 Am. Dec. 197, and extended note; *Stephens v. Clay*, 31 Am. St. Rep. 328 (17 Colo. 489).

The exception referred to is the doctrine of some Missouri and Mississippi cases,—that, perhaps of one or two other states,—that, when a trust deed to secure debts confers a power of sale to be exercised after giving a prescribed notice, the notice is a condition precedent to any conveyance of the legal title by the trustee. *Ohasburg v. Turner*, 87 Mo. 127; *Enochs v. Miller*, 60 Miss. 19. It is familiar to this court that such is not the law in this state, as settled by *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183, and many subsequent analogous cases. With us such an irregular sale is voidable, and the equity of redemption, without regard to the statutory right of redemption, will continue until enforced or barred by laches. In *Robinson v. Cahalan*, 91 Ala. 479, there was a fatally defective execution of the power of sale in a mortgage on account of nonconformity to the prescribed formalities as to notice, etc., but a deed was made to the purchaser by the mortgagee; and it was held that this deed, although not a foreclosure of the mortgage, for the want of the prescribed notice, etc., passed the legal title of the mortgagee to the purchaser, and on that deed the purchaser recovered, in an action of ejectment.

The rule is universal that upon breach of trust by a trustee, however manifested, the *cestui que trust* may affirm or disaffirm the breach at his election. For instance, no one would doubt for a moment the equity of a bill filed, in due season, by a *cestui que trust* against the trustee who, holding the legal title, sold and conveyed to a purchaser, both of whom engaged in misappropriating the purchase money, and against such purchaser, affirming the sale and conveyance, and electing to hold the trustee and purchaser responsible for the misappropriation, and to have the money reclaimed, and the same laid out, under the direction of the court, in other property upon the same trusts, securing its payment into court, or to another trustee appointed by the court, by a lien on the land conveyed to the purchaser. Suppose a demurrer to such a bill, objecting that

complainant had his remedy at law, in that the breach of the trust rendered the sale and conveyance to the purchaser void at law, and that his only remedy was to take back the land; what would be the ruling upon the demurrer? To ask the question is to answer it. The law prescribes no fixed, unalterable consequence of a breach of trust, committed in the disposition of a trust estate. The remedies, in equity, of the *cestui que trust*, are various, and subject to his election. He may, we repeat, affirm the breach, submit to the conveyance, and elect other redress against the trustee and purchaser. If an infant, the court may elect for him. The remaindermen in this cause may have deemed the sales advantageous to them, by reason of their power to have the purchase money brought into and secured by the court of equity, for their ultimate enjoyment, charging the payment of the sum, not only upon the trustee and purchasers personally, but upon the lands inequitably disposed of by the trustee. To determine that the breach of trust is of itself conclusive of the invalidity of the sale would be to determine that the only recourse of the *cestui que trust* is to reclaim the land. If the sale and conveyance are to be treated as nullities, then, although the lands may have sold for a large price, or may have enormously diminished in value since the sale, or, being valuable principally for their improvements, the improvements may have been destroyed after the sale, without fault of the purchaser, yet the benefits of these casualties will be conferred upon the culpable purchaser, by securing him exemption from the restoration of the original agreed purchase money to its legitimate channels and compelling the *cestui que trust* to take the land only, in its denuded or valueless condition. Of course, the *cestui que trust* may, by his bill, elect to annul the legal conveyance, and reclaim the land, instead of other redress. These elections cannot, of course, be made in a court of law.

Again, were we to hold that the Wright and Pierce deeds are void, because of the breaches of trust apparent upon the deeds themselves, we would presuppose that the recitals of payment of the purchase money to Mrs. Robinson, in the one case, and her husband, in the other, conclusively establish, as matter of law, beyond all issue, investigation, or inquiry, that there was a substantial misappropriation of the purchase money, amounting to a breach of trust. And not only this, but that they conclusively establish, as matter of law, beyond all issue, investigation, or inquiry, that the purchase money took the direction indicated by the recitals, without any act of omission or commission on the part of the remaindermen, or either of them, estopping them, in equity, to impeach the transactions. Although the purchasers and trustee or their representatives may stand ready and able to aver and prove that the purchase money was actually, honestly, and judiciously invested in other property upon the same trusts,—in slaves, it may be, who were lost by death or

emancipation, or in stocks or bonds which went into the hands of the trustee, or even in lands, with all the necessary muniments of title; or though they be ready and able to aver and prove that the transactions took the shape they did, by the express consent and request, in writing, it may be, of all the remaindermen,—yet the mere circumstance that the deeds recite payment of the money to Mr. and Mrs. Robinson forever precludes them; forever shuts them out from all opportunity to explain and show that the trust requirements were, in fact, honestly and judiciously carried out, or that the wishes and desires of the remaindermen, expressly made known, were honestly observed. A practical test: Suppose the remaindermen had, within a reasonable time after the sales, filed their bill to redress the breaches of trust indicated by the recitals in question, electing the nature of relief deemed most advantageous to them, to which the trustee and purchasers answered or pleaded in bar a due reinvestment, such as we have above supposed, or an act of clear estoppel, as supposed; would any court hold that such answer or plea, established by proof, would not have defeated relief? Most assuredly not. See the consequences of such a rule: It will not be contended that a deed by a trustee, whose recitals show a breach of trust, possesses any other or greater invalidity than one whose recitals show due conformity to the trust, but which, upon extrinsic proof, is shown to have been executed in breach of the trust, participated in by both the trustee and purchaser. The only difference is one of evidence. In the one case the recitals are prima facie evidence of the breach, casting the burden of proof upon the purchaser; in the other they are prima facie evidence of conformity to the trust, casting the burden of proof upon the *cestui que trust*. The breach being established, in either case its effect upon the deed is precisely the same. What that effect is, as we have already seen, equity opens a wide door to the injured *cestui que trust* to determine, by his election. He cannot be forced to treat the conveyance as void, and take the land, or have it secured for him when his right, in possession, accrues; for to do so would deprive him of his right to elect other redress which might secure to him much larger benefits. If the deed is a nullity, the purchaser thereby having no legal or equitable rights under it, this right of election of the *cestui que trust* would, as we have said, be excluded; for a party cannot ratify or affirm a conveyance absolutely void, conferring no right, legal or equitable, and elect to take other rights, as growing out of it, more burdensome, it may be, to the opposite party. It would require a new contract in such a case to confer any right other than the right to reclaim what the opposite party may have acquired possession of under the void deed, together with such damages as might be legally incident to such wrongful possession. To state another practical case: The deed recites due conformity to the trust. A bill is filed, alleging that the recitals are

false; that the purchase money was, in fact, paid by the purchaser to the life tenant and her husband, instead of to the trustee who alone was authorized to receive it; and praying for such lawful redress as the complainant, as *cestui que trust*, might elect and claim. Thus, upon the principle that a deed is void because of the breach of trust, we would have a bill which showed, by its allegations, that the deed was absolutely void, from its inception; and, unless the bill was so framed as to justify a decree canceling the deed as a cloud upon the complainant's title, it would go out of court for want of equity. Again, the rights of the parties in reference to the verity of the recitals must be correlative. The trustee is the embodiment, so to speak, of the *cestui que trust*. Through him, they are parties to the deed. They are separate from him, and can assail his acts only in equity. If recitals showing a breach are conclusive, as a corollary, they are conclusive when they show conformity; thus excluding, in the latter case, all redress.

A purchaser from a trustee, in contravention of the trust, in no sense becomes thereby an express trustee. He becomes a trustee, *in invitum*, by construction of law. He is a constructive trustee. He holds actually in his own right, and in hostility to the world; but a court of equity, as Judge Story puts it, will "force a trust upon his conscience," and compel him to perform it or answer for its fruits. 2 Story, Eq. Jur. § 1257; 2 Washb. Real Prop. *177, § 21; Hill, Trustees, *144; 1 Perry, Tr. §§ 217, 241; 2 Pom. Eq. Jur. § 1048; *Smyth v. Oliver*, 31 Ala. 39. A resulting trust, though by no means an express one, because not declared in the deed out of which it arises, approaches more nearly thereto, in that it rests upon a presumed intention; from which results the rule that the purchase money must have been paid at the time of the purchase, whereas a constructive trust, like the present, is supported by no such presumption. It is entirely *in invitum*, and is raised and enforced by a court of equity, as a principle of justice. It has attached to it none of the attributes of an express trust. The purchaser is charged for breaking up the trust, and not because he has agreed to execute it.

In view of these considerations, we are compelled to hold that the legal title passed by the Welsh deeds to Wright and Pierce, and that the remedy of the complainants was alone in equity, upon bill filed in due season. It follows from what has been said that the counsel for the complainants, had they been in season, properly conceived their remedy when they filed the bill in equity. But that bill was properly dismissed by the chancellor, and the dismissal affirmed by this court, because of the great staleness of the demand sought to be made the basis of relief. The court was open to the complainants from 1854, in one case, and 1858, in the other, to obtain the relief they may have been entitled to, or ever could have become entitled to,—the identical relief (assuming the same elec-

tion) sought by the bill in this case. The fact that, by the terms of the Falconer trust, the complainants could have had no possessory right until the death of Mrs. Robinson, who was the life tenant, cannot possibly affect the question. It is unquestionably true (for it is the settled rule everywhere, saving what shall be said of *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, and cases following it) that one having a legal title entitling him to a possessory action upon the falling in of a precedent particular estate is not affected by any lapse of time, howsoever great, until the particular estate falls in, by which event he for the first time becomes entitled to his action. There can, it would seem, upon principle, and certainly so by the great weight of authority, be no disseisin of a remainderman having the legal title in remainder in himself, until his right of possession accrues; for until then he is without remedy of any sort against any trespasser or adverse holder, except the right in equity to stay waste and the like. But here these complainants were divested of all title by Welsh's execution of the trust. Their estate was gone. Neither the death of Mrs. Robinson nor any other event would or could have vested in them any estate whatever growing out of the muniments of title. If there was, in the execution of the trust, such a breach committed by Welsh and his vendee as is alleged, its effect was, as we have shown, to create in the complainants an independent, substantive cause of relief for being made whole against the consequences of the breach, to be worked out through the court of chancery according to such recognized equitable right and remedy of redress in such cases as the complainants might, by their bill, elect. Upon establishing the breach, they could have affirmed the sales, and held the guilty parties to a proper accounting therefor, and disposition of the purchase money; or they could have disaffirmed the sales, and, by decree, obtained vacation of the conveyances, and restoration of the estates in the land to the status and condition in which the Falconer trust deed would have left them. It is, then, necessarily true (assuming election of the last-named relief), that the only right in respect of the land which the complainants, at the time of Welsh's execution of the trust, or ever afterwards, either before or after the death of Mrs. Robinson, could have asserted, was this right to sue in equity to obtain an estate, by restoration, by decree, of the original status. This done, and if the trust still remained unexecuted at the death of Mrs. Robinson, her death would have rendered its execution impossible. There would have been no longer necessity for retention of the legal title by the trustee, and the legal estate in fee would have vested in the complainants, upon which they could then have maintained their possessory action, either by petition to the chancery court, in the cause where their title was established, to be let into possession, or by real actions at law, as they might have chosen; and no lapse of time (unless

the trustee had suffered himself to be disseised for a period sufficient to bar him, thereby barring all *cestuis que trust*), occurring during the life of Mrs. Robinson, could have affected their right of recovery. These possessory rights, it is manifest, did not and could not come into existence until, as independent, substantive equities, they should be sued for and obtained in a court of equity; and that remedy was open immediately upon the commission of the breach of trust, to precisely the same extent and effect as after the death of Mrs. Robinson. A perfect bill filed before her death would have been in the identical words of one filed after that event. It would not have been even necessary to ask, in the bill, for a writ of possession; for that could be done by petition to the chancellor after passing the decree establishing the complainants' estate and right of possession, suggesting and showing the death of the life tenant. The suit in equity is, for the purpose of acquiring an estate which will give a possessory right, enforceable by action at law, at the time which, by the effect of the grants as they are decreed to exist, such right would arise. The power of the chancellor, upon establishing this estate, on petition, to put the complainants in possession, is purely auxiliary, incidental,—not the primary purpose of, nor forming a part of the equity of, the bill. The question of when or on what contingency the complainants may become entitled to possession cannot possibly concern the relief sought by the bill.

Let us illustrate by a perfectly plain case: One having (we will say) a vested legal estate in remainder in lands, dependent upon a precedent life estate, is, by fraud and deceit, induced to sell and convey his estate to another, pending the life estate. Here, we observe, his estate is, by his deed, entirely gone,—destroyed. But there grows out of its destruction, by reason of the fraud, a right in him, at his election, to confirm the fraud, and sue for damages, in the equitable action of deceit, or, repudiating the transaction, to file a bill in chancery for rescission and restoration to his estate. It is manifest that the remedy chosen is open to him at once, without regard to the life or death of the life tenant. If he elects the remedy in chancery, his object is to get back his title. It matters not when his right of possession may accrue, for, until he is restored to his title by a court of equity, he can never have a right or action of possession at law. His restoration to his estate, established by decree years before his possessory period, is just as available to him, for all purposes, as if so established after that period. The question of the time or event of the possessory right is utterly immaterial. No one would contend that a party thus alleged to be defrauded could lie by for thirty or forty years, either before or after the life estate falls in, and then file a bill to rescind his conveyance on account of such alleged fraud.

The briefs on file contain an ample colla-

tion of the authorities on the subject we are discussing. Though the last Alabama case on the subject (*Lowery v. Davis*, 8 So. 79), seems to commit this court irrevocably to the much-criticised and doubtful, if not plainly erroneous, doctrine of *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, yet the integrity of that decision is by no means essential to the correctness of the conclusion declared in this case. There, as in the two subsequent cases which followed that decision (*Lansden v. Bone*, 90 Ala. 446, and *Lowery v. Davis*, 8 So. 79), the attempted sale of the reversionary estate was absolutely void. The legal title, according to the muniments, continued unbroken in the reversioners down to, and after, the death of the life tenant; and yet, because (as it was held), the void deed, professing to convey the reversion, cast a cloud upon the reversioners' title, which they could have gone into equity to remove, and because (as was held), the purchase money paid by the purchaser at the void sale of the reversion having gone into the hands of the personal representative of the deceased owner of the land through the medium of the void sale, and by him applied to the payment of the debts of such deceased owner, an equitable estoppel was created upon the reversioners, in whom the legal title resided, to claim the land against the void purchaser without paying back the purchase money (whether with or without interest being pretermitted by the decision), it became the duty of the reversioners, within twenty years, although they held the legal title, with no power whatever to enforce it until their right of possession accrued by the falling in of the life estate, to file their bill for a redemption, so to speak, from the void sale, tendering to the purchaser the purchase money, and to have the cloud removed from their title; and having failed so to sue within twenty years, notwithstanding the continuance of the life estate, they were barred to assert their title after the life estate fell in. Here, in the case before us, after the trustee executed the trust, the remaindermen had no title and no possibility of becoming invested with one, except by suing in equity, to acquire it, based upon the independent cause of relief conferred by the breach of trust. It is to this equitable proceeding to acquire a title that staleness of demand is pleaded, and to disallow the defense would be to overrule that great and invaluable principle of equity which has stood for centuries, requiring the suitor to be diligent. What conceivable reason can there be for exempting a person from this rule of diligence who sues in equity to acquire an estate in remainder or reversion, any more than one suing in equity to acquire an estate in possession? His decree, when obtained, establishes perpetually his title, entitling him to maintain his action for possession whenever the event entitling him to possession transpires; and no lapse of time after recovery of the decree, and before the possessory right accrues, could affect his right to recover possession upon the happening of the latter event. The 45 L. R. A.

harshness and injustice of a contrary rule would work untold detriment. Here, the complainants, professing no right but that of an equity, capable at any time within twenty years of enforcement, call upon the respondents to answer and make proof, if they would defend themselves against that equity, alleged to have grown out of transactions *in pais*, occurring nearly forty years before.

That the complainants' right to file their bill at any time after the commission of the alleged breach of trust was perfect cannot be questioned. A case strongly illustrative (saying nothing of our own decisions cited upon briefs), is that of *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438. There a trust deed vested an equitable estate in lands in remaindermen. The trustor and trustee conveyed, in contravention of the trust, under decree of court fraudulently obtained. The remaindermen filed their bill, pending the life estate, to have the fund properly restored and reinvested for their ultimate use, when their right in possession would have accrued, and the relief was granted. We think there can be no doubt that the dismissal of the bill was supported by the staleness of the demand.

The Application for modification of our former opinion in the equity case is granted, so as to conform to the views herein expressed. In Each of the law cases the judgment will be reversed, and the cause remanded.

Brickell, Ch. J., not sitting.

Coleman, J., dissenting:

I am aware that any further discussion of the principles involved in this case would not change the result, and I do not propose to do more than merely to state my position, and the propositions which sustain it.

John Falconer, in 1847, conveyed the lands in fee to Thomas Welsh, in trust for the sole use and benefit of his daughter, Mary Jane Robinson, during her natural life, and at her death to complainants. By the deed of trust the trustee was given the power to sell and convey said lands on request of Mary Jane Robinson, in writing, and invest the proceeds of the sale thereof in property "to be held subject in like manner to the same uses and trusts hereinbefore stated." Mary Jane Robinson, the life tenant, died in 1889. Within less than a year after her death, the complainants, both by suit in ejectment and by bill in chancery, instituted proceedings to assert their rights under the deed made by John Falconer. It is not pretended that any conduct or word of theirs has induced action on the part of the defendants, or that they have been guilty of anything which authorizes the application of the doctrine of estoppel. It is not pretended that the defendants are entitled to protection as innocent purchasers. Notwithstanding the provisions of the deed of trust for their benefit, and that no principle of estoppel arises, and that defendants are not innocent pur-

chasers, and that plaintiffs instituted proceedings within a year after the termination of the life estate to enforce their rights, the decision of this court is that they are without remedy, either in a court of law or equity. However plausible and specious the reasoning, the conclusion reached demonstrates its unsoundness and injustice. My own opinion is that the deed of the trustee to defendants, showing upon its face that it was not made in accordance with the power

vested in the trustee, but in direct violation of that power, did not divest the estate of the remaindermen, and that upon the falling in of the life estate, under the facts, upon the plainest principles of justice, they were entitled to assert and recover the estate given to them by the conveyance of their grandfather. The authorities are numerous also which sustain this view, and which can be found in the briefs of counsel representing the plaintiffs.

DELAWARE SUPREME COURT.

Mayor, etc., of WILMINGTON, *Plff. in Err.*,
v.

Luther W. EWING *et al.*

(.....Del.....)

A statutory exemption of municipal corporations from liability for defective condition of footways except when caused by the city or its authorized agents is not unconstitutional, even if that part of the statute which attempts to impose the liability therefor on abutting owners is invalid.

(*Pennewill, J., dissents.*)

(April 18, 1899.)

ERROR to the Superior Court for Newcastle County to review a judgment in favor of plaintiffs in an action brought to recover damages for injuries caused to plaintiffs by defective plates covering a gutter across a footway in the defendant city. *Reversed.*

The facts are stated in the opinions.

Messrs. Robert G. Harman and Horace Greeley Knowles for plaintiff in error.

Mr. Lilburne Chandler, for defendants in error:

The proximate cause of this injury to Mrs. Ewing was the neglect of the city to provide a safe gutter at the time of building of the houses, and to keep it safe up to the time of the accident—a matter preceding the passage of the act exempting the city from liability.

Campbell v. York, 172 Pa. 205.

The ultimate liability in damage cases, such as the Ewing case, is upon the author or continuor of the nuisance.

Dill. Mun. Corp. § 1034.

Where a municipality permits a private citizen to build a sidewalk in front of his premises, and the same to be used by the public, the duty devolves upon the corporation to see that it is kept in proper repair.

Graham v. Albert Lea, 48 Minn. 206; *Weare v. Fitchburg*, 110 Mass. 337; *Saulsbury v. Ithaca*, 94 N. Y. 27, 46 Am. Rep. 122; *Aurora v. Bitner*, 100 Ind. 401; Dill. Mun. Corp. 3d ed. 1024.

Municipal corporations are required to keep their streets and sidewalks in proper re-

pair and free from dangerous obstructions, and are liable for injuries resulting from their neglect so to do.

Conrad v. Ithaca, 16 N. Y. 158; *Clifford v. Dam*, 81 N. Y. 52; Dill. Mun. Corp. ed. 1, 571; Cooley, Torts, 625, 626.

Under the Roman law, the corporation was liable for torts, the obligation *alterum non ledere* resting upon it.

Jones, Neg. § 14.

A municipal corporation was always liable for torts in England.

Jones, Neg. §§ 15–18; *Lynn v. Turner* (1774) 1 Cowp. 86; *Russell v. Men of Devon*, 2 T. R. 667.

American law has invariably held municipal corporations liable for torts.

Jones, Neg. § 19 A; 2 Dill. Mun. Corp. § 966, p. 1179.

An "unconstitutional law" is one which violates the provisions or principles of the supreme law of the land, or of that Constitution by which the particular law-making body is governed.

3 Am. & Eng. Enc. Law, p. 671.

A statute contrary to the spirit of the Constitution and the implications necessarily drawn from it, or to the fundamentals of justice and good government, or to those cardinal principles of the social compact which underlie all legislation and enter into the framework or representative government, may be pronounced void by the courts.

Jones v. Wootten, 1 Harr. (Del.) 81; *Beeson v. Beeson*, 1 Harr. (Del.) 469; *Regents of the University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72; *Welch v. Wadsworth*, 30 Conn. 155, 79 Am. Dec. 236; *Caldier v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Wilkinson v. Leland*, 2 Pet. 657, 7 L. ed. 553; *People v. Toynbee*, 20 Barb. 218; *Taylor v. Porter*, 4 Hill, 145, 40 Am. Dec. 274; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Varick v. Smith*, 5 Paige, 137, 28 Am. Dec. 417.

In all jurisdictions it is conceded that the courts may bring every legislative enactment that violates the great principles of natural justice, or is contrary to the spirit of our republican form of government within the 14th Amendment to the United States Constitution.

People v. Turner, 55 Ill. 280, 8 Am. Rep. 645; *Tiedeman*, Pol. Power, § 3, pp. 10, 11;

NOTE.—As to the personal liability of highway officers, see *note* to *Bates v. Horner* (Vt.) 22 L. R. A. 324.
45 L. R. A.

East Kingston v. Towle, 48 N. H. 61, 97 Am. Dec. 575, 2 Am. Rep. 174.

The expressions "due process of law" and "law of the land" were intended to secure an individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 561; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395; *Wilkinson v. Leland*, 2 Pet. 641, 7 L. ed. 547; *Ordroneaux*, Constitutional Legislation, 254, 255.

The statute is clearly unconstitutional, because it imposes upon the adjacent landowner an absolute liability, irrespective of negligence.

Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 395; *Jensen v. Union P. R. Co.* 6 Utah, 253, 4 L. R. A. 724; *Cateril v. Union P. R. Co.* 2 Idaho, 540; *Bielenberg v. Montana Union R. Co.* 8 Mont. 271, 2 L. R. A. 813; *Oregon R. & Nav. Co. v. Smalley*, 1 Wash. 206; *East Kingston v. Towle*, 48 N. H. 61, 97 Am. Dec. 575, 2 Am. Rep. 174; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259; *Durkin v. Kingston Coal Co.* 171 Pa. 193, 29 L. R. A. 808; *San Antonio & A. P. R. Co. v. Wilson* (Tex. App.) 19 S. W. 910; *Anderton v. Milwaukee*, 82 Wis. 279, 15 L. R. A. 830; *Cooley, Const. Law*, 484, 485; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Sedgw. Stat. & Const. L.* 138-145.

The adjacent landowner cannot be held liable for defects in the sidewalk over which he has no control.

Rochester v. Campbell, 123 N. Y. 405, 10 L. R. A. 393; *Toutloff v. Green Bay*, 91 Wis. 490; *Law v. Kingsley*, 82 Hun, 76; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; *Fulton v. Tucker*, 3 Hun, 529; *Dill. Mun. Corp.* § 1012; *Kirby v. Boylston Market Asso.* 14 Gray, 252, 74 Am. Dec. 682; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457; *Jansen v. Atchison*, 16 Kan. 358; *Keokuk v. Independent District*, 53 Iowa, 352, 36 Am. Rep. 226; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603.

There is no liability on the landowner at common law.

Cooper v. Waterloo, 88 Wis. 433.

The legislature can no more absolutely relieve a municipal corporation from liability for its negligence than it can an individual.

Durkee v. Janesville, 28 Wis. 470, 9 Am. Rep. 500; *Del. Const. art. 1, § 9*; *Cook v. Gray*, 2 Houst. (Del.) 455, 81 Am. Dec. 185; *Cooley, Const. Lim.* 352, 353, 445.

A right of action when it comes into existence under common-law principles, and is not given by the statute as a mere penalty, or without equitable basis, is as much property as any tangible possession, and is as much within the rules of constitutional protection.

Griffin v. Wilcox, 21 Ind. 370; *Dunlap v. Toledo, A. A. & G. T. R. Co.* 50 Mich. 474; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 45 L. R. A.

159; *Power v. Harlow*, 57 Mich. 111; *Hubbard v. Brainard*, 35 Conn. 503; *Cooley, Const. Lim.* 445, note.

There is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the benefit of such other person, whether by general law or by special enactment.

Cooley, Const. Lim. 437; *Foule v. Mann*, 53 Iowa, 42; *Ehlers v. Stoeckle*, 37 Mich. 261; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Picquet, Appellant*, 5 Pick. 65.

Acts exempting municipalities are unconstitutional and void.

Noonan v. Stillwater, 33 Minn. 198, 53 Am. Rep. 23; *Rincks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 725; *Durkee v. Janesville*, 28 Wis. 470, 9 Am. Rep. 500; *Jones, Neg.* §§ 87-89; *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182; *Fitzpatrick v. Slocum*, 89 N. Y. 365; *San Mateo County v. Southern P. R. Co.* 13 Fed. Rep. 145; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Ulman v. Baltimore*, 72 Md. 587, 11 L. R. A. 224.

As the owner of land, a municipal corporation is subject to the same liabilities for its negligent care thereof as an individual.

2 Dill. Mun. Corp. §§ 985, 986; 1 Shearm. & Redf. Neg. § 285; 2 Thomp. Neg. 658, 666, 740; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, on appeal, 2 Denio, 433; *Jones, Neg.* §§ 38, 39.

Mr. William S. Hilles, also for defendants in error:

Apart from some statute plainly imposing such obligations, there is no obligation on the part of an abutting owner to repair the sidewalk, although he may be liable to be taxed for repairs made to the sidewalk by the municipality or by its direction.

Eustace v. Jahns, 38 Cal. 3; *Rockford v. Hildebrand*, 61 Ill. 155; *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393; *Keokuk v. Independent District*, 53 Iowa, 352, 36 Am. Rep. 226; *Beach, Pub. Corp.* § 1490; *Jones, Neg. of Mun. Corp.* § 89; *Dill. Mun. Corp.* 1012; *Law v. Kingsley*, 82 Hun, 76; *Fulton v. Tucker*, 3 Hun, 529; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; *Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457; *Jansen v. Atchison*, 16 Kan. 358; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603.

Under the charter of Wilmington, there is no provision whatever to charge an abutting owner for such repairs as were, by the proof, necessary and needed to this gutter.

Any statute imposing a special burden of this character must be strictly construed, and not made to comprehend cases not falling within its very terms.

Cooley, Taxn. 276-609; *Beach, Pub. Corp.* §§ 1125-1137, 1166.

Where by statute, or ordinance, an abutting owner has been obliged to remove snow and ice from his pavement under penalty for his failure to do so, and where such abutting owner has been sought to be made

liable to one injured, by reason of the failure of such owner to comply with the statute or ordinance, it has been invariably held in such cases that the owner was not liable to such persons, and was not liable over to the city against whom damages had been originally recovered.

Flynn v. Canton Co. 40 Md. 312, 17 Am. Rep. 603; *Moore v. Gadsden*, 93 N. Y. 12; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393; *Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682.

The courts of this state have power to declare unconstitutional a law not in direct conflict with the language of the Constitution of the state or of the United States.

Rice v. Foster, 4 Harr. (Del.) 479; *Regents of the University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72; *Welch v. Wadsworth*, 30 Conn. 155, 79 Am. Dec. 236; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Wilkinson v. Leland*, 2 Pet. 657, 7 L. ed. 553; *People v. Toynbee*, 20 Barb. 218; *Taylor v. Porter*, 4 Hill, 145, 40 Am. Dec. 274; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Varick v. Smith*, 5 Paige, 137, 28 Am. Dec. 417; *Griffith v. Crawford County Comrs.* 20 Ohio, 609; *Ross's Case*, 2 Pick. 169; *Bonham's Case*, 8 Coke, 113.

The legislature can make no man responsible for negligence except "according to the usual practice" of the courts.

Oregon R. & Nav. Co. v. Smalley, 1 Wash. 206; *Bielenberg v. Montana Union R. Co.* 8 Mont. 271, 2 L. R. A. 813; *Jensen v. Union P. R. Co.* 6 Utah, 253, 4 L. R. A. 724; *Cater v. Union P. R. Co.* 2 Idaho, 540; *Dacres v. Oregon R. & Nav. Co.* 1 Wash. 525; *Zeigler v. South & North Ala. R. Co.* 58 Ala. 594; *Memphis & O. R. Co. v. Lyon*, 62 Ala. 71; *Thompson v. Northern P. R. Co.* 8 Mont. 279; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395; *Birmingham Mineral R. Co. v. Parsons*, 100 Ala. 662, 27 L. R. A. 263; *Denver & R. G. R. Co. v. Wheatley*, 7 Colo. App. 284; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 53, 20 Am. Rep. 259.

The municipality having title to the real estate comprised within the limits of Ninth street is equally responsible with an individual for injuries occasioned by its failure to use proper care in the management of its property.

Dill. Mun. Corp. §§ 66, 985, 986; *Cooley, Torts*, 619, 620; 1 Shearm. & Redf. Neg. § 285; 2 Thomp. Neg. 658-666, 740; *Jones, Neg. of Mun. Corp.* §§ 38, 39, 149-158; *Pollock, Torts*, 51, 52; *Savannah v. Cullins*, 38 Ga. 334, 95 Am. Dec. 398; *Hannon v. St. Louis County*, 62 Mo. 313; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, on appeal, 2 Denio, 433; *Clark v. Peekham*, 9 R. I. 455; *Pennoyer v. Saginaw*, 8 Mich. 534; *Cumberland & O. Canal Corp. v. Portland*, 62 Me. 504; *Diamond State Iron Co. v. Giles*, 7 Houst. (Del.) 556.

The legislature may change, limit, or control the form of action, but it cannot do this to such an extent as to practically relieve the tortfeasor from all responsibility for his negligence.

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Cooley, Const. Lim. 352, 353, 445.

There must be a remedy in a case where one is injured without fault of his own, by a defect in one of the streets or approaches to the street, either against the city or some one of the officers.

Noonan v. Stillwater, 33 Minn. 198, 53 Am. Rep. 23; *Hincks v. Milwaukee*, 47 Wis. 559, 32 Am. Rep. 725; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Jones, Neg.* § 87; *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182; *Fitzpatrick v. Blooom*, 89 N. Y. 365; *San Mateo County v. Southern P. R. Co.* 13 Fed. Rep. 145; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Ulman v. Baltimore*, 72 Md. 587, 11 L. R. A. 224; *Eustace v. Jahns*, 38 Cal. 3; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Elkhart v. Wickwire*, 87 Ind. 77; *Keokuk v. Independent District*, 53 Iowa, 352, 36 Am. Rep. 226; *Janson v. Atchison*, 16 Kan. 358; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457; *Heeney v. Sprague*, 11 R. I. 466, 23 Am. Rep. 502; *Law v. Kingsley*, 82 Hun, 76; *Wenslick v. McCotter*, 87 N. Y. 122, 41 Am. Rep. 358; *Moore v. Gadsden*, 93 N. Y. 16; *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393; *Babbage v. Powers*, 130 N. Y. 281, 14 L. R. A. 398; *Elliott, Roads & Streets*, 539; *Dill. Mun. Corp.* 1272, 1273.

Spruance, J., delivered the opinion of the court:

This action was brought against the mayor and council of Wilmington to recover damages for injuries sustained by Sidney E. Ewing, one of the plaintiffs, on the 18th of October, 1894, occasioned by defective iron gutter plates covering a gutter extending from the adjacent property to the curb, across a certain footway or sidewalk in said city. It does not appear by whom said gutter plates were placed in said sidewalk, but they had been there more than twenty years, and had been broken and out of repair for at least a year before the accident. The action is founded upon the alleged negligence of the city in not keeping the said gutter plates and sidewalk in proper repair, and in suffering them to remain in an unsafe and dangerous condition. By § 31 of the charter of the city, the council was given power "to ascertain and fix the boundaries of streets, . . . to repair and amend the same, and provide for the paving thereof; . . . to regulate and fix the ascent and descent of all streets; . . . to direct the paving of footways and to prescribe the width thereof. . . ." The act of April 20, 1887 (18 Del. Laws, 352), created a street and sewer department, and gave to it "entire jurisdiction and control within the limits of said city of the streets, . . . said jurisdiction and control to extend from building line to building line, . . . and the same rights and powers, and . . . the same authority over the said streets, . . . as were theretofore held and exercised by the council."

The city charter further provided, in substance, as follows:

"Sec. 119. That, upon application of certain freeholders residing or holding property on any street, the board of directors of the street and sewer department are authorized, in their discretion, to require the street commissioners to cause the footways of such street to be paved with such material as the case may require, and fix the curbstones agreeably to the ground plan and regulations of the city. Upon the completion of such paving and curbing, the same are to be measured by the chief engineer, and such measurement transmitted by him to said board; and said board is to have the cost and expense of such paving and curbing assessed upon the owners of property bordering or fronting on the street, according to the number of feet in the street line of such property, and such assessment is to be entered in a record book, and from the time of such entry such assessment is made a lien upon the lands and buildings fronting on such street. The said board is to have a transcript of such recorded assessment transmitted to the city auditor, to be recorded in his office. The said board is forthwith to present to each owner or person having charge of such property a bill for such expense so assessed to such owner; and, in default of payment within sixty days, provision is made for the collection of the same, with costs, by the sale of such property.

"Sec. 120. The owner of any ground may pave his, her, or their own front or fronts, provided it be completed within twenty days from the day of fitting the curbstone, and notice thereof given to such owner. . . .

"Sec. 121. The street and sewer department shall have full power and authority to compel the paving and repairing of footways between the curbstone and the building line, . . . and to regulate and prescribe the mode of paving or repairing footways and the material to be used therein. . . . The street and sewer department may, however, at its option, pave or repair any footway of the city, and the expense of paving or repairing the same shall be assessed against the premises fronting on said footways, and shall constitute a lien against such premises. The method of assessment and such proceedings as may be had thereon, shall be the same, as far as may be, as now provided by law in regard to paving and curbing footways in § 119 of this act. The owner of any premises fronting upon any footways shall be solely responsible for any damage that may result to persons or property by reason of any hole, excavation, or obstruction in or upon such footways, or from any defective condition of such footways: provided, however, that such hole, excavation, or obstruction or other defective condition of the footways aforesaid is not caused by the city or any of its authorized agents.

"Sec. 122. Upon the completion of any paving or curbing as aforesaid, the chief engineer of the surveying department shall give to the owner of the property so curbed and

paved a certificate that it has been done according to the proper ground plan and regulation of the city. . . . And no owner of property to whom such certificate is thus given shall be liable for any change or error of regulation, or subsequent curbing or paving of the same property by the street and sewer department in consequence of such change or error, but the same shall be defrayed by the street and sewer department."

All of the above-recited provisions were in force for several years before and at the time of the accident in question, and are believed to be all of the statute law material for the consideration of this case.

The defendant requested the court below to charge the jury that, "if the jury believe that the defective condition of said sidewalk, if said sidewalk was defective, was not caused by the city or any of its authorized agents, then its verdict must be for the defendant." The court refused said request, and charged the jury, in effect, that the charter having imposed upon the city the duty to keep the sidewalks in repair, and the courts having defined that duty, and the liability of the city arising from its default in the performance of such duty, the legislature had no right so to amend the charter as to exempt the city from such liability, and that the act of April 24, 1889 (18 Del. Laws, p. 889), being the last clause of § 121 of the amended charter above recited, "is, as far as this case is concerned, unconstitutional and void, and presents no defense to this action." To this charge, and refusal to charge as requested, the defendant excepted; and the assignment of errors covers these and other points in the charge, not necessary now to be stated. The jury rendered a verdict against the defendant, on which judgment was entered.

In the case of *Coyle v. Gray*, 7 Houst. (Del.) 44, the court of errors and appeals settled the law of this state as to the power of the legislature over municipal corporations. It was there held that a municipal corporation is "a body politic and corporate established by law to assist in the civil government of the state with delegated authority to regulate and administer the local or internal affairs of a city, town, or district which is incorporated; . . . 'that such a corporation may be controlled and its constitution altered and amended by the government in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed because there is in reality but one party to it.' There is in fact no contract, in any just sense of that word, and public municipal corporations are not founded on contracts. . . . The mayor and council of Wilmington is merely an agency instituted by the state for the purpose of carrying out in detail the objects of government. It is essentially a revocable agency. It has no vested [interest in] any of its powers or franchises. Its charter . . . is in no sense a contract with the state. It is subject to the control of the legislature, who may enlarge or diminish its

territorial extent or its functions, and may change or modify its internal arrangement or destroy its very existence at discretion.

. . . The legislature can divest the council of any and every power and authority it possesses." In view of this decision, it is difficult to see how the question of the consent of the city to the amendment of April 24, 1889, could have been of any consequence; but if such consent was material, as it certainly was not, it may be fairly inferred from the fact that this amendment is incorporated in the charter as contained in the "Charter, Laws, and Ordinances of the City of Wilmington," published by order of the council in 1893, and from the further fact that this amendment was urged and relied upon by the attorneys of the city as its principal defense to this action.

The sole question necessary now to be considered is whether that part of the said amendment which purports to relieve the city from liability for damages resulting from the defective condition of footways, except such as are caused by the city or any of its authorized agents, is unconstitutional and void. For the purpose of this inquiry, we may presume that the injury in this case was not, in the sense of the statute, caused by the city or any of its authorized agents. Many of the cases cited in the argument were upon the construction of statutes imposing certain duties upon municipal corporations in respect to streets and sidewalks, without expressly declaring the liability or nonliability of the corporation in case of default in the performance of such duties. The liability of a municipal corporation for injuries resulting from defective streets and sidewalks is either an express statutory liability or an implied liability. In general, but not uniformly, it has been held that, where the duty of control over the streets is imposed upon a municipal corporation, there is an implied liability, arising from default in the performance of such duty. Such has been the construction given by the courts of this state to the charter of the city of Wilmington as it existed prior to the amendment of April 24, 1889; but these cases dealt only with the implied liability of the city under a charter which imposed upon it certain duties, and was silent as to its liability. *Robinson v. Wilmington*, 8 Houst. (Del.) 409; *Anderson v. Wilmington*, 8 Houst. (Del.) 516. The charter, as it now is, and was at the time of the alleged injury in this case, is express as to the circumstances under which the city shall and shall not be liable. "If," as is said in *Shearm. & Redf. Neg. § 124*, "the statute, either expressly or by necessary intendment, enacts that the corporation shall not be subject to liability, there is the end of the matter."

The power to alter, modify, or take away the liability of municipal corporations for injuries sustained from defective streets and sidewalks has been frequently exercised by state legislatures, and sustained by the courts.

In *Watson v. Tripp*, 11 R. I. 98, 23 Am. Rep. 420, it was held that it was the duty of 45 L. R. A.

the city to keep its highways in safe condition, and that the city could not divest itself of its capacity to discharge that duty, either by contract or ordinance, unless authorized by statute so to do.

O'Harra v. Portland, 3 Or. 525, was an action against the city for injuries to the plaintiff occasioned by a defect in a sidewalk which it was the duty of the city to keep in good order. The amended charter of the city provided that "the city of Portland is not liable to anyone for any injury to the person . . . growing out of the condition of any streets." It was contended that this provision was unconstitutional and void. The court sustained the constitutionality of the provision and held that the city was not liable to the plaintiff. *Rankin v. Buckman*, 9 Or. 253, was an action against certain officers of the city of East Portland for injuries resulting from the alleged negligence of the defendants in not repairing a bridge. The charter of the city exempted the city from liability from accidents occasioned by the defective condition of streets, etc., and made the officers liable by whose wilful act or gross negligence the accident is caused. The court approved of the decision in *O'Harra v. Portland*, exempting the city from liability, and sustained the provisions of the charter making the negligent officers liable. *Templeton v. Linn County*, 22 Or. 313, 15 L. R. A. 730, was an action against a county for an injury resulting from a defective highway. Held, that at common law a county was not liable in such case; that, the statute making the county liable in such case having been repealed before the accident, this action could not be maintained. The cases of *O'Harra v. Portland* and *Rankin v. Buckman*, were approved, and the court says: "If the legislature can constitutionally take away both the common-law and statutory right of action against a municipal corporation for an injury received from a defective highway, it certainly can withdraw the statutory remedy against a county."

In *Nichols v. Minneapolis*, 30 Minn. 545, provisions of the charter of the city, that no action should be maintained against the city on account of injuries from defective condition of any street, sidewalk, etc., unless such action be commenced within one year, nor unless notice be given within thirty days stating the place and time of the injuries, and the intention to claim damages of the city, were held to be constitutional. In reference to municipal corporations the court says: "Such corporations are creatures of the statute, and have such powers, duties, and obligations as the statute gives or imposes. The legislature is presumed to regulate these as in its opinion the needs and interests of the people within the prescribed territory require. In respect to liability for injuries by reason of defects in streets, the legislature may impose it on the corporation or not, as it deems most expedient; and it may prescribe the extent to which, or the conditions on which, it shall be liable, and

the conditions on which the liability shall be enforced."

In *Van Vranken v. Schenectady*, 31 Hun, 516, the provisions of the charter of the city, that the city should not be liable for injuries sustained by defective sidewalks unless actual notice of the defect be given to the council or superintendent of streets twenty-four hours before the injury, and that claims for injuries should be presented within three months, and actions brought within one year, were held to be constitutional. In *McNally v. Cohoes*, 53 Hun, 202, a provision of the city charter, that the city should not be liable in damages for injuries occasioned by a street or sidewalk being out of repair, unless actual notice of the defect be given to the council or superintendent of streets twenty-four hours before the injury, was held to be valid, and that without such actual notice there could be no recovery. *Gray v. Brooklyn*, 50 Barb. 365, was an action against the city of Brooklyn for injuries sustained by reason of a street being out of repair. The charter provided that the city should not be liable in damages for the nonfeasance or misfeasance of the common council, or any officer of the city or appointee of the council, of any duty imposed on them, or any of them, by the statute, but that the remedy should be by mandamus, or other proceedings to compel the performance of duty, or action against the members of council or officer. Held, that this statute was a defense to the city. The court says: "I am unable to see why the same legislature may not create a city and limit its liability. The power is constantly exercised." On appeal the decision below was affirmed. 2 Abb. App. Dec. 267. *Fitzpatrick v. Slocum*, 89 N. Y. 358, was an action, under the above-recited provisions of the charter of the city of Brooklyn, against certain officers of the city, to recover damages for injuries by reason of the negligent operation of a bridge. The court held that the injury was not caused by the act or neglect of the defendant officers; that the said provisions did not exempt the city from liability to discharge a duty resting on it which it has not devolved upon one of its officers. The court says, however, that "the views here expressed are not in conflict with anything decided in the case of *Gray v. Brooklyn*." *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182, is to the same effect. In *Bieling v. Brooklyn*, 120 N. Y. 108, the right of the legislature to exempt the city from liability in certain cases specified in the charter, as before set forth, was distinctly recognized. The court says that the city is liable, "except so far as qualified by the statute; . . . that, to relieve itself from such responsibility it must be made to appear that the cause of the injury complained of . . . is within the provision of the statute exempting the city from liability. That defense was not, by the evidence in the present case, established."

In *Parsons v. San Francisco*, 23 Cal. 463, a statute exempting the city of San Francisco from liability for injuries occasioned by a 45 L. R. A.

street being out of repair, and providing that, if the defect has existed for twenty-four hours, the persons on whom the law may have imposed the obligation to repair, and the officers through whose negligence such defect remained, should be liable to the party injured, was held to be constitutional. In *Eustace v. Johns*, 38 Cal. 3, while holding that, under the charter of the city of San Francisco, it was the duty of the city to keep the streets in repair, and that it was not the duty of adjacent owners so to do, the court recognized the validity of the provisions of the charter exempting the city from liability for injuries from defective streets, and transferring such liability to the individual officers and agents of the city whose personal neglect or malfeasance occasioned the injury.

In *Hincks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 735, it was held that the provisions of the charter exempting the city from liability for injuries occasioned by the condition of the streets or sidewalks, under certain circumstances, were invalid, as granting to the city a special immunity, not enjoyed by other like corporations, contrary to "the principles of constitutional law," and in violation of § 9 of article 1 of the Constitution of Wisconsin, that, "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character." We make no criticism upon this application of the state Constitution, but we know of no "principles of constitutional law" which prohibit the legislature from granting to a city special privileges and immunities not enjoyed by all other cities.

The theory of the defense is that, in order to hold valid the provision of the charter exempting the city from liability, it must be shown that there is provided a valid remedy against the owners of the adjacent property. While the maxim "that where there is a wrong there is a remedy" is, in general, true, it is subject to qualifications and exceptions. It is well settled that an action of tort for injuries from defective highways will not lie against a county, in the absence of a statute giving such action. *Carter v. Wilds*, 8 Houst. (Del.) 14; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Templeton v. Linn County*, 22 Or. 313, 15 L. R. A. 730. Nor could such an action against the state be maintained. The legislature had the right to impose on the abutting owner the duty of repairing the footways in front of his property, and, considering all of the above-recited provisions of the charter together, it is by no means certain that they have not done so; and, beyond doubt, the amendment of April 24, 1889, purports to make such owner liable for damages resulting from the defective condition of such footways not caused by the city or its agents. We do not, however, consider it necessary in this case to determine whether the legislature has imposed upon property owners the duty of repairing the adjacent footways, or whether that part of the said amendment which purports to make such owners responsible for damages

resulting from the defective condition of such footways is constitutional. It will be time enough to consider these questions when they arise in an action in which they are material. The plaintiffs have no vested right to sue the city in this action. Such liability as is now sought to be enforced never arises from any implied contract between the city and the person injured, but, in the absence of statutory exemption, it is implied by law from the duty imposed by law upon the city. Before the happening of the accident in question, the city was relieved of such implied liability by the express terms of the amendment of April 24, 1889, if such amendment is constitutional. We know of no provision of the Constitution of this state or of the United States which this amendment violates. There is great danger in declaring a law unconstitutional because of its supposed conflict with some vague principle of constitutional law. In such cases courts are in danger of substituting their idea of what the law should be for their judgment of what the law is. Caution should be exercised in declaring an act of the legislature unconstitutional and the presumptions are in favor of its validity. If, after due consideration, a reasonable doubt remains, it should be solved in favor of the act; and it should not be declared unconstitutional unless it be so, clearly and manifestly. *Cooley*, Const. Lim. pp. 218, 219. The great burden imposed upon municipal corporations by their unrestricted liability for injuries occasioned by defective streets and sidewalks has doubtless been the cause of the frequent modification or removal of such liability. The relief of the city from this unrestricted liability was obviously the main purpose and design of the legislature in enacting this amendment, and this main purpose and design should not be defeated, even if the provision making the adjacent owners liable in certain cases should for any cause fail to be effective. "If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other." *Cooley*, Const. Lim. pp. 178-181, 211. From considerations of public policy, as to the sufficiency of which we have no right to determine, the legislature has, by an amendment of the charter of the city of Wilmington, limited the liability of the city to cases of defective condition of footways "caused by the city or any of its authorized agents," and we hold that the said limitation was within the power of the legislature; that the said amendment, so far as this case is concerned, is constitutional and valid; and that the court below erred in its charge to the jury, and in its refusal to charge, as stated above. *The judgment below is reversed.*

Pennewill, J., dissenting:

I regret very much that I cannot agree with the majority of the court in the conclusion they have reached in this case. While I have not considered it necessary to prepare any extended dissenting opinion, or give at 45 L. R. A.

much length the reasons which have led me to a different conclusion, I nevertheless deem it proper to briefly state the position I have taken, and wherein I feel bound to differ from the majority of the court.

I am not prepared to say that it is not competent for the legislature to relieve the municipality from liability for injuries caused by defective footways without placing the liability elsewhere; and, while expressing no opinion on that question, yet I think it will be found upon examination that in almost every case, if not in every case, in which a city has been so relieved of such common-law liability, it has been imposed upon certain officers of the city, or other persons whose duty it was to repair such footways. And the provision, found in so many statutes, which exempts the city from liability unless certain notice is given, or claim is made, or suit is brought within a certain time, and which has been quite uniformly held to be constitutional, cannot be regarded as sustaining the validity of a statute which relieves the city from liability, because such a provision does not attempt to take away the remedy for such injuries, but only to regulate its use. This the legislature unquestionably has the right to do. But the statute in question, and which this court is called upon to consider and construe, seeks not only to relieve the city, but also to impose on the owner of the premises fronting upon the footways the liability for all injuries caused by defects in such footways, provided the same are not caused by the city or its authorized agents. It becomes necessary, therefore, to inquire whether the statute is constitutional and valid in so far as it undertakes to impose such liability upon such owner, and, if it be not constitutional and valid in that particular, whether it can be held to be constitutional in so far as it seeks to relieve the city.

I am clearly of the opinion that at the time of the passage of this statute there was no duty resting upon the owner of the premises to repair the footways, but that such duty rested primarily and absolutely upon the city, which had not only the power to make the repairs, but was possessed with complete supervision and control over the footways, and had all the means (by taxation, assessment, and otherwise), to perform such duty. It is true that the owner might make such repairs, but it was discretionary, and not mandatory, and necessarily under the supervision and control of the municipality. Such owner was without the means and power possessed by the city in that behalf. It therefore not being the duty of such owner to repair the footways, it necessarily follows that it was not within the power of the legislature to impose upon him a liability to third persons for injuries caused by the defective condition of such footways; for it is most elementary that such liability cannot be imposed where there is no negligence and there can be no negligence in this sense when there is no obligation or duty. A statute which seeks to create a lia-

bility irrespective of negligence has been quite universally held to be invalid upon constitutional grounds, as well as repugnant to sound reason. But it is earnestly contended that, even though the duty to repair did not rest upon the owner prior to the passage of the act which we are considering, yet it was placed upon him by this act which imposed the liability. It is urged that such duty was created or arose in some way by implication; that is, when the legislature declared by this statute that the owner should be liable, it must have necessarily followed that the same statute raised the duty, because there could not be any liability in the absence of a duty. But such a process of reasoning, I submit, is simply begging the question, and is, in effect, equivalent to saying that there must have been a duty, otherwise the enactment could not be constitutional. And, besides, if the act that imposed the liability also necessarily created the duty, then there would be no meaning in the expression, which is axiomatic, "There can be no liability when there is no duty," because the liability would always carry with it the duty.

Believing that the statute is unconstitutional in so far as it attempts to impose the liability on the owner of the premises, it remains only to inquire whether it can be held to be constitutional in so far as it would exempt the city from liability; assuming that it is competent for the legislature to so exempt the city, and that a statute having that for its sole purpose would be constitutional. Is the statute, in so far as it would relieve the city, so separable from, and independent of, that part which seeks to impose the liability on the owner, that the former can be held to be valid, even though the latter be unconstitutional? In this connection it is needful to keep clearly in mind the very language of the act, which is as follows: "The owner of any premises fronting upon any footways shall be solely responsible for any damage that may result to persons or property by reason of any hole, excavation, or obstruction in or upon such footways, or from any defective condition of such footways; provided, however, that such hole, excavation, or obstruction or other defective condition of the footways aforesaid is not caused by the city or any of its authorized agents." It will be noted that the city is not expressly exempted, by the terms of the statute, but only by implication, by making the owner solely responsible. The important question that arises is, Did the legislature, at the time of the enactment of the statute in question, intend to relieve the city of liability, if the same could not be placed on the owner? Or did the lawmaking body merely intend to shift the responsibility from the city to the owner? If the latter, then it is inconceivable that it should have intended that the statute, in so far as it exempted the municipality, should be operative, even though the other part should be invalid. It must be remembered that prior to the passage of the statute the city was liable for such injuries

as the legislature sought to impose upon the owner, and it was even a common-law liability. I submit that the very effort to impose the liability upon the owner clearly indicates that it was not the intention of the legislature to take away entirely the remedy for such injuries; and it is a fair, nay, an almost irresistible, inference, that the lawmakers would not have taken away the remedy as against the city had they known that their act would leave the party injured absolutely remediless. "The owner of the premises shall be solely responsible." The effect of that language, it is insisted, is to relieve the city which had been hitherto liable. There is nothing else in the act which could possibly give the relief contended for. Then, if that provision ("the owner shall be solely responsible") is held to be invalid, what is there left upon which the city can claim exemption from liability? Cooley, in his work on Constitutional Limitations (pages 211, 212), says: "If, when the unconstitutional portion of [a statute] is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of this rule." And if the objects sought to be accomplished "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." And in a note (page 212 of the same authority) the following language is used: "It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While, therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the Constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void." I do not believe the legislature would have been willing that the act in question, in so far as it, by implication, relieved the city of liability, should be sustained if that part which imposed the

liability on the owner were held void. In my opinion, therefore, the act is wholly unconstitutional and void, and accordingly I hold that the former liability of the city for injuries caused by defective footways is not in any wise affected thereby.

VERMONT SUPREME COURT.

Charity B. ISHAM
v.
Isaiah DOW'S Estate.

(70 Vt. 588.)

Unlawfully and maliciously shooting and wounding a dog lying near his owner's house is the proximate cause of an injury to a woman who is thrown down by the sudden and violent rushing of the wounded dog into the house, and the person who shot the dog is liable therefor.

(August 14, 1898.)

EXCEPTIONS by plaintiff to rulings of the Chittenden County Court directing a verdict for defendant in a proceeding to recover damages for injuries caused by a dog wrongfully shot by decedent. *Judgment reversed.*

The facts are stated in the opinion.

NOTE.—Rule of proximate cause in case of malicious torts.

- I. *The general rule.*
- II. *In case of wrongful violations of legal duty or positive law.*
- III. *In case of acts directly malicious or wilful.*
- IV. *Wilful misrepresentations and false warranties.*
- V. *Limit to the rule.*

I. The general rule.

The rule that to render one liable for an injury to a third person resulting from a negligent or wrongful act, the injury must have been the immediate or proximate consequence of such act, which is applied so closely where the act resulting in the injury is merely negligent or negligently wrongful, is considerably relaxed so as to cover a much wider field of resulting injuries where the act was a wilful or malicious tort as distinguished from mere negligence.

And one who violates a duty owed to others, or commits a tortious or wrongfully negligent act, is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act. *Smethurst v. Proprietors of Independent Cong. Church*, 148 Mass. 261, 2 L. R. A. 695.

It would appear, however, that it cannot be said that a different rule applies where the injuries are wilful or malicious from that which applies in cases of negligence. The distinction seems to lie in the application of the rule that one is liable only for the proximate consequences of his acts. Proximate consequences are regarded, in case of mere negligence, as covering only such direct and immediate results as occur without the intervention of any outside or independent agency, while in case of wilful or malicious acts, consequences which might have been reasonably expected or foreseen are deemed to be proximate, though outside and independent agencies do intervene.

-45 L. R. A.

Messrs. Seneca Haselton and J. E. Cushman for plaintiff.

Messrs. W. L. Burnap and Henry Ballard, for defendant:

The plaintiff must establish two propositions, and, failing in either, the action fails: (1) That the act of Mr. Dow was a wrongful negligent one toward the plaintiff herself, i. e., that he owed a legal duty to the plaintiff which he violated by this act; (2) that such act was the proximate cause of the injury, for a remote cause, though consisting of a wrongful and negligent act, cannot support an action.

Davis v. Central Vermont R. Co. 66 Vt. 298.

Before one can be held chargeable for the injuries of an act, and before any question can be entertained as to whether the act was the remote or proximate cause, it must affirmatively appear that the act was a negligent and wrongful one.

II. In case of wrongful violations of legal duty or positive law.

This rule is applied to unlawful acts and to violations of legal duty, on the theory that such acts are presumed to be malicious.

Thus, where an act done is unlawful in itself, the wrongdoer will be held responsible, although other causes may have subsequently arisen and contributed to produce the injury, where the unlawful act itself is such that the injury might reasonably and naturally be expected to result therefrom. *Weick v. Lander*, 75 Ill. 93.

And one who does an illegal or mischievous act which is likely to prove injurious to others is answerable for the consequences which may directly and naturally result from his conduct, though he did not intend to do the particular injury which followed. *Vandenburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268. See also *ISHAM v. DOW*.

So, the act of a dealer in cartridges in selling, unlawfully and against the statute, cartridges to minors, knowing their dangerous character and that the boys were unfit to be intrusted with them, renders him liable for an injury to one of the boys caused by a discharge of a toy pistol containing one of the cartridges which was picked up and discharged by another boy a short time afterwards. *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508.

And the placing of a lot of brick in a public street in violation of a city ordinance, when on the opposite side of the street there was a pile of lumber, rendering it difficult for teams to pass each other without collision, is the direct cause of an injury received by a boy about twelve years old, who was riding upon the back part of a wagon, which was suddenly stopped at the obstructed point by collision with an express wagon, by being struck by the tongue of a wagon immediately behind the one upon which he was riding, it being elevated by an effort of the driver to stop the wagon, as the injury is traceable

Wilder v. Stanley, 65 Vt. 145, 20 L. R. A. 479; *Stevens v. Dudley*, 56 Vt. 158; *Kahl v. Low*, 37 N. J. L. 5.

Mr. Wharton defines legal duty to be, that which the law requires to be done or foreborne to a determinate person, or to the public at large, and as correlative to the right vested in such determinate person or in the public.

No contractual relation existed here.

The dog did not belong to the plaintiff, and the defendant owed her no duty respecting it.

Would a reasonably prudent man, under the same circumstances, guided by those considerations which ordinarily regulate the conduct of human affairs, have recognized that to shoot would be a wrongful or imprudent act, and so have foreborne?

An affirmative answer must be given before the fundamental and essential element of this action—duty—can be established.

Shearm. & Redf. Neg. 12.

to the first wrong,—the obstruction of the street. *Welch v. Lander*, 75 Ill. 93.

So, one who delivers an article which he knows to be dangerous or noxious to another person, without notice of its nature or qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom to that person, or any other, who is not himself in fault. *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64.

And one who sells naphtha to another for the purpose of being retailed and resold to be burned in lamps for illuminating purposes, knowing it to be explosive and dangerous to life when so used, and knowing that the purchaser's business was that of a retailer, and that it was his purpose to retail and resell the same to the public to be so used, is liable in damages to a person injured by it to whom the retailer resold a part of it, from its igniting and exploding while he was so using it, as such exploding and such injury are to be regarded as the natural and probable consequences of the unlawful act of so selling it. *Ibid.*

And Mass. Stat. 1867, chap. 286, §§ 3, 5, declaring that any person who shall sell or keep or offer for sale naphtha under the name of oil shall be subject to a penalty, and shall also be liable therefor to another person suffering damage from the explosion or igniting of such oil thus unlawfully sold, does not confine the civil liability of the offender for such explosion to injuries suffered by persons to whom he sells or offers it, but includes any person suffering damage. *Ibid.*

So, a street-car company is liable for the injury sustained by a boy passenger, whom the conductor of a car compels to give up his seat and make room for other passengers, by whom he is carried and pushed out on the front platform which, like the inside of the car, was full of people, and from which he was knocked off by a rush of another passenger, and was run over by the car, though the immediate cause of the injury was the rush of the passenger. *Sheridan v. Brooklyn City & N. R. Co.* 36 N. Y. 89, 93 Am. Dec. 490.

And the act of a person in entering upon the premises of another and digging into a bank near a dam that had been built across a river, taking away gravel and undermining some trees, is the direct cause of damages sustained by an unusual flood coming about three weeks later which carried away the owner's soil, so as to enable him to sustain an action of trespass therefor, where the act of the defendant in digging

The law makes no unreasonable demands; no one is held guilty of a breach of duty—a culpable negligence—because of failure to take precautions which reasonably prudent men would not be likely to have taken under the same circumstances.

Shearm. & Redf. Neg. 6.

Even after a legal duty has been charged and found, then the question of its breach—negligence—is for the court, when the undisputed facts have no reasonable tendency to support the inference of negligence necessary to sustain the action.

Latremouille v. Bennington & R. R. Co. Vt. 336; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L. R. A. 326; *Magoon v. Boston & M. R. Co.* 67 Vt. 185; Shearm. & Redf. Neg. 11.

This action cannot be maintained, though the act was a negligent one, because such negligence was too remote, and was not the proximate cause.

into the bank caused the water to break through. *Dickinson v. Boyle*, 17 Pick. 78, 28 Am. Dec. 281.

And one who places a barrier in a private way, consisting of a hurdle set up lengthwise next to a foot path, which consists of two wooden barriers armed with spikes, leaving an open space through which a vehicle can pass, after which comes another larger barrier set up lengthwise which blocks up the rest of the road, is liable to a person having a house and grounds upon such road who passes along in the night upon his way home and succeeds in passing the first hurdle and entering the foot path beside the road, in which he supposes there is no obstacle, but, owing to the fact that the larger hurdle has been moved by some person unknown, runs against it, and is injured by his eye coming in contact with one of the spikes. *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. N. S. 427, 38 L. T. N. S. 454, 26 Week. Rep. 613, 7 Cent. L. J. 11.

So, an assault by an insured person upon a woman whose husband in defending her strikes the assailant upon the head with a jack plane or some other wooden instrument, fracturing his skull and causing his death, is the proximate cause of his death within the meaning of a clause in an insurance policy conditioned that the policy shall be void if the insured should die in the known violation of the law. *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 40 Am. Rep. 469.

And an assault by an insured person and another upon a third person, in which one assailant seized the arms of the party assaulted from behind, and the other, the insured person, beat him with a rawhide, whereupon the person assaulted drew a revolver which was discharged accidentally because of the jerking of his arm by the assailant, who held him after the insured had attempted to escape, the bullet hitting him in the forehead causing his death,—is the proximate cause of his death within the meaning of a condition of an insurance policy that it should be void in case the assured should die in consequence of the violation of the law. *Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658.

And the question in an action upon an insurance policy containing a condition against liability in case the insured shall die in the known violation of law, in which it appears that the insured assaulted a boy and that the boy ran away a few paces and then shot him, is whether or not the assault was so far ended

Gilson v. Delaware & H. Canal Co. 65 Vt. 215; *Stevens v. Dudley*, 56 Vt. 158; *Ellis v. Clereland*, 55 Vt. 358.

The causal connection between the defendant's negligent act and the plaintiff's injury is interrupted by the interposition of a new and independent force or act.

The test is: Was the intervening efficient cause a new and independent force acting in and of itself in causing the injury, and superseding the original wrong complained of so as to make it remote in the chain of causation; though it may have remotely contributed to the injury as an occasion or condition—an incident?

Holmes v. Fuller, 68 Vt. 207.

The inquiry is: Was the act complained of causal or purely casual? If the injury had come directly upon the plaintiff from fright at the shot, then her claim would be

more tenable, for an independent intervening force would not be so clearly apparent.

The plaintiff's injury was caused by the assault of the dog upon her. That assault was a new and independent and intervening force that superseded the shot, and was no part of the shot itself.

The causal connection is broken because the intervening force or act made the original act, otherwise innocuous, operative to injury.

Sturgis v. Kountz, 165 Pa. 353, 27 L. R. A. 390; *Renner v. Canfield*, 36 Minn. 90; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781.

Rowell, J., delivered the opinion of the court:

Dow, the intestate, a poor gunner, as he knew, with eyesight much impaired, know-

when he was fired upon that the shot is to be regarded as a new and independent event rather than a continuation of the original affray. *Cluff v. Mutual Ben. L. Ins. Co.* 13 Allen, 308.

So, in *Derry v. Flitner*, 118 Mass. 131, in which the owner of a sea-wall gave the owner of several vessels employed in building it the right to lay his vessels at the wall as a place of safety in case of storm, and the master of another vessel without permission placed his vessel behind the wall and refused to move it when requested, in consequence of which the builder lost two vessels in a storm, it was held that as the storm causing the loss was not an uncommon one, but might have been reasonably expected in that climate, the master of the vessel refusing to move was liable for his wrongful act causing the loss of the two vessels.

III. In case of acts directly malicious or wilful.

The rule above stated is also applicable where the act causing the injury is directly malicious or wilful, whether or not it amounts to a violation of law or legal duty.

Thus one who wilfully and intentionally directs a stream of water from a hose against a team of horses fastened to a post in the street, in front of his premises, whereby they are frightened, and break loose, and run away through the street, running against a horse and wagon belonging to a third person, causing injury, is liable to such third person for such injury. *Forney v. Geldmacher*, 75 Mo. 113, 42 Am. Rep. 388.

And the wrongful act of a person in loosening the shoe of a horse and pricking his foot with intent to induce the owner to believe that the blacksmith who shod him had done the work badly, and so injure him in his trade, whereby he lost the custom of the owner, has a sufficiently close connection with the injury to the blacksmith to entitle him to maintain an action against the person who loosened the shoe for the injury sustained. *Hughes v. McDonough*, 43 N. J. L. 459, 39 Am. Rep. 603.

And the seizing and confining of a horse by the owner of a field which did not have a lawful fence, when the horse strayed into it, are wrongful and constitute a trespass rendering him liable for the injury caused thereby; and where the owner of the field ties the horse thus seized and confined, to a tree with a rope and leaves him until the next day, when he is found dead, appearing to have been choked to death, he is liable for the injury done, including the destruction of the horse, if its death was the 45 L. R. A.

natural and proximate consequence of his acts. *Wilhite v. Speakman*, 79 Ala. 400.

And the manner of the tying and the time the horse was left in the field are proper circumstances to be considered by the jury in an action for damages for the injury, not on the question of negligence, but in determining whether the death of the horse was the natural and proximate consequence of his having thus been tied and left. *Ibid.*

So, one who, having had a quarrel with a boy in a street, takes up a pickax and follows him into a store where he has fled, is liable to the owner of the store for the damages sustained, where the boy, in endeavoring to keep out of his reach, runs against and knocks out the faucet from a cask of wine, by means of which a quantity of the wine runs out and is wasted. *Vanderburgh v. Truax*, 4 Denio, 464, 47 Am. Dec. 268.

And the act of a brakeman upon a railroad train in seizing a lad about ten years of age and forcibly putting him on board the train and carrying him against his will for 5 miles is a trespass rendering him liable for injuries to the lad caused by his returning home on foot, running most of the way, and being taken sick and becoming permanently crippled in both legs thereby, and if the conductor of the train personally directed or consented to the acts of the brakeman they are joint trespassers, and a recovery may be had against both for the sickness and injury if they resulted directly from such acts. *Drake v. Klely*, 93 Pa. 495.

And where a person gets upon a locomotive, occupying a dangerous and improper position in front of and under the headlight, and one of the railroad company's servants pushes him off while the engine is moving at a rate of speed rendering it dangerous for him to get off, and he is injured thereby, the act of pushing him off the engine is the proximate cause of his injury, and his wrong in getting there is not proximate to the injury so as to preclude his right to recovery. *Carter v. Louisville, N. A. & C. R. Co.* 98 Ind. 552, 49 Am. Rep. 780.

So, the act of the persons in charge of a railway train in running it over a hose placed by a fireman across the track to obtain water from a hydrant for use on burning buildings upon the other side of the track, thereby severing the hose and stopping the water so that the buildings were burned before the hose could be repaired, is to be regarded as the direct and efficient cause of such burning, rendering the railroad company responsible therefor, where the firemen could not otherwise obtain a supply of water, and the fire was diminished and would

ing that the plaintiff and her children were alone in her husband's house, unlawfully, wantonly, and maliciously shot at and wounded her husband's dog, lying peaceably in close proximity to the house, on the land of a third person, whereupon the dog sprang up, rushed wildly and rapidly towards the house, entered it through an open door into the room where the plaintiff was, ran violently and forcibly against her, knocking her down and injuring her; and the question is whether the estate is liable for it. The defendant says that, in order to recover, the plaintiff must establish two things, namely,

have been extinguished in a short time had it not been for such severing of the hose, and the persons in charge of the train had no occasion for haste, and had sufficient notice and warning and might have stopped, but refused to delay and give time for uncoupling the hose. *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689.

And a complaint in an action against a railroad company for a personal injury, alleging that the servants and agents of the company operated a locomotive of the company in such a careless and culpably negligent manner as to wilfully and wrongfully cause a team of horses of a third person to take fright and run away, and that because of such fright and while unmanageable and running away they ran against a horse of the plaintiff and caused its death, does not show merely passive negligence, but a wanton and wilful wrong, and will not be deemed to state an injury too remote to warrant a recovery, where it appears that the whistle was sounded at an improper place in a wilfully and dangerously negligent manner, without excuse or justification. *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230.

And where valuable property which was heavily mortgaged had depreciated in value in consequence of the removal by a railroad company of its depot, and an agreement was entered into between the railroad company and the property owner to secure the prompt return of the depot to its former site and save the sacrifice of a foreclosure in a time of depreciation, whereby he surrendered valuable riparian rights to the railroad company, and the latter, fully understanding the situation, maliciously and wilfully, because of the refusal of the owner to consent to the closing up of a street upon which his property abutted, broke its agreement and delayed the restoration of the depot for the express purpose of preventing the owner from warding off the foreclosure, and itself instigated such foreclosure; and the property was sold at a sacrifice, and damages were released and the street closed,—there is something more than a mere breach of contract, the acts of the company amounting to a tort for which it is liable, and the breach of the contract being one of the elements constituting it; and proof of the contract and its breach, and of delay in restoring the depot, and the reasons therefor, and the situation of the parties with respect to their several properties, and the existence of the mortgage and the agreement to postpone the sale, are elements of the transaction proper to be shown in an action for damages. *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382.

So, a person throwing a squib which struck near one person, who, to prevent injury to himself, threw it across a market house where it fell near another person, who, to save himself, again threw it from him, where it struck a third person in the eye, seriously injuring him, was 45 L. R. A.

negligence on the part of Dow, and that her injury resulted proximately therefrom, and that the case shows neither, as it does not show that Dow owed her any legal duty, nor that his act was the proximate cause of the injury. But we cannot adopt this view. The intestate unlawfully, wantonly, and maliciously shot at the dog, intending, we will assume, to kill it, but not knowing whether he would or not, and not knowing what would happen if he did not; and by his wanton act the dog was set wildly in motion, and that motion, thus caused, continued, without the intervention of any other agency, and

held liable to the person so injured. *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403.

And in *Conklin v. Thompson*, 29 Barb. 221, a recovery was allowed in an action for the value of a horse which died of sudden fright caused by the sudden explosion of firecrackers thrown under him by the defendant, under an allegation that he designedly and intentionally and wilfully did the act; but it does not appear whether the result was affected by the allegation of wilfulness.

And in *Kicker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267, it was held that an injury received by a person who was caught by another by the arm and swung around violently and then let go and thrown by the impetus against another standing near, who immediately pushed him off, whereby he was thrown against a hook and severely injured, though not to be regarded as the inevitable result of the original unlawful act, would entitle the person injured to maintain trespass against the person swinging him, if the result was a consequence of the act. But in this case it was said that no malice was attributed to the defendant.

So, one on whom a wilful injury is inflicted is not precluded by his mere failure to exercise reasonable care to avoid the consequences of the injury from recovering for so much of the damage as resulted from that failure. *Galveston, H. & S. A. R. Co. v. Zantlinger (Tex.)* 44 L. R. A. 553.

And the act of a locomotive engineer in throwing steam and water upon a trespasser standing upon a foot board between the engine and a flat car, in order to make him get off, must be deemed to be wilful so that the negligence of the trespasser in placing himself there cannot deprive him of the right to recover for an injury received in attempting to get off. *Ibid.*

IV. Wilful misrepresentations and false warranties.

The subject of misrepresentations and false warranties is here intended to be dealt with only so far as their wilfulness affects the question of liability for consequences not proximate or immediate,—as such misrepresentations, and such only, fall within the rule applicable to wilful and malicious torts.

Thus, the plaintiff in an action for fraudulent misrepresentations may recover for any injury which is the direct and natural consequence of his having acted on the faith of such misrepresentations. *Mullett v. Mason*, L. R. 1 C. P. 559, 1 Harr. & R. 779, 35 L. J. C. P. N. S. 299.

And the owner of cows to whom a cattle dealer sells a cow upon the wilful fraudulent misrepresentation that it is free from infectious disease when in fact it is not, who places such cow with his own causing them to catch the disease and die, is entitled to recover the value of all the cows from the cattle dealer. *Ibid.*

without power on his part to control it, until the plaintiff's injury resulted therefrom. In these circumstances the law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen or not, or was or not the probable consequence of the act; for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events. This is the universal rule when the injurious act is wanton. In 16 Am. & Eng. Enc. Law, 434, the true principle is said to be that he who does such an act is liable for all the consequences, however remote, because the act is quasi criminal in its character, and the law conclusively

presumes that all the consequences were foreseen and intended. But it is not necessary, in this state, certainly, that the act should be wanton, in order to impose liability for all the injurious consequences. If it is voluntary, and not obligatory, it is enough. In *Vincent v. Stinehour*, 7 Vt. 66, 29 Am. Dec. 145, it is said that for such an act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness. In *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496, the defendant shot at a fox that the plaintiff's dog had driven to cover, and accidentally hit the dog; and he was held liable, because the shooting at the fox was voluntary, and furnished no excuse for hitting the dog, though he did not

And one who caused a horse afflicted with a contagious disease to be put up at auction knowing it to be so afflicted is liable to the purchaser, where the horse was worthless to him and he paid money to a veterinary surgeon for examining it and placed it in a stable with another horse, which also became infected and died, for the amount paid for the horse, to the veterinary surgeon, and for the value of the horse thus lost. *Hill v. Balla*, 2 Hurst. & N. 299, 27 L. J. Exch. N. S. 45, 3 Jur. N. S. 592.

So, one who is injured by the explosion of a badly-manufactured and unsafe gun made of unsound and inferior materials can recover for such injury from a person who sold the gun to his father, knowingly, falsely, and fraudulently warranting it to have been made by a certain well-known gun maker, and to be a good, safe, and secure gun, the purchase having been made by the father for the use of himself and sons. *Langridge v. Levy*, 2 Mees. & W. 519.

V. Limit to the rule.

Even in case of wilful and malicious torts, however, the rule of liability is limited to probable consequences or consequences which might have been foreseen.

Thus, the act of the owner of a house in permitting a large party of negroes to meet at it to dance and frolic, though unlawful and exposing him to a penalty of \$2 for each person, does not render him liable for the death of one of the slaves killed by an officer of a patrol who came to the house to arrest the negroes and, while they were attempting to escape, fired a pistol into a dark room where many of them remained, the damage being the direct and immediate consequence of the shooting, and not the probable or natural consequence of the unlawful act of the owner of the house. *Bosworth v. Brand*, 1 Dana, 377.

And an allegation in an action for damages for an alleged tort, that the defendant, knowing the plaintiff's horse to be running at large in the uninclosed lands of the county, and maliciously contriving to injure the plaintiff, unlawfully and negligently cut a tree on the land and set it on fire, and that the tree afterwards, in consequence of the cutting and burning, fell upon and killed the plaintiff's horse, contains no cause of action in the absence of anything to show that there was some degree of probability that the tree was so situated as to fall upon such horse. *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133.

So, in *Drake v. Kiely*, 93 Pa. 495, which was an action for a wilful tort, it was said that in determining what is proximate cause the general rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding 45 L. R. A.

circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act.

And in *Renner v. Canfield*, 36 Minn. 90, it was held that if the act of a person in shooting another's dog in the highway about 175 feet from the owner's residence while the owner's wife was standing outside, but not seen by him or known to be there, whereby she was so startled and frightened as to seriously affect her health, amounts to a tort which in any possible view of the case could be held to be the proximate cause of the injuries complained of, the gist of it must be negligence in shooting in such proximity to a human residence as might naturally and reasonably be anticipated to be liable to injure the inmates by fright or otherwise. And in such case a verdict for the plaintiff cannot be sustained on the theory that the defendant might be liable from the mere fact that the killing of the dog was unlawful, as it is elementary that a man is liable only for the proximate or immediate and direct results of his acts. But see *ISHAM v. DOW*.

So, though whenever an injury results to a party from an unlawful act or omission of another the injured party is in general entitled to reparation and may maintain an action against the wrongdoer, the injury must be the direct and immediate, or at least the proximate and natural, consequence of the act or omission complained of, and though it may be traced to the unlawful act of one person, if it would not have happened but for the subsequent unlawful act of another person, the latter, and not the former, is liable therefor. *Bosworth v. Brand*, 1 Dana, 377.

And the explosion, and not the act of one person in drawing another in front of him to act as a shield when an explosion of dynamite caused by a third person is about to take place in their presence, is the proximate cause of injuries received by the person thus drawn, where they are not shown to have been increased by such act. And the person thus drawing the other before him cannot be held liable for injuries received by the latter from its explosion when it is not shown the injuries were thereby increased. *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216.

And an action for such injuries should not be submitted to the jury in the absence of any evidence beyond mere conjecture tending to show that the injuries received were thereby increased. *Laidlaw v. Sage*, 158 N. Y. 73, 44 L. R. A. 216.

The question whether or not a wilful trespass is the proximate cause of injury received, is one for the jury, where all the material facts in the case are in dispute. *Drake v. Kiely*, 93 Pa. 495.

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intend to hit him. The same rule was applied at nisi prius, without exception, in *Taylor v. Hayes*, 63 Vt. 475, where the defendant shot at a partridge, and accidentally hit a cow. So, in *Bradley v. Andrews*, 51 Vt. 530, the defendant voluntarily discharged an explosive missile into a crowd, and hurt the plaintiff; and it was held that, as the act was voluntary and wrongful, the defendant was liable, and that his youth and inexperience did not excuse him. The rule is the same here in negligence cases, and may be formulated thus: When negligence is established, it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But, in administering this rule, care must be taken to distinguish between what is negligence, and what the liability for its injurious consequences. On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated; but, when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability. This is all well shown by *Stevens v. Dudley*, 56 Vt. 158, and *Gilson v. Delaware & H. Canal Co.* 65 Vt. 213. The rule is the same in England, as will be seen by referring to the leading case of *Smith v. London & S. W. R. Co.* L. R. 6 C. P. 14, in the exchequer chamber. In *Sneesby v. Lancashire & Y. R. Co.* L. R. 1 Q. B. Div. 42, a herd of plaintiff's cattle were being driven along an occupation road to some fields. The road crossed a siding of the defendant's railway on a level, and when the cattle were crossing the siding the defendant's servants negligently sent some trucks down the siding among them, which separated them from the drovers, and so frightened them that a few rushed away from the control of the drovers, fled along the occupation road to a garden some distance off, got into the garden through a defective fence, and thence onto another track of the defendant's railway, and were killed; and the question was whether their death was not too remote from the negligence to impose liability. The court said that the result of the negligence was twofold: First, that the trucks separated the cattle; and, second, that the cattle were frightened, and became infuriated, and were driven to act as they would not have done in their natural state. That

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everything that occurred or was done after that must be taken to have occurred or been done continuously. And that it was no answer to say that the fence was imperfect, for the question would have been the same, had there been no fence there. Then liability was made to depend, not on the nearness of the wrongful act, but on the want of power to divert or avert its consequences, and it continued until the first impulse spent itself in the death of the cattle. See *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267; *Alabama & G. S. R. Co. v. Chapman*, 80 Ala. 615. *Ellis v. Cleveland*, 55 Vt. 358, is not in conflict with the Vermont cases above cited, as is supposed; for there was no causal connection between the wrongful act and the injury complained of, and so there could be no recovery. As illustrative of nonliability for damage flowing from an intermediate and independent cause operating between the wrongful act and the injury, see *Holmes v. Fuller*, 68 Vt. 207. *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49, is relied on by the defendant. *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431, is a similar case. It is said in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 474, 24 L. ed. 258, that these cases have been much criticised; that if they were intended to hold that when a building has been negligently set on fire, and a second building is fired from the first, it is a conclusion of law that the owner of the second has no remedy against the negligent wrongdoer, they have not been accepted as authority for such a doctrine even in the states where they were made, and are in conflict with numerous cases in other jurisdictions. Judge Redfield says in 13 Am. L. Reg. N. S. 16, that these cases have not been countenanced by the decisions in other states. And Judge Cooley says that a different view prevails in England and most of the American states; that the negligent fire is regarded as a unity; that it reaches the last building, as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first, though, if it had been stopped on the way, and started again by another person, a new cause would thus have intervened, back of which any subsequent injury could not be traced; that proximity of cause has no necessary connection with contiguity of space or nearness of time. Cooley, Torts, 1st ed. 76.

Judgment reversed, and cause remanded.

IOWA SUPREME COURT.

Peter R. L. VAN HORN

v.

William VAN HORN *et al.*, Appts.

(107 Iowa, 247.)

1. The general and notorious recognition of an illegitimate son by his father, which will entitle him to inherit real and personal property of his father in Iowa, under Iowa Code 1873, § 2466, may be sufficient, although it took place in another state, where the parties resided at the time, and in which the son might have no such right to inherit.
2. The recognition of an illegitimate son is general and notorious, within the meaning of Code 1873, § 2466, when it is open and extensive, though not universal.

(January 21, 1899.)

A PPEAL by defendants from a decree of the District Court for Howard County in favor of plaintiff in a proceeding to establish plaintiff's right to inherit property of Peter Van Horn, deceased. *Affirmed.*

Statement by Deemer, J.:

This is a proceeding to establish plaintiff's right as an illegitimate son to inherit the property, real and personal, of one Peter Van Horn, who died intestate in Howard county, Iowa, in August of the year 1895. The deceased was never married, and the defendants are his brothers and sisters. In answer to plaintiff's claim defendants made a general denial, and further pleaded that at the time of plaintiff's birth, and for many years thereafter, both he and his putative father were residents of the state of New Jersey, and that by the laws of that state in force prior to and since 1854 there was no provision whereby an illegitimate child may inherit from his father. Plaintiff's demurrer to this affirmative plea was sustained, and the cause was tried on the issue tendered by the general denial, resulting in a decree for plaintiff, and defendants appeal.

Messrs. H. L. Spaulding and John McCook, for appellants:

Had the parties remained in New Jersey, and had property been there acquired, then certainly after the death no inheritable right could be claimed by reason of any of the acts of recognition which it is claimed occurred there, and deceased would assume no responsibility by making the fullest recognition while there; and had it occurred, the deceased had the right to rely upon its legal significance there, and it could not follow him to a state having a different statutory provision and there defeat the legal heirs from inheriting an estate of which he might die possessed.

Crane v. Crane, 31 Iowa, 296; *Hartinger v. Ferring*, 24 Fed. Rep. 15; *Smith v. Derr*, 34 Pa. 126, 75 Am. Dec. 641; *Smith v. Kelly*, 23 Miss. 167, 55 Am. Dec. 87; *Miller v.*

NOTE.—As to inheritance by, through, or from illegitimate persons, see *note* to *Croan v. Phelps* (Ky.) 23 L. R. A. 758.
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Miller, 91 N. Y. 315, 43 Am. Rep. 669; *Wheaton*, Private Int. Law, ed. 1863, 172; *Wharton*, Private Int. Law, § 247; *Story*, Conf. Law, § 93a; *Sunderland's Estate*, 60 Iowa, 732; *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40.

At the commencement of this action the legal title to the lands of deceased was conceded in the defendants. To divest it the proof should be clear, strong, unmistakable, unequivocal, and should establish one or more of the grounds for relief beyond a doubt.

Williamson v. Williamson, 4 Iowa, 279; *Nelson v. Worrall*, 20 Iowa, 469; *Noel v. Noel*, 1 Iowa, 423; *Stem v. Nysonger*, 69 Iowa, 512; *Lich v. Lich*, 81 Iowa, 84; *Story*, Equity, § 769; *Pomeroy*, Eq. 2d ed. § 1040.

The father was required to do affirmative acts after the birth to confer inheritable rights upon an offspring so begotten.

Deceased did not intend that plaintiff should inherit any of his property, and he did none of the acts which would have the legal effect to entitle appellee to inherit.

The New Jersey statute is and was dissimilar to our own in that the acts which in Iowa would give to a child inheritable rights would not so do in the state of New Jersey. Such child not having in that state the benefit of a statute giving it the right to inherit from its putative father, even though he should recognize it as his child orally or in writing, therefore the father could there do these things and they would have no legal significance.

Hartinger v. Ferring, 24 Fed. Rep. 15.

Messrs. H. T. Reed and C. W. Reed, for appellee:

The succession of personal property is regulated and exclusively governed by the law of the owner's domicile, while that of real property is so governed by the law of the place where it is situated.

Story, Conf. Law, 7th ed. §§ 365, 481, 484; *Tiedeman*, Real Prop. § 664; 3 Washburn, Real Prop. § 32; *United States v. Fox*, 94 U. S. 320, 24 L. ed. 92; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 38 L. ed. 356; *Harvey v. Ball*, 32 Ind. 98.

And the law in force at the death of the owner controls.

3 Washburn, Real Prop. § 32; *Tiedeman*, Real Prop. § 664; *United States v. Fox*, 94 U. S. 320, 24 L. ed. 192.

A state may provide that property situated therein may descend to others than legitimate children, and such would be legal heirs.

Recognition in New Jersey will be given effect in Iowa.

Harvey v. Ball, 32 Ind. 98; *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 38 L. ed. 356; *Caldwell v. Miller*, 44 Kan. 12.

If the recognition of the plaintiff by deceased during infancy was of that character which satisfies the requirements of the statute, then this fixes the right of plaintiff to inherit from his father from that time.

Milburn v. Milburn, 60 Iowa, 411; *State v. Hastings*, 74 Iowa, 574.

The writing required by the statute to effect recognition need not be a formal one executed for that purpose, but it may be by correspondence or made out from several different writings, though none of them were made in the belief that they were made for such purpose.

Crane v. Crane, 31 Iowa, 296.

The bond for the support of plaintiff, given by deceased in the New Jersey bastardy proceedings, was a recognition in writing.

Leland v. Cameron, 31 N. Y. 115; *Mandeville v. Reynolds*, 68 N. Y. 528; 1 Greenl. Ev. §§ 115, 116.

Deemer, J., delivered the opinion of the court:

Appellee was born in the state of New Jersey in January of the year 1854. His mother was Sarah Ann Scales. She died in the year 1859, at the age of thirty-one. About the year 1857 Peter Van Horn, deceased, moved to Howard county, where he resided most of the time until his death. As we have said, he was unmarried, and the defendants are his brothers and sisters, who claim his property by right of inheritance. Appellee claims that Peter Van Horn was his father, and that the deceased recognized him as his son while both lived in the state of New Jersey, both orally and in writing, and that he is entitled to inherit as such. At common law a bastard could not inherit from either parent. He was regarded as *nullius filius*, or *filius populi*. This rule has been changed by statute in this state, which provides that "they [illegitimate children] shall inherit from the father whenever the paternity is proved during the life of the father, or they have been recognized by him as his children, but such recognition must have been general and notorious or else in writing." Code 1873, § 2466. They may always inherit from the mother. Id. § 2465. These statutes were enacted prior to the year 1851, as they are found in the Code of that year as §§ 1415 and 1416. They were in force at the time of plaintiff's birth, and he is entitled to the benefit thereof, provided he has shown that the deceased father generally and notoriously recognized him as his child or made such recognition in writing.

At the threshold of the case we are met with the proposition that the court erroneously sustained plaintiff's demurrer to that part of the answer pleading the affirmative defense, and this same proposition is made the basis of objections to some of the evidence adduced. It is said that recognition of plaintiff by the deceased in the state of New Jersey, which state has no statute allowing an illegitimate to inherit, does not give plaintiff the right of succession; and several cases are cited in support of the conclusion. None of them, however, seem to be exactly in point. The case of *Crane v. Crane*, 31 Iowa, 296, sheds no light upon the question. *Sunderland's Estate*, 60 Iowa, 732, involved the construction of § 2454 of the Code of 1873, which provides that the heirs of an intestate's deceased child may inherit in the same manner as though the child had outlived its parents. The question

there determined was whether or not a child adopted under the laws of the state of Louisiana was such an one as the statute contemplated. A majority of the court held it was not. *Hartinger v. Ferring*, 24 Fed. Rep. 15, simply holds that §§ 1415 and 1416 of the Code of 1851 are not retroactive. *Smith v. Derr*, 34 Pa. 126, 75 Am. Dec. 641, holds that a decree of a foreign state legitimizing an illegitimate child was not binding upon the courts of Pennsylvania in determining the right of succession or descent of real property situated in that state. In *Blythe v. Ayres*, 96 Cal. 532, 19 L. R. A. 40, Garoutte, J., writes an able opinion covering the entire ground, and he concludes that statutes similar to the one upon which plaintiff relies are statutes of descent, and that the domicile or status of the child and the extraterritorial operation of state laws are wholly immaterial matters. And this, it seems to us, is the correct doctrine. It is written on the hornbook of the law that, as a general rule, the succession of personal property is regulated and governed by the law of the owner's domicile, while that of real property is governed by the law of the place where it is situated. 3 Washb. Real Prop. 3d ed. p. 16, § 32, and cases cited; Tiedeman, Real Prop. § 664. The statute under consideration is undoubtedly a statute of descent, and must, like other statutes in derogation of the common law, be liberally construed, with a view to promote its objects and assist the parties in obtaining justice. Code 1873, § 2528. It is quite immaterial, then, where the acts of recognition relied upon occurred; for, if plaintiff brings himself within the terms of the statute, he is the legal heir of the deceased, and entitled to inherit. Such seems to be the conclusion arrived at by the Supreme Court of the United States in *Hutchinson Invest. Co. v. Caldwell*, 152 U. S. 65, 38 L. ed. 356. See also *Caldwell v. Miller*, 44 Kan. 12; *Harvey v. Ball*, 32 Ind. 98; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669. It may be that the plaintiff's status is to be determined by the law of his mother's domicile, or, in the event of her death, by that of his own, or of his father's; but with that question we have nothing to do. The sole inquiry here is, Is he entitled to inherit the real estate and personal property situated in this state, under the facts presented in evidence? Our conclusion is that the laws of New Jersey are wholly immaterial to this inquiry, and that the trial court was right in sustaining plaintiff's demurrer. What, then, must plaintiff do in order to establish his heirship? This query is answered by turning to the statute, which says, in substance, that paternity must be proved during the lifetime of the father, or that the father must have recognized him as his child, either in writing or generally and notoriously. In construing this statute we have held that this recognition need not be made in the shape of a formal avowal, but may be sufficiently established by letters and correspondence. See *Crane v. Crane*, 31 Iowa, 296. And we have also said, in construing the words "general and notorious," as used in

this statute, that "general" is not equivalent to universal, and that "general" means extensive, though not universal; that "notorious" is synonymous with open, and should be construed with reference to the circumstances and surroundings of the parties.

With the rules of law thus settled, we now turn to the evidence, and, without setting it out in detail, state our conclusions therefrom as follows: Plaintiff's mother lived with the father of the deceased as his housekeeper during the summer and fall of 1853. Deceased, who was then a young man, waited upon her and escorted her to various entertainments. After the birth of plaintiff, deceased visited the mother many times, and spoke of the child as his son. He also gave the mother money with which to purchase clothing for it. It also appears that bastardy proceedings were instituted in the state of New Jersey against the deceased, and that under these proceedings the mother received aid for the support of the child until she died. One of the defendants made affidavit in which she stated that deceased generally recognized plaintiff as his son, and that such fact was generally known in the neighborhood. Another sister, who is also a defendant, made a similar affidavit. Other witnesses testify that while deceased lived in New Jersey he generally called and treated plaintiff as his son, and that he was generally so recognized in the community. In the year 1888 the deceased returned to New Jersey on a visit, and while there inquired after plaintiff, spoke of him as his son, and called him such openly and in the presence of many people. A great number of witnesses testify to having heard of the bastardy proceedings, and say in effect that this was com-

mon knowledge of the community. Soon after coming to Iowa, the deceased spoke to several people about having an illegitimate son in New Jersey, and so described him as to leave no doubt that he referred to plaintiff. As late as the year 1895 the deceased spoke of plaintiff as his son to his neighbors in Iowa. From about the year 1876 until 1885 or 1886, deceased was in the insane hospital at Independence. During the latter years of his life, deceased introduced plaintiff as a relative, sometimes as a nephew and sometimes as a son. There are many other acts of recognition and notoriety, which need not be referred to, as we have said enough to show the general tenor of plaintiff's evidence. Defendants introduced evidence tending to show that deceased denied that plaintiff was his son, and also to the effect that it was not a notorious fact in the community in which he lived. While giving full force to the evidence, it seems to us that there can be no doubt that plaintiff is the son of Peter Van Horn, and that deceased's recognition of him as such was general and notorious within the meaning heretofore given those terms by this court. We have gone over the entire record with care, and have many times resorted to the transcript; and, without further extending this opinion, it is sufficient to say that, disregarding all improper and irrelevant evidence, of which there was much, we still think that plaintiff has brought himself within the letter of the statute, and is entitled to inherit.

The decree of the District Court is therefore affirmed.

Rehearing denied.

GEORGIA SUPREME COURT.

Florence Barclay JOHNSTONE, by Trenholm Baker, His Next Friend, *Plff. in Err.*,

v.

Charles C. TALIAFERRO, Trustee under a Deed of Mary M. Marshall, Deceased.

(.....Ga.....)

*The words "child" and "children," appearing in a deed conveying to an unmarried female certain property during her life, and at her death to such child or children as she may leave living at the time of her death, will not include an illegitimate child of such female, born several years after the making of the deed, unless it plainly appears from the language of the instrument that it was the intention of the grantor that an illegitimate child was to take thereunder. (a) The word "issue," used in a subsequent part of the deed under consideration in the present case,

is to be given the same meaning as the words "child" or "children."

(March 17, 1899.)

ERROR to the Superior Court for Chatham County to review a judgment in favor of defendant in a proceeding brought to establish an interest in a trust created by Mary M. Marshall, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. Mercer & Mercer, for plaintiff in error:

If a mother in Georgia dies without expressing her will, the liberal law gives her property to all her children. If she should express her wish that her property go to her children, it would go equally to all her children.

If some third party gives property to the children generally of this same mother, on what principle can the courts say that this means only one class of her children, her legitimate children alone?

Houston v. Davidson, 45 Ga. 574; *Allen v. Donaldson*, 12 Ga. 336.

In general where a statute declares that

*Headnote by COBB, J.

NOTE.—For illegitimate children as next of kin, see note to *French v. French* (Iowa) 15 L. R. A. 300.
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a bastard shall inherit as if legitimate, the legitimation thus imparted is not treated as a limited or restricted legitimacy; the legitimation has been considered to have the effect of putting the legitimated in the status of one born in lawful wedlock.

24 Am. & Eng. Enc. Law, 1st ed. p. 423.

"Issue" is conceded to be a much broader and more comprehensive word than "children," and in this sense Mrs. Marshall evidently used it. It is broad enough to take in all descendants.

Pearce v. Rickard, 18 R. I. 142, 19 L. R. A. 472; 11 Am. & Eng. Enc. Law, 1st ed. p. 870, note.

In *Bennett v. Toler*, 15 Gratt. 588, 78 Am. Dec. 638, the court held that the illegitimate son of a woman took equally with her legitimate children under a devise from her father to her for life, and at her death the property to be equally divided among her children.

The death of the mother before descent cast would not prevent the illegitimate child from inheriting her share of the estate cast upon him from her father.

McGuire v. Brown, 41 Iowa, 650; *Simmons v. Bull*, 21 Ala. 501, 56 Am. Dec. 263.

"Child" does not mean only a legitimate child.

Bunce v. Bunce, 27 Abb. N. Cas. 61; *Re Wardell*, 57 Cal. 489.

It has been held that illegitimate children might take under a statute which declared that a limitation to the "heir" shall be construed to be the "children."

3 Am. & Eng. Enc. Law, 2d ed. p. 893, note; *Howell v. Tyler*, 91 N. C. 207.

The word "children" is not confined to those born in lawful wedlock.

Drain v. Violet, 2 Bush, 155; 5 Am. & Eng. Enc. Law, 2d ed. p. 1097; *Rogers v. Weller*, 5 Biss. 166; *Heath v. White*, 5 Conn. 228; *Hughes v. Knoulton*, 37 Conn. 429; *Dickinson's Appeal*, 42 Conn. 491; *McGunnigle v. McKee*, 77 Pa. 81; *McGuire v. Brown*, 41 Iowa, 650.

The old common-law rule that a bastard, being of kin to no one, cannot be an heir, nor have heirs save those of his own body, has been modified by statute in the United States and the various states, so as to allow inheritance and transmission of inheritance through the mother.

Stevenson v. Sullivan, 5 Wheat. 267, 5 L. ed. 85; *Gregley v. Jackson*, 38 Ark. 487; *Wardell's Estate*, Myrick, Prob. Ct. Rep. (Cal.) 224; *Harrison's Estate*, Myrick, Prob. Ct. Rep. (Cal.) 121; *Brown v. Dye*, 2 Root, 280; *Heath v. White*, 5 Conn. 228; *Doe, Crawle, v. Bates*, 6 Blackf. 533; *Stover v. Boswell*, 3 Dana, 233; *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246; *Allen v. Ramsey*, 1 Met. 635; *Berry v. Owens*, 5 Bush, 452; *Neel v. Hibbard*, 30 La. Ann. 808; *Hunt v. Hunt*, 37 Me. 333; *Earle v. Dawes*, 3 Md. Ch. 230; *Waggoner v. Miller*, 28 N. C. (4 Ired. L.) 480; *Grubb's Appeal*, 58 Pa. 55; *Woltemate's Appeal*, 80 Pa. 219; *Neil's Appeal*, 92 Pa. 193; *Burlington v. Fosby*, 6 Vt. 83, 27 Am. Dec. 535; 2 Kent, Com. 212.

The testator's "intention" was a fact to be submitted to the jury.

The words "child or children" include illegitimate children when necessary to effectuate the intention of the testator.

Hill v. Crook, L. R. 6 H. L. 266; *Palmer v. Horn*, 84 N. Y. 516.

Messrs. Burton Smith and Spencer R. Atkinson also for plaintiff in error.

Messrs. Saussy & Saussy, for defendant in error:

The estate of Mary M. Barclay in the trust estate was a life estate and a life estate only; being expressly for and during her natural life, no estate passed to her heirs.

Simms v. Freiherr, 100 Ga. 610.

Plaintiff can only inherit from his intestate mother.

Acts 1816, p. 266; Prince, Dig. 202; Act 1850, p. 172.

There was no inheritance estate in Mrs. Taliaferro in the property conveyed by the will and deed of Mrs. Mary M. Marshall, no estate transmissible to her heirs, and the plaintiff is not entitled to take by virtue of his claim as her son and heir.

Stevenson v. Sullivan, 5 Wheat. 207, 5 L. ed. 70.

"Child or children" in wills, deeds, and statutes must be taken to mean legitimate child or children as much as if the word "legitimate" had been introduced before it, and cannot in cases like the present be construed to include illegitimate children.

Re Ayles, L. R. 1 Ch. Div. 282; *Ellis v. Houston*, L. R. 10 Ch. Div. 236; *Dorin v. Dorin*, L. R. 7 H. L. 568; *Re Bolton*, L. R. 31 Ch. Div. 547; *Durrant v. Friend*, 11 Eng. L. & Eq. 2; *Cartwright v. Vaudry*, 5 Ves. Jr. 530; *Lyon v. Lyon*, 88 Me. 395; *Cromer v. Pinckney*, 3 Barb. Ch. 475; *Bolton v. Bolton*, 73 Me. 299; *Kirkpatrick v. Rogers*, 41 N. C. (6 Ired. Eq.) 130; *Thompson v. McDonald*, 22 N. C. (2 Dev. & B. Eq.) 463; *Doggett v. Moseley*, 52 N. C. (7 Jones, L.) 587; *Hicks v. Smith*, 94 Ga. 809; *Floyd v. Floyd*, 97 Ga. 124; *Porter v. Porter*, 7 How. (Miss.) 106; *Shearman v. Angel*, Bail. Eq. 351, 23 Am. Dec. 166; *Flora v. Anderson*, 75 Fed. Rep. 217.

So long as there are legitimate children to take, bastards can never come under the designation of children.

Ellis v. Houston, L. R. 10 Ch. Div. 236; *Bagley v. Mollard*, 1 Russ. & M. 581; *Cartwright v. Vaudry*, 5 Ves. Jr. 530; *Godfrey v. Davis*, 6 Ves. Jr. 44; *Harris v. Lloyd*, 1 Turn. & R. 310; *Collins v. Hoxie*, 9 Paige, 81; *Heater v. Van Auker*, 14 N. J. Eq. 159.

To take a case out of the common rule that only legitimate children can take under a gift to children there must be on the face of the will such a strong probability of the testator intending to include illegitimate children that a contrary intention cannot be imputed to the testator.

Megson v. Hindle, L. R. 15 Ch. Div. 198; *Holt v. Sindrey*, L. R. 7 Eq. 170; *Wilkinson v. Adam*, 1 Ves. & B. 422; *Bell v. Phyn*, 7 Ves. Jr. 458; *Hill v. Crook*, L. R. 6 H. L. 267, 7 Moak, Eng. Rep. 1; *Re Wells*, L. R. 6 Eq. 599; *Dorin v. Dorin*, L. R. 7 H. L. 568; *Re Bolton*, L. R. 31 Ch. Div. 542.

Extrinsic evidence is not admissible to

prove testator's intention to include bastards in the general designation of children.

Gardner v. Heyer, 2 Paige, 11; *Shearman v. Angel*, Bail. Eq. 351, 23 Am. Dec. 166; 4 Kent, Com. 346, 414, 419.

There must be such a *designatio personæ* as to clearly indicate the object of the gift. The bastard must be in existence.

Re Wells, L. R. 6 Eq. 599.

Bastards cannot acquire reputation of a reputed child until after birth.

Earle v. Wilson, 17 Ves. Jr. 528; *Harper v. Archer*, 4 Smedes & M. 99, 43 Am. Dec. 475, note.

The act of December 13, 1868, pamph. p. 266, and the amendment in the act of February 11, 1850, pamph. p. 172, did not invest bastards with all the rights of children. They could only inherit from their mother or from each other.

Hicks v. Smith, 94 Ga. 818; *Floyd v. Floyd*, 97 Ga. 124; *Edmondson v. Dyson*, 7 Ga. 512; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339; *Stevenson v. Sullivan*, 5 Wheat. 207, 5 L. ed. 70; *Williams v. Kimball*, 35 Fla. 49, 26 L. R. A. 746.

In the construction of the law they are to be considered as bastards liable to all the disabilities to which the common law subjects them as such except those from which the statute law exempts them.

Stevenson v. Sullivan, 5 Wheat. 207, 5 L. ed. 70; *Williams v. Kimball*, 35 Fla. 49, 26 L. R. A. 746; *Haraden v. Larrabee*, 113 Mass. 430; *Pratt v. Atwood*, 108 Mass. 40; *Russell v. Russell*, 94 Ala. 48; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339.

Messrs. Erwin du Bignon, Chisholm, & Jacob also for defendant in error.

Cobb, J., delivered the opinion of the court:

Florence Barclay Johnstone filed a petition to the superior court of Chatham county against C. C. Taliaferro, as an individual, and as trustee under a deed hereinafter referred to, alleging that Margaret Marshall was a foundling left by someone unknown upon the steps of the residence of Mary M. Marshall; that it was never known who were the parents of Margaret Marshall, but it was supposed that she was a natural child, born out of wedlock; that Mary M. Marshall became so attached to her that she was adopted as her child, and given the name of "Marshall"; that she was known as "Maggie Moonshine," because of the fact that she was discovered on the doorstep on a bright moonlight night; that the supposed circumstances of her birth and parentage did not interfere in any way with Mary M. Marshall becoming sincerely attached to her, and treating her as if she were her own child; that Margaret Marshall intermarried with A. A. E. W. Barclay, and a daughter, Mary M. Barclay, was the offspring of the union. On the 30th day of May, 1874, Mary M. Marshall executed a trust deed, the following being a copy of all the provisions in the same that are material in the present case:

Whereas, on the 23rd day of December, in the year of our Lord one thousand eight hundred and sixty-eight, the said Mary M. Marshall, in the presence of George W. Wyllie, W. W. Paine, and John Cooper, did make and publish her last will and testament, disposing of her property in manner and form set out in the following language [the provisions contained in items 1, 2, and 3 are immaterial to the proper consideration of this case]: "Item Fourth. All the rest and residue of my estate, of whatever kind and character and description, either real, personal, or mixed, and wherever situated, which I may leave at the time of my death, I give, devise, and bequeath unto my executors hereinafter named, in trust, nevertheless, to and for the sole and separate use of Mary M. Barclay, the daughter of my adopted daughter, Margaret Marshall, late deceased, for and during the term of her natural life, free from the debts, contracts, or control of any husband with whom she may hereafter intermarry, and, from and after the death of the said Mary M. Barclay, then in trust for such child or children of the said Mary M. Barclay as she may leave living at the time of her death, share and share alike, if more than one, as tenants in common, their heirs and assigns, forever; the representatives of a deceased child to stand in the place of the parent, and to take *per stirpes*, and not *per capita*. The allowance of a liberal income to be made by said executors hereby created trustees to the said Mary M. Barclay, under the directions of a court of equity, until she arrive at the age of eighteen years. After that time, the whole net income to be given to her. The excess of income in the preceding years to be invested in other property, to be held upon the same use and trusts as are in this will expressed. But, if the said Mary M. Barclay should depart this life leaving no such child or children, or representative of children, living at the time of her death, then and in that case I give and bequeath [here follows a bequest of certain property, upon the happening of the contingency mentioned, to the wardens and vestrymen of Christ Church, in Savannah, for a parsonage]. Item Fifth. The rest and residue of my property which may remain after the death of the said Mary M. Barclay without leaving issue living at the time of her death, as aforesaid, deducting the said lots on West Broad street, mentioned in the immediately preceding item of this, my will, I give, devise, and bequeath to the said the wardens and vestrymen of the Episcopal Church, in Savannah, called 'Christ Church,' for the purpose of erecting an orphan asylum and a house of industry for the indigent poor of the city of Savannah on such lots of land within the limits of the city of Savannah as to them may seem suitable for that purpose, and for the endowment of said institution. . . . Item Six. I desire and direct that the said Mary M. Barclay shall be liberally educated and that a governess shall be employed for her, with an adequate salary, until she arrives at mature years; that said Mary M., with the said governess, shall reside in my house, on West Broad street; and that the governess shall be changed,

dred and sixty-eight, the said Mary M. Marshall, in the presence of George W. Wyllie, W. W. Paine, and John Cooper, did make and publish her last will and testament, disposing of her property in manner and form set out in the following language [the provisions contained in items 1, 2, and 3 are immaterial to the proper consideration of this case]: "Item Fourth. All the rest and residue of my estate, of whatever kind and character and description, either real, personal, or mixed, and wherever situated, which I may leave at the time of my death, I give, devise, and bequeath unto my executors hereinafter named, in trust, nevertheless, to and for the sole and separate use of Mary M. Barclay, the daughter of my adopted daughter, Margaret Marshall, late deceased, for and during the term of her natural life, free from the debts, contracts, or control of any husband with whom she may hereafter intermarry, and, from and after the death of the said Mary M. Barclay, then in trust for such child or children of the said Mary M. Barclay as she may leave living at the time of her death, share and share alike, if more than one, as tenants in common, their heirs and assigns, forever; the representatives of a deceased child to stand in the place of the parent, and to take *per stirpes*, and not *per capita*. The allowance of a liberal income to be made by said executors hereby created trustees to the said Mary M. Barclay, under the directions of a court of equity, until she arrive at the age of eighteen years. After that time, the whole net income to be given to her. The excess of income in the preceding years to be invested in other property, to be held upon the same use and trusts as are in this will expressed. But, if the said Mary M. Barclay should depart this life leaving no such child or children, or representative of children, living at the time of her death, then and in that case I give and bequeath [here follows a bequest of certain property, upon the happening of the contingency mentioned, to the wardens and vestrymen of Christ Church, in Savannah, for a parsonage]. Item Fifth. The rest and residue of my property which may remain after the death of the said Mary M. Barclay without leaving issue living at the time of her death, as aforesaid, deducting the said lots on West Broad street, mentioned in the immediately preceding item of this, my will, I give, devise, and bequeath to the said the wardens and vestrymen of the Episcopal Church, in Savannah, called 'Christ Church,' for the purpose of erecting an orphan asylum and a house of industry for the indigent poor of the city of Savannah on such lots of land within the limits of the city of Savannah as to them may seem suitable for that purpose, and for the endowment of said institution. . . . Item Six. I desire and direct that the said Mary M. Barclay shall be liberally educated and that a governess shall be employed for her, with an adequate salary, until she arrives at mature years; that said Mary M., with the said governess, shall reside in my house, on West Broad street; and that the governess shall be changed,

should said Mary M. become displeased with her. [Here follows a recital that, in a codicil to the will above set out, James J. Waring and Mary M. Barclay had been appointed executor and executrix thereof, respectively, and that the following second codicil to the will had been published]: It is my will, and I do hereby direct, that the allowance from the income of my estate to be given to Mary M. Barclay, the daughter of my adopted daughter, Margaret Marshall, afterwards Margaret Barclay, until she shall attain the age of eighteen years, as also the entire net income of my said estate from that time until she attain the age of twenty-one, shall be subject to the judgment and control of James J. Waring, the executor nominated in my first codicil, who shall hold the same for the exclusive benefit of the said Mary M. Barclay; and it is my wish that under no circumstances shall A. A. E. W. Barclay, the father of the said Mary M. Barclay, have any of the said income, or claim a natural guardianship over her person." And whereas, on the 8th day of April in the year 1874, a petition was filed in the court of ordinary of Chatham county by Albert R. Lamar, solicitor general, etc., under instructions from a grand jury of the superior court of the said county, praying that a guardian might be appointed of the person and property of said Mary M. Marshall, according with the provision of § 1855 of the Code of Georgia. And whereas, the said Mary M. Marshall is apprehensive that, although a decision was rendered by the said ordinary on the 30th day of said month of April refusing the appointment of a commission, on the ground that said application had not been made in proper form and with proper verification, yet that the same effort in some other form may be repeated, and although she is now in full possession of her mental faculties, and is fully able to take care of herself and her property, yet that the time may come when the advance of years may produce such effect upon her as to invite the renewal of the same effort to place her and her property under the control of some person not of her own selection. And whereas she, the said Mary M. Marshall, prefers to guard against the danger of such result by exercising now her right and power to select for herself the person to be intrusted with that care and management of her property, whenever disease or infirmity may incapacitate herself: Now, then, this indenture witnesseth that the said Mary M. Marshall, for and in consideration of the premises, and of the sum of five dollars to her in hand paid by the said James J. Waring at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has given, granted, bargained, sold, . . . and by these presents doth give, grant, bargain, sell, . . . all the tracts or parcels of land, premises hereinafter particularly described, situate, lying, and being in the city of Savannah, and in the county of Chatham, and in the state of Georgia; that is to say [here follows a description of the property conveyed]; and any other and all other property which may hereafter belong to the said

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Mary M. Marshall. To have and to hold, all and singular, the above-described lots, parcels, and tracts of land and premises, with the appurtenances, and any and all other the said property hereinbefore described and referred to, unto him, the said James J. Waring, in trust nevertheless, to and for the only proper use, benefit, and behoof of the said Mary M. Marshall for and during the remainder of her natural life, the rents, profits, and income thereof to be disposed of by herself, or in accordance with her directions, so long as she may be able to collect, manage, and dispose of the same; but if at any time hereafter said Mary M. Marshall, from disease or infirmity, or from any cause, shall be unable to collect, manage, and dispose of the said rents, profits, and income, and should be unable to give direction, management, and disposition of the same, then, and in that event in trust to collect and receive the said rents, profits, and income, and to apply so much thereof as may be proper and necessary to the support of the said Mary M. Marshall, liberally supplying her with all the comforts of life; and further to apply as much thereof as may be required, indicated, and called for by the said Mary M. Barclay, in order to provide liberally for all of her wants as a young person in her station of life, investing whatsoever surplus may thereafter remain subject to the same use and trust; and after the death of the said Mary M. Marshall, and until the said Mary M. Barclay shall attain the age of twenty-one years, to apply the entire net income, or so much thereof as shall be required, indicated, and called for by the said Mary M. Barclay, for her support and use, investing whatsoever surplus may thereafter remain, subject to the same uses and trusts; and after the death of the said Mary M. Marshall, and after the said Mary M. Barclay shall have attained the age of twenty-one years, or shall have departed this life, with or without issue, then to hold the said property subject to the trusts which are explicitly set forth in recitals of the contents of the said last will and testament of the said Mary M. Marshall, and the codicils thereto, which said recitals are hereinbefore contained, and which, to that end, are made part and parcel of this deed of indenture.

On the 7th day of March, 1893, the defendant, Taliaferro, was "duly appointed as substituted trustee" under the deed above referred to. It is further alleged in the petition that plaintiff is the natural son of Mary M. Barclay, born out of wedlock in the year 1878; that, after the birth of plaintiff, his mother intermarried with the defendant Taliaferro, and that there are now living three children, the offspring of this marriage; that Mary M. Barclay has departed this life; that, since her death, Taliaferro has furnished petitioner with what was necessary for his support and education, until about a year before the filing of the petition, but that since that time the defendant has totally failed and refused to furnish anything to petitioner; that petitioner, under the terms of the deed above referred to, is

entitled to a one-fourth interest in the property described in that deed, which property is in the hands of the defendant as trustee. The prayer is that an accounting be had, and that petitioner recover his interest in the property. To the petition the defendant filed demurrers, both general and special, which were sustained by the court. To this ruling the plaintiff excepted.

The plaintiff contends that he is entitled to share in the property described in the trust deed, under that part of the paper purporting to be a will which is embodied in the deed, and which declares that from and after the death of Mary M. Barclay the property shall be held "in trust for such child or children of the said Mary M. Barclay as she may leave living at the time of her death, share and share alike, if more than one, as tenants in common, their heirs and assigns, forever; the representatives of a deceased child to stand in the place of the parent, and to take *per stirpes*, and not *per capita*." It is also contended that the word "issue," appearing in a subsequent clause of the deed, which provides for a limitation over in the event that Mary M. Barclay should die "without issue," should be given a broader signification than the word "children," and that for that reason the words "child" or "children," wherever contained in the deed, are to be given the same meaning as would be given the word "issue." Construing this deed as a whole, it does not appear that the use of the word "issue" was intended by the grantor to in any way alter the meaning which would ordinarily be given the word "children," nor to enlarge the meaning of that word, even if, under some circumstances, the word "issue" should be construed to embrace illegitimate children. Treating the terms "children" and "issue" as having been used in identically the same sense in the trust deed under which the plaintiff claims, it becomes necessary to determine who were intended by Mrs. Marshall to be the recipients of her bounty, when she said that the property described in the deed should go to the "children" of Mary M. Barclay upon her death. It becomes necessary, in the first instance, to determine whether, under the law of this state, the words "child" or "children," when used in a deed or will, would embrace other than legitimate children.

Mr. Schouler, in his work on Domestic Relations, thus describes the status of a bastard at the common law: "The rights of a bastard are very few at the common law; children born out of a legal marriage having been from the earliest times stigmatized with shame, and made to suffer through life the reproach which was rightfully visited upon those who brought them into being. The dramatist depicts the bastard as a social Ishmaelite, ever bent upon schemes for the ruin of others, fully determined to prove a villain; thus fitly indicating the public estimate of such characters centuries ago in England. The law writers, too, pronounce the bastard to be one whose only rights are such as he can acquire; going so far as to demonstrate, by cruelly irresistible logic, 45 L. R. A.

that an illegitimate child cannot possibly inherit because he is the son of nobody;—sometimes called *filius nullius*, and sometimes *filius populi*. Coke seemed to concede a favor in admitting that the bastard might gain a surname by reputation, though none by inheritance. The most important disability of an illegitimate child at the common law is that he has no inheritable blood; that he is incapable of becoming heir, either to his putative father or to his mother, or to anyone else; that he can have no heirs but those of his own body." Schouler, Dom. Rel. §§ 276, 277. See also 1 Bl. Com. 459; 2 Kent, Com. 14th ed. 212; 4 Kent, Com. 14th ed. 413; 3 Am. & Eng. Enc. Law, p. 891. The condition of a bastard under the law of this state is the same as it was at common law, except in so far as it has been ameliorated by statute. In 1816 the general assembly passed an act in relation to escheats, which declared that, "where any woman shall die intestate, leaving children commonly called illegitimate or natural-born out of wedlock, and no children born in lawful wedlock, all such estate whereof she shall die seised or possessed of, whether real or personal, shall descend to, and be equally divided among, such illegitimate or natural-born children and their representatives, in the same manner as if they had been born in wedlock; and if such illegitimate or natural-born child shall die intestate, without leaving any child or children, his or her estate, as well real as personal, shall descend to, and be equally divided among his or her brothers and sisters, born of the body of the same mother, and their representatives, in the same manner and under the same regulations and restrictions, as if they had been born in lawful wedlock." Acts 1816, p. 40. The reason for passing this act is stated in the preamble to be that the term "heirs" "has been so construed as to prevent children born of the body of the same mother from being capable of inheriting or transmitting inheritances." In 1829 an act was passed for the "relief of certain fortunate drawers" in a land lottery which had been authorized by law, and it was declared in that act that the fact that the drawer was an illegitimate child should not interfere with his rights to the land drawn, and that "whenever any illegitimate child, having drawn a lot of land in said lottery and who has or may die intestate without child or children, or the representatives of children, and without brothers or sisters on the maternal side, then and in that case, the said land shall descend to and vest in the mother." Acts 1829, pp. 121, 122. In 1850 the act of 1816, *supra*, relating to escheats, was amended so as to provide "that from and immediately after the passage of this act, all bastards or natural-born children of widows, when said widows shall die intestate, shall inherit the real and personal estate of their deceased mothers, acquired and accumulated during widowhood, equally with the child or children of said widows born in lawful wedlock—any law, usage, or custom to the contrary notwithstanding." Acts 1850, p. 172.

In 1855 the general assembly passed an act "to prescribe the order of descent and succession of the estates of illegitimate persons who die intestate," which provides as follows: "When any person shall depart this life intestate, who by law is illegitimate, having a widow, or widow and child or children, or their descendants, then the property of such illegitimate person shall descend to, and belong to, such persons as would inherit the same were such person legitimate. If such illegitimate person shall leave no widow, or child or children, or the descendants of a child or children, then the property of such illegitimate person shall descend to and belong to such persons of the maternal blood as would be entitled to the same had such illegitimate person been legitimate, and died leaving no collateral kindred of the paternal blood." Acts 1855-56, pp. 227, 228. In 1859 a law was passed amending "the law of descent, in cases of persons who are illegitimate, or born out of lawful wedlock, dying intestate." It provided as follows: "When any person who is illegitimate or born out of wedlock and who has never been legitimized, shall die intestate, leaving no widow or child or children, or descendants of a child or children, and shall leave surviving a brother or sister, or brothers and sisters of like illegitimate birth, and born of the same mother of such intestate, or descendants of such brother or sister, or brothers and sisters, and their said descendants shall be entitled to, and inherit the estate, real or personal, of such intestate, under the same rules and regulations, as if said intestate and said brother or sister, or brothers or sisters, were born in lawful wedlock. If such intestate shall die leaving no widow, or child or children, or descendants of a child or children, or brother or sister so born as hereinbefore mentioned, no descendants of such brother or sister, but shall leave a brother or sister, or brothers or sisters, born of the mother of such intestate in lawful wedlock, or descendants of such last-mentioned brother or sister or brothers and sisters, then and in that event, such last-mentioned brother or sister, or brothers and sisters, and their descendants shall be entitled to and inherit the estate of such intestate, under the same rules and regulations as if they were in law the next of kin of such intestate." Acts 1859, p. 36.

The provisions of the different statutes above referred to relating to bastards were incorporated in the Code of 1863, in the following language:

"Sec. 1751. Bastards have no inheritable blood except that given to them by express law; they may inherit from their mother and from each other, children of the same mother in the same manner as if legitimate. If a mother have both legitimate and illegitimate children, they shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow, his mother, brothers and sisters shall inherit his estate equally. In distributions under this law the children of a deceased bastard shall represent the deceased parent.

"Sec. 1752. If a bastard dies intestate, 45 L. R. A.

leaving no widow or lineal descendant, or illegitimate brother or sister, or descendant of a brother or sister or mother, but shall leave a brother or sister of legitimate blood, such brother or sister, or descendant of such brother or sister, may inherit the estate of such intestate."

Section 1751 of the Code of 1863 appears in the Code of 1895 in identically the same language. Civil Code, § 2510. Section 1752, as amended by the act of 1865, appears in the Code of 1895, in the following language: "If a bastard dies intestate, leaving no widow or lineal descendant, or illegitimate brother or sister, or mother, but shall leave a brother or sister of legitimate blood, such brother or sister, or descendant of such brother or sister, may inherit the estate of such intestate; but in default of any such person, the brothers and sisters of the mother of such bastard or their descendants, or the maternal grandparents of such bastard, may inherit the estate of such bastard, to be divided amongst said persons in accordance with the degrees of consanguinity prescribed in the laws for the distribution of other estates." Civil Code, § 2511 (Acts 1864-65, p. 102).

Under the law of this state, a bastard has inheritable blood, to the extent provided in the statutes above referred to. He can take as heir by descent from his mother, and she from him; and, in like capacity, he may inherit from his mother generally with legitimate children. He may also inherit from an illegitimate brother or sister; and illegitimate brothers or sisters, or their descendants, may inherit from him. In certain instances, upon failure of heirs of the illegitimate line, the brother or sister of the legitimate blood, or their descendants, may inherit from him; and even the maternal grandparents of the bastard may inherit his estate. Such is the relation which, under the law of this state, the bastard bears to the mother and those persons related to him through her. The relation which the father bears to the bastard under the laws of this state is to be found in the declarations that the father of a bastard is bound to maintain him; that he may voluntarily discharge his duty, but that, if he fails or refuses to do so, the law will compel him. The father of an illegitimate child may render the same legitimate, by appropriate proceedings in the superior court. Civil Code, §§ 2494, 2508. It will thus be seen that the bastard is recognized as an heir of the mother, and of the issue of the mother, and that those who are in certain degrees of consanguinity to him may be his heirs; but, as to the father, the relation of a bastard who has never been legitimated is the same as it was at common law,—he cannot inherit from the father, nor are the descendants or relations of the father, under any circumstances, his heirs. The legal status of the bastard has changed from time to time in this state, as is seen by the statutes above referred to; and it may be well, in the present investigation, to examine the decisions of this court in reference to the matter. In the case of *Edmondson v. Dyson*, 7 Ga. 512, it was held, where an act

of the general assembly (Acts 1826, p. 136, § 2) declared "that the name of Sarah Jane Wells be charged to the same of Sarah Jane Rakestraw, and that she be declared legitimate and capable of inheriting, and like privileges in law as if she had been born in lawful wedlock; . . . that inasmuch as the illegitimate child was not, by the act, made legitimate to any particular person, the only effect of it was to change her name," and hence that she could not take under a will which bequeathed certain property to the "heir or heirs at law" of Gainham L. Rakestraw, her reputed father. In *Beall v. Beall*, 8 Ga. 210, the question was raised as to whether the general assembly of Georgia possessed the power by a special act to legitimate a bastard child; and it was there held that as, under the common law, the British Parliament could pass such an act, and as there was nothing in the written Constitution of this state to deprive the general assembly of the power, it still resided there. Since the Code of 1863, the power to legitimate bastards has been vested in the courts. Code 1863, § 1738; Civil Code, § 2494. In *Allen v. Donaldson*, 12 Ga. 332, decided in 1852, it was held: "When there are two sets of children, born of the same mother, the one legitimate and the other illegitimate, and one of the latter dies intestate and without issue, the legitimate brothers and sisters on the maternal side are not, by the statutes of this state, codistributees of the estate of the deceased, with the illegitimates." The radical changes which had been made in the law in reference to bastards up to the time of this decision are thus alluded to by Judge Lumpkin: "We acknowledge that there is an increasing liberality evinced in modern legislation in favor of illegitimates. And we rejoice that it is so. This is shown by the act of 1829, which provides that land drawn by illegitimates who have been returned as orphans should not be considered as fraudulent, but the same was declared to vest in them. But it does not occur to this court that we should be advancing this policy by holding that legitimates should come in and share the inheritance of an illegitimate with the co-illegitimates, while the privilege was not reciprocal. We do not understand, in the language of our brother Peeples, how legitimates can be of kin to the illegitimates, but the illegitimates at the same time not of kin to them. It is counsel, and not the court, who erect the wall between these uterine brethren, and maintain that the legitimates may leap over this wall, and feed in common on the wild pasturage of the illegitimates, while they deny to the latter the privilege of returning with them and partaking of their green meadows. It would be a good law, perhaps, to enable each to inherit from the other, where there were no others occupying the same status, in preference to allowing the property to vest, under our statute of distribution, in distant collateral relations, or to escheat to the state for want of heirs capable of inheriting." *Shelton v. Wright*, 25 Ga. 636, decides that "an illegitimate child, fully legitimated by an act of 45 L. R. A.

the legislature passed by the procurement of the putative father, becomes his lawful child, and such child and his lawful children, upon the death of either, inherit from each other." Judge McCay, in *Houston v. Davidson*, 45 Ga. 574, thus declares the law of Georgia in reference to the capacity of bastards to inherit: "The progress of civilization and the spread of correct ideas has now almost obliterated the old notion that illegitimates are outcasts. They do not inherit from the father, because the marriage tie—the proof that they are his children—does not exist between him and the mother. But no such proof being needed as to their connection by blood with the mother, or with the brothers and sisters of her womb, they inherit. It is in Georgia, now, only a question of legal proof of blood connection, since now legitimates and illegitimates inherit equally from the mother, and a legitimate brother or sister may in some cases inherit from an illegitimate. . . . So the marriage of the parents legitimates the children born before. . . . The whole spirit of our law is to put them on the same footing of legitimates, as to their mother, and to the children of her womb. We hold, therefore, that the act of 1859, extending the principle of representation among collaterals to the grandchildren of brothers and sisters, extends to the case where the estate for distribution is the estate of an illegitimate." The decision in *Langmade v. Tuttle*, 78 Ga. 770, was simply declaratory of the law that the mother was an heir of her bastard son. *Hicks v. Smith*, 94 Ga. 809, decides that an order of the superior court legitimating a bastard on the application of the father makes such bastard capable of taking by descent from his father only, and that he is not, by virtue of such order, enabled to take as the heir of the ancestors of the father. In *Floyd v. Floyd*, 97 Ga. 124, it was held that "the term 'child,' as employed in § 2664 of the Code, does not include a bastard, so as to entitle him to the benefits of its provisions, and the conclusive presumption of a gift resulting from continuous possession, under the circumstances therein set forth arises only in favor of legitimate children."

Florence Barclay Johnstone is therefore undoubtedly an heir of his mother, Mary M. Barclay, and as such is entitled to inherit with her other children any property which she may have owned at the time of her death, and which would go to her heirs at law upon her demise. But the property in controversy was not vested in Mary M. Barclay in such a way as to be transmissible to her heirs at law. Those who take this property after her death must take as purchasers under the trust deed; and therefore the question to be determined is whether the plaintiff is a "child" of Mary M. Barclay, within the meaning of that term as it was used by Mrs. Marshall. In other words, Was it the intention of Mrs. Marshall, when she signed the paper purporting to be a will, and when she afterwards incorporated it in the deed, that the provisions of that paper should be broad enough to embrace within the reach of the benefits therein provided for the illegitimate

offspring of Mary M. Barclay, brought into life more than three years after the date of the deed so made? Was it in contemplation of Mrs. Marshall when she made this deed that the child who was undoubtedly the object of her great affection should come to disgrace, and have born to her a child out of lawful wedlock? A casual reading of the deed, with its provisions with reference to the care and attention which were to be given to Mary M. Barclay in her rearing and education, is all that is necessary to sufficiently demonstrate that this result was not only not contemplated by Mrs. Marshall, but would have been almost the last thing that would have occurred to her mind. No mother could have been more tender and solicitous about the future of her own child than Mrs. Marshall evidently was about the future of this girl. That the effect of holding that the plaintiff cannot take any interest in the property in controversy under the terms of the deed would be adding sorrows to the life of one already unfortunate and desolate cannot weigh with us in determining what the language of this deed means. We are irresistibly forced to the conclusion that the plaintiff cannot take any interest whatever, under this deed, as the child of Mary M. Barclay, and that the meaning of the word "child" cannot be enlarged so as to embrace him, notwithstanding the use of the word "issue" in another part of the deed. The words "children" and "issue," in deeds, wills, and other conveyances, must be held to mean legitimate children or issue, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the words import other than legitimates. The conclusion reached by us in this case is, we think, not only essentially correct, but the same is supported by the great weight of authority. Indeed, we have been unable to find any case which is entirely irreconcilable therewith. A number of cases are cited on the briefs of counsel for both parties. Those which seem to be more nearly in point will now be considered, and we think we will be able to demonstrate that those which seem to be antagonistic to the view we have taken are in fact distinguishable from the present case.

In the case of *Cartwright v. Vawdry*, 5 Ves. Jr. 530, Lord Chancellor Loughborough says: "It is impossible, in a court of justice, to hold that an illegitimate child can take equally with lawful children, upon a devise to children." And this was in a case where the illegitimate thus excluded was one born before the marriage of the parents, and at the time of the making of the will was a member of the testator's household, with his children born after marriage. A similar ruling was made in the case of *Godfrey v. Davis*, 6 Ves. Jr. 43. See also *Durant v. Friend*, 11 Eng. L. & Eq. 2. A testator bequeathed property to his son T., who was an illegitimate, and directed a division of his estate into seven parts, one of which was given to his widow for life, and after her death to "such of his children to whom the other six shares were given." As to those six shares, the direction was to pay 45 L. R. A.

them "among all my children living at my decease (except my son Thomas)." The testator left seven children, two of whom (T. and A.) were illegitimate; and it was held that A. was not entitled to a share as one of the testator's children; the vice chancellor saying: "There is no such *designatio personæ* as to enable me to say that Ann, being illegitimate, is entitled to share with legitimate children of the testator in a gift to his children, nor does the exception of Thomas raise a necessary implication that Ann is to take as one of the testator's children." *Re Wells*, L. R. 6 Eq. 599. See also *Re Ayles*, L. R. 1 Ch. Div. 282; *Ellis v. Houstoun*, L. R. 10 Ch. Div. 236; *Megson v. Hindle*, L. R. 15 Ch. Div. 198.

The rule laid down in the cases just cited was recognized by the court of appeals of South Carolina in *Shearman v. Angel*, Bail. Eq. 351, 23 Am. Dec. 166. In that case the will of the testator contained the following items: "I give, devise, and bequeath to my beloved mother, Mrs. Elizabeth Shearman, a part of my plantation on John's island [describing it], . . . which said part or parcel of land I give to my said mother during her life, and at her decease to her children forever. Also, I give, devise, and bequeath to my said mother . . . the following negro slaves [naming them], together with their issue, to her, my said mother, during her life, and at her decease to her children forever. Also, I give and bequeath to my said mother [certain personal property], to her, my said mother, and her children, forever." The remainder of the testator's property, after bequeathing certain sums of money to several slaves whom he desired emancipated, was devised to his sister Martha Angel and her husband, Justus Angel. The testator and Martha Angel were the natural children of Mrs. Shearman, then Miss Tucker, and Isaac Waight, from whom the testator derived his estate. The complainants were the legitimate children of Mrs. Shearman by a subsequent marriage, and they claimed the whole of the real estate and personal property devised to Mrs. Shearman (she having died), by virtue of the express limitation to her children. The chancellor decreed that they were so entitled; holding that the illegitimate sister of the testator was not one of the children of their mother, in the sense in which that word was used in the will. Upon appeal this decision was affirmed. The ruling in the case just cited goes much further than it is necessary for us to go in the present case, and it is evidence of how tenaciously the courts cling to the idea that the word "child" shall always convey to the mind that a legitimate is being dealt with, and that it is incumbent upon anyone who desires to give to his word any other than its well-known meaning to show that such was the intention of the person who used the language.

In Massachusetts it was held that the word "children" did not embrace illegitimate children, in an act (Rev. Stat. chap. 62, § 21) which provided that "when any testator shall omit to provide in his will for any of his children, or for the issue of any deceased

child, they shall take the same share of his estate, both real and personal, that they would have been entitled to if he had died intestate, unless they shall have been provided for by the testator in his lifetime; or unless it shall appear that such omission was intentional, and not occasioned by any mistake or accident." And this, too, notwithstanding the fact that there was a statute which declared that an illegitimate child should be considered as an heir of its mother, and inherit from her estate. *Thomas, J.*, in the opinion, thus states the conclusion reached: "As, at the common law, illegitimate children have no rights of inheritance or descent, whatever they take is by force of the statutes. The statutes have provided for cases of inheritance, for the descent of intestate estates. They have made no provision for cases where there is an omission by a testator to provide in his will for an illegitimate child. Whether the same reasons apply to the case of an omission of an illegitimate child, and the same results should follow such omission, is a question for the legislature, and not for the court." *Kent v. Barker*, 2 Gray, 535.

In Illinois it was held that, *prima facie*, the term "children" means lawful children, and that a statute of descents by which the property of an intestate is made to descend to and among children and their descendants has reference to lawful children only, and does not do away with the common-law rule which prevents illegitimate children from inheriting. *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 330.

In North Carolina it was held that the word "children" *per se* imports, in law, legitimate children, and none but legitimate children can be understood as embraced in an instrument providing for "children," unless it manifestly appears that natural children were thereby intended, and that this meaning of the word "children" was not at all altered by an act of the legislature of that state which permits, where a woman dies intestate and without legitimate children, "those commonly called illegitimate or natural children" to succeed to the property of their mother. They are not thereby made, in law, the children of their reputed mother, but only enabled to take her property where there are none such under the description above quoted. The facts of the case in which this ruling was made were that John Charteris bequeathed all of his property to his two sisters, Jane McDonald and Ann Charteris, with the express limitation that, if either of them should die without having a child or children living at her death, the survivor should take the property. Ann Charteris died without having been married, but leaving a daughter born out of lawful wedlock long before the execution of John Charteris's will. It was held that Jane McDonald took the entire estate of the testator. *Thompson v. McDonald*, 22 N. C. (2 Dev. & B. Eq.) 463. In the same state it was held that the word "issue," in a will which contained a clause bequeathing certain property to a daughter, to which was added these words, "which I intend for the said Ann or

her issue," did not embrace illegitimate issue, although the daughter had such illegitimate issue at the time the will was made, and died without having legitimate issue. *Doggett v. Moseley*, 52 N. C. (7 Jones, L.) 587. See also *Kirkpatrick v. Rogers*, 41 N. C. (6 Ired. Eq.) 130.

In Pennsylvania it has been held that the effect of statutes regulating the right of bastards to inherit, similar to those which have been passed in this state, did not legitimate illegitimate children, but only gave the child and mother capacity to inherit from each other. *Grubb's Appeal*, 58 Pa. 55; *Neil's Appeal*, 92 Pa. 193.

In New Jersey the rule is thus stated: "Under a devise or bequest to 'children' as a class, natural children are not included, unless the testator's intention to include them is manifest, either by express designation or necessary implication. . . . All the cases cited in support of the claim of the illegitimate children will be found to fall within this principle. Illegitimate children may take under the general description of 'children,' but it must appear unequivocally from other parts of the will that such was the testator's intention. The natural and legal import of the term 'children' is legitimate children. To overcome this presumption, and to extend or alter the legal import of the term, the testator's intention must be manifest. The residuary clause of the will in question, under which the children of Mary Heater claim title, contains no express designation, by name or otherwise, of her illegitimate children. The testator's intention to include them in that devise, if it exist, must appear by necessary implication from other parts of the will." In this case the testator gave the residue of his estate to his stepdaughter, Mary Heater. At the time of the devise, and at the death of the testator, she had two children born before her marriage, and two legitimate children born after her marriage. After the death of the testator she had six other children born in wedlock, one of whom, Sarah Casterline, died in the lifetime of her mother, leaving issue, five children. Mary Heater at her death left nine children, two of whom were illegitimate, and five grandchildren, the children of a deceased daughter. *Heater v. Van Auken*, 14 N. J. Eq. 159.

In New York the rule has been thus stated: "Where there are legitimate children in existence at the time of making the will, so as to satisfy the words of the devise or bequest in their primary sense, an illegitimate child cannot take under a general devise or bequest to children as a class, unless there is something appearing upon the face of the will to show that the testator intended to include others besides legitimate children." *Collins v. Horie*, 9 Paige, 81. In *Cromer v. Pinckney*, 3 Barb. Ch. 466, Chancellor Walworth uses this language: "As a general rule, in the construction of wills the testator must be presumed to have used words in their ordinary or primary sense and meaning, unless, from the context of the will, it appears that he must have intended to use them in some other or secondary sense;

or where, by reference to extrinsic circumstances which existed at the time of making of the will, or which must necessarily exist in the event or at the time contemplated by him, the use of such words in their ordinary or primary sense would render the provision of the will in reference to which such words were used insensible, absurd, or inoperative. Thus, the word 'children,' in its primary and ordinary sense, means the immediate legitimate descendants of the person named. And, where there is nothing to show that the testator intended to use it in a different sense, it will not be held to include illegitimate offspring, stepchildren, children by marriage only, grandchildren, or more remote descendants." In Maine it has been held that a statute declaring under what circumstances an illegitimate might take property by inheritance or descent would not have the effect of requiring words in a will which would ordinarily refer to legitimates only, to be so construed as to allow illegitimates to take by purchase under the will. *Lyon v. Lyon*, 88 Me. 395. In the case of *Flora v. Anderson*, 67 Fed. Rep. 182, it was held that a devise to issue meant, prima facie, legitimate issue, and that an intention to include illegitimate issue must be deduced from the language itself, without resort to extrinsic evidence. The same case being before the circuit court of the United States in the Southern district of Ohio the second time, a ruling was made that the Ohio statute of descents, which permitted bastards to inherit and transmit inheritances on the part of their mothers, did not enable an illegitimate child of a woman to take under a devise of a remainder to the issue of the body of such woman. *Flora v. Anderson*, 75 Fed. Rep. 217.

We will now proceed to a consideration of some of the cases relied on by the plaintiff in error: The case of *Bennett v. Toler*, 15 Gratt. 588, 78 Am. Dec. 638, seems to have been confidently relied on as controlling, in principle, the question under consideration in the present case. Upon a close examination of the facts of that case, we cannot see that the decision is really in conflict with the ruling made in the present case. Joseph Toler gave to his daughter, Mary Bennett, the land on which she then lived; also, certain slaves,—the clause of the will concluding in these words: "My will is, at the death of my daughter, Mary Bennett, that the land and negroes given to her shall be equally divided amongst her children." At the testator's death his daughter was married to Louis Bennett, by whom she had several legitimate children. Previous to her marriage she gave birth to an illegitimate child by another man. This illegitimate was known and recognized by the testator as his daughter's son. When the testator died, the legitimate children and the bastard were all living. The question was whether the illegitimate child took an interest equally with the lawful children of Mary Bennett, under their grandfather's will. While the reasoning of Allen, P., seems to lead to the conclusion that, had it been necessary, the court would have gone to the extent of holding

that an illegitimate child not in life at the time the will was made would have taken under the devise to children in the will under consideration in that case, the ruling made, when considered in connection with the fact that the bastard was born several years before the will was made, and was recognized by the testator as his daughter's child, is not authority for the construction sought to be given the word "children" in the deed under consideration in the present case. In the case of *Howell v. Tyler*, 91 N. C. 207, the court had under consideration a will which provided that "what is yet remaining, not above disposed of, shall be held and disposed of for the benefit of Martha J. Trevan's heirs, by my executor hereafter to be named, or in such manner as he may think best and proper." Martha Trevan had no legitimate children, and it was held that, under the word "heirs," her illegitimate children would take under this will; the court saying that "inasmuch as, in the absence of children born to the mother in wedlock, those of illegitimate birth can inherit from the mother, and thus become her heirs, these plaintiffs are sufficiently designated by the term which describes that relation." In that case it appeared that the testator knew that Martha J. Trevan had both legitimate and illegitimate children. In *Drummond v. Leigh*, L. R. 30 Ch. Div. 110, an illegitimate was allowed to take under a will which made provision for "all and every the children and child" of a designated person, because it was clear and manifest from the terms of the will that the testator so intended; the vice chancellor concluding his opinion in the following words: "Here I am satisfied the testator did intend that his nephew's daughter, whom he knew to be illegitimate, was to be treated, for the purposes of his will, as if she was legitimate." In *Dickinson's Appeal*, 42 Conn. 491, it was simply ruled that under the law of Connecticut a bastard has inheritable blood, for the purposes of collateral as well as lineal descent through him. Whether he could take as purchaser under a will or deed using the word "children" was not a question considered at all in that case. In *Hughes v. Knowlton*, 37 Conn. 429, the court had under consideration a will which contained a clause devising real estate to two daughters, "meaning and intending that all the children that have been or may be born of their bodies shall become heirs to the same." Each of these daughters had illegitimate children in life at the time the will was made. It was held that under the law of Connecticut this will gave to the daughters a fee-simple estate, and therefore the question as to whether the illegitimates would take under the language quoted was not passed upon by the court. The ruling made by the supreme court of California in *Re Wardell*, 57 Cal. 484, is entirely consistent, we think, with what is ruled in the present case. A California statute provided that "when any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same

share in the estate of the testator as if he had died intestate." Civ. Code, § 1307. Another statute declared that "every illegitimate child is, in all cases, an heir of his mother, and inherits her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock." Id. § 1387. Ada Wardell died testate leaving a husband, two sons, and a daughter. No provision was made in the will for the daughter. Her name was not mentioned in it, but it does not appear from anything in the will itself that the omission was intentional. The daughter was born out of lawful wedlock, and had never been legitimated in any way authorized by the law of California. It was held that, under the statute first above quoted, she was entitled to a share in the estate in like manner as if she were legitimate. The statute last quoted made her an heir of her mother; and, being such heir, she was a child of her mother within the meaning of the other statute, so as to allow her to claim that she had not been intentionally omitted from the will of her mother. Construing the two statutes together, the result reached by the court in that case was undoubtedly correct. In the case of a devise by a mother to children generally, her illegitimate issue, recognized by her as her children, would certainly take, unless the contrary intention on the part of the testatrix was clearly manifested in the will. Under the California law the question under consideration was the same as if the mother had devised her property to her children generally. The statute in this state allowing a bastard to inherit from his mother while throwing but little light on the question of the intention of a person who devised property to a woman with remainder to her children would certainly have great weight with the courts in construing a will made by the mother herself. On account of the natural affection which mothers bear to their offspring it would take a strong case to authorize the exclusion of illegitimate children of a mother from participating in property devised by her to her children.

We have examined practically all of the cases cited in the very able and elaborate briefs of counsel in this case. We have referred to such as we believe required special attention in dealing with the case. The conclusion reached by us is supported by an almost unbroken line of authorities. The case must at last be decided upon what was the intention of Mrs. Marshall when she made the deed of trust. What she might have done for this unfortunate plaintiff if the deed or will had been made after he came into existence, we do not know; but that it was not her intention, by the language used in the deed, to provide for those of the class to which he belongs, hardly admits of doubt.

Judgment affirmed.

All the Justices concur, except **Lewis, J.** disqualified.
45 L. R. A.

T. R. JONES, *Plff. in Err.*,
v.

M. A. CRAWFORD.

(.....Ga.....)

*1. A petition alleging that the defendant is liable in damages to the plaintiff, a married woman, for fraudulently procuring her to sign, as coprincipal with another, a negotiable note payable to the defendant, when her undertaking was one of suretyship only, upon the express understanding that she should never be liable to pay the same, and that she was compelled by suit to pay the note to an innocent purchaser, who acquired the same before maturity for value, in due course of trade, sets forth a cause of action.

2. A promissory note containing words of negotiability, executed since the passage of the act of 1891 (Civ. Code, § 3667) providing that contracts to pay attorney's fees, in notes and like instruments, shall be void unless a plea be filed by the defendant and not sustained, is negotiable, notwithstanding an agreement in the note "to pay all costs of collection, including 10 per cent attorney's fees."

(April 21, 1899.)

ERROR to the City Court of Cartersville to review a judgment in favor of plaintiff in an action brought to recover damages from defendant for fraudulently inducing plaintiff, a married woman, to become surety on a note. *Affirmed.*

The facts are stated in the opinion.

Mr. John W. Akin for plaintiff in error.

Messrs. J. M. Neel and Neel & Neel, for defendant in error:

A married woman cannot bind herself by any contract of suretyship whether for her husband or for any other person.

Code, § 2488; *Saulsbury v. Weaver*, 50 Ga. 254.

But if she signs a negotiable note really as surety, but the fact of her suretyship does not appear on the face of the note, and if before maturity the note is transferred by the payee to a bona fide purchaser for value who has no notice of such suretyship or that the woman is a married woman, she will be held liable on the note to such innocent purchaser.

Perkins v. Rowland, 69 Ga. 661; *Strauss v. Friend*, 73 Ga. 782; *Temples v. Equitable Mortg. Co.* 100 Ga. 506.

The note signed by Mrs. Crawford as surety for Cobb to Jones as payee did not bind her, while held by Jones, he having full knowledge that she was a married woman and that she signed the note as surety only. But when Jones, in order to deprive her of her defense as against him, transferred the note before maturity to a bona fide purchaser, she was compelled to pay the note to such innocent purchaser.

*Headnotes by **COBB, J.**

NOTE.—As to the liability for transferring a negotiable note to a bona fide holder so as to cut off defenses, see *Nashville Lumber Co. v. Fourth Nat. Bank (Tenn.)* 27 L. R. A. 519, and note.

Perkins v. Rowland, 69 Ga. 661; *Temples v. Equitable Mortg. Co.* 100 Ga. 506.

The strategy of Jones in procuring such signature as alleged in the declaration, his concealed purpose at the time, and his subsequent wrongful transfer, together with the compulsory payment of the note enforced from Mrs. Crawford, constitute a good cause of action in her favor against defendant Jones.

Keener, *Quasi Contracts*, 397; *Bleaden v. Charles*, 7 Bing. 246; 2 Randolph, Com. Paper, §§ 727, 800.

Where a married woman, even voluntarily, pays the debt of another, either by assumption or on a suretyship, she can recover back the money so paid to or for the use of a person having notice.

Mills v. Hudgins, 97 Ga. 417; *Lewis v. Howell*, 98 Ga. 428.

The legal principles and doctrines derivable from our books of law must be applied to new and ever shifting combinations of facts, and justice administered to suit each case.

Bishop, *Non-Contr. L.* § 486.

It is quite as reasonable and just to hold Jones liable to Mrs. Crawford for his wrongful transfer of the note made for the purpose of depriving her of a just and legal defense thereto and which resulted in loss to her, as to make one liable to a mortgage creditor for removing beyond the latter's reach a chattel covered by the mortgage, for the purpose of preventing the enforcement of the mortgage thereon, and which does prevent it and results in loss to the creditor.

Harris v. Grant, 96 Ga. 211; *Benton v. McCord*, 96 Ga. 395.

For full discussion of liability for transfer of a negotiable note to a bona fide holder so as to cut off defenses, see—

Nashville Lumber Co. v. Fourth Nat. Bank (Tenn.) 27 L. R. A. 519.

Cobb, J., delivered the opinion of the court:

Mrs. Crawford sued Jones for damages; alleging, in substance, as follows: That on March 10, 1897, petitioner was a married woman. On that date Jones, holding some claim or demand against Thomas H. Cobb, a son of petitioner by a former husband, for which claim petitioner was in no way liable, and had received no benefit therefrom, came to petitioner with a promissory note which had been signed by Cobb, payable to the order of Jones, for the sum of \$230.50 principal, with interest at 8 per cent per annum, and "stipulating to pay all costs of collection, including 10 per cent attorney's fees," and asked petitioner to sign the same as surety. In order to induce her to do so, defendant stated that Cobb had requested her to sign, and assured her "that he would never trouble her with the note, and that she should never have to pay it," and on these statements petitioner consented to sign the note. After signing her name, she was about to add the word "surety" or "security," when the defendant begged her not to do that, saying that it was unnecessary, and 45 L. R. A.

"again assured her that the note would never be collected out of her." After obtaining the signature of petitioner to the note, the defendant, before its maturity, indorsed and transferred the same to L. S. Munford, who in turn transferred the note before maturity to F. M. Ford, receiver. These two indorsements and transfers were made for value in due course of trade, and without notice to either transferee that petitioner had any defense to the note. After the maturity of the note, Ford demanded payment from petitioner, which was refused because petitioner was ignorant at that time of the fact that either of the above-mentioned indorsees had taken the note in due course of trade without notice of her defenses, but, on the contrary, believed that they did have such notice. Upon her refusal to pay, Ford brought suit against both Cobb and petitioner, as joint makers, to which suit petitioner filed pleas setting up that she signed the note as surety, and was a married woman at the time of signing the same, and also that neither Ford nor Munford took the note in due course of trade for value before maturity, without notice of her defenses. Upon the trial of this suit, petitioner established by uncontradicted evidence that she signed the note as surety, and was a married woman at the time of signing the same, but failed to establish that Ford was not a bona fide holder before maturity for value, and without notice of her defenses, whereupon the jury returned a verdict against Cobb, as principal, and petitioner, as security, for the principal of the note, together with interest and 10 per cent attorney's fees, on the sole ground that Ford was a bona fide holder for value, without notice of the defenses set up by petitioner. Upon this verdict judgment was entered against Cobb, as principal, and petitioner, as security. Execution was issued upon this judgment, and, Cobb having no property out of which the money could be made, the execution was about to be levied upon the property of petitioner, whereupon, to protect her property from levy and sale, petitioner procured certain persons to pay off the execution, for which she is bound to repay them. Petitioner has demanded payment of this sum from the defendant, but he fails and refuses to pay the same. It is alleged that in defending the suit above-mentioned, and also in prosecuting the present action, petitioner has been put to considerable expense. It is further alleged and charged that Jones procured petitioner's signature to the note "by material misrepresentations, as hereinbefore set forth, and did so for the purpose and with the intention, at the time he procured the note, of indorsing and transferring the same before maturity to an innocent purchaser thereof, for the sole purpose of depriving petitioner of her just defense to said note, which said Jones well knew she could and would set up and prove against him, should he bring suit on said note against her." Damages are laid in the sum of \$400, which sum is made up of the amount paid on the execution and the various items of expense petitioner has incurred

by reason of the suit against her on the note and of the present action. The court overruled a general demurrer to the plaintiff's petition, and the defendant excepted.

The exact question now before us is presented for the first time in this state, and, after a thorough investigation of the authorities, we have been unable to find any case exactly identical with the one now under consideration. When Mrs. Crawford signed the note that had been previously signed by her son, she was interested in no way whatever in the consideration; and hence her signature imposed upon her no liability, under the law, to anyone who had notice of the fact that her contract, though apparently that of a principal, was really one of suretyship only. Jones being cognizant of these facts, the paper was, in his hands, so far as Mrs. Crawford was concerned, absolutely worthless. Civil Code, § 2488. If Mrs. Crawford had paid to Jones the full amount of this note, she would have had the right to recover the same from him. *Mills v. Hudgins*, 97 Ga. 417; *Lewis v. Howell*, 98 Ga. 428. As she appeared upon the face of the note to be a principal, and as she had a right, under the law, to bind her separate estate by a contract of this character, a purchaser of the note for value before maturity, and without notice of the fact that the contract was really one of suretyship, would have a right to enforce payment of the same. *Perkins v. Rowland*, 69 Ga. 661; *Strauss v. Friend*, 73 Ga. 782; *Southern Mut. Bldg. & Loan Assn. v. Perry*, 103 Ga. 800, and cases cited. The married woman would thus be compelled to pay the innocent holder of the note, but in so doing she would be discharging the obligation for the benefit of the payee who had transferred the same. If, therefore, a married woman could recover from the payee of the note, who had notice of the invalidity of her contract, an amount paid to him in satisfaction of the same, why should she not be allowed to recover from him the amount he has wrongfully compelled her to pay out for his benefit to another person? If Mrs. Crawford had, at the special instance and request of Jones, voluntarily paid a sum equal to the amount due on the note to a creditor of Jones, who had no notice of the invalidity of her contract, and Jones had then surrendered her note, under the principle of the cases above cited there would be no legal obstacle to her bringing suit against Jones for the amount paid out for his benefit. If this is true, does it not necessarily follow that, where she has been compelled to pay to a creditor of Jones, she would have a right to recover the amount thus extorted from her? Certainly would this be true when at the time the note was signed by her she attempted to sign in such a way that no liability would arise against her on the note in the hands of anyone, but was prevented from doing so by the fraudulent statements made to her by Jones that he did not intend to use the note in any way whereby she would be held liable thereon, which was, in effect, an agreement that the note would never be negotiated. The sub-

sequent negotiation of the note to an innocent purchaser, who, on account of the insolvency of the principal, compelled Mrs. Crawford to pay the amount due thereon, made complete a cause of action in her behalf against the payee, who had thus caused damage to her. The fraud in procuring and negotiating the note, followed by damage to the plaintiff on account of having to pay the same, made a cause of action against the defendant. Civil Code, § 3813. In the case of *Metropolitan Elev. R. Co. v. Kneeland*, 120 N. Y. 134, 8 L. R. A. 253, it appeared that Kneeland was president of the plaintiff company; but no salary was attached to his office, and the plaintiff had never agreed to pay him any salary. The other defendants were directors in the plaintiff company, and without authority passed a resolution authorizing the president to use the credit of the company by issuing and negotiating its notes to pay a salary of \$25,000 which the directors had voted in his favor. The notes were issued, and some of them came into the hands of bona fide purchasers for value before maturity, and without notice of the purpose for which they were issued, or of the want of authority of the directors to pass the resolution above referred to. The suit was brought to compel the defendants to pay the plaintiff the amount of the notes issued by them, or for such part of them as it would be liable to pay. It was held that the action could be maintained; Vann, J., saying in the opinion: "These notes, as is here admitted, the plaintiff has become liable to pay in consequence of the fraudulent conduct of those defendants. Thus, the dead pieces of paper were, to this extent, given life, and converted into contracts binding upon the company without its consent. . . . We think that the cases relating to this subject rest upon the principle that a person who fraudulently places in circulation the negotiable instrument of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a bona fide purchaser, is guilty of a tort, and in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value thereof." See also *Nashville Lumber Co. v. Fourth Nat. Bank*, 94 Tenn. 374, 27 L. R. A. 519; *Decker v. Mathews*, 12 N. Y. 313; *Smith v. Cuff*, 6 Maule & S. 160; *Horton v. Riley*, 11 Mees. & W. 491; 2 Randolph, Com. Paper, § 727.

It is contended, however, that it appears from the allegations in the petition that there is no liability, because the note was not negotiable, and therefore Mrs. Crawford could have successfully defended the suit thereon by a proper plea. The petition alleged that the note was payable to the order of the payee, which would make it negotiable by indorsement; but counsel for plaintiff in error contends that the stipulation in the note for the payment of attorney's fees renders the note nonnegotiable. It was held in *Stapleton v. Louisville Bkg. Co.* 95 Ga. 802, that "the fact that a promissory note payable to the order of a named payee con-

tains a stipulation to pay 'all costs, and ten per cent on amount for counsel fees, if placed in the hands of an attorney for suit,' does not destroy its character as a negotiable instrument." It is contended, however, that that decision will not control in the present case, because the note upon which Mrs. Crawford was sued was executed after the passage of the act of 1891, now embodied in Civil Code, § 3667, providing that contracts to pay attorney's fees in notes or like instruments shall be void unless a plea or pleas be filed by the defendant and not sustained. The contract in the case cited authorized the collection of attorney's fees upon a condition,—that is, if the note was "placed in the hands of an attorney for suit"—and this condition was held not to destroy the negotiability of the note. The effect of the act referred to was to declare that contracts to pay attorney's fees in notes and like instruments should be collectible only upon the happening of one condition; that is, that a plea be filed by the defendant, and the same be not

sustained. There is no difference in principle between this condition and the condition dealt with in the case cited, and for that reason the decision is controlling on the question now under consideration. The reasons which constrained the court in that case to hold that the note contained a promise to pay "a specific amount of money" are also applicable in the present case.

As against a general demurrer, the petition set forth a cause of action against the defendant, and there was no error in overruling such a demurrer. A demurrer of this character does not raise the question as to what would be the measure of damages in such a case, and whether or not the plaintiff would be entitled to recover the amounts she has expended, or become liable for, as attorney's fees by reason of the suit brought against her on the note, and in bringing the present action, is not now decided.

Judgment affirmed.

All the Justices concur.

ILLINOIS SUPREME COURT.

NORTH CHICAGO STREET RAILROAD COMPANY, *Appt.*,

v.

William F. BAUR.

(179 Ill. 126.)

Standing on the platform of a cable car with one's back against the dashboard will not constitute negligence on the part of the passenger who has gone out of the car as he approaches his destination, so as to preclude a recovery for injury caused by a sudden jerk of the car throwing him into the street.

(April 17, 1899.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Statement by **Craig, J.:**

This was an action brought by William F. Baur against the North Chicago Street-Railroad Company to recover damages for personal injuries alleged to have been received by reason of negligence of the railroad company. The declaration contains four counts. The first alleges that on the 29th day of January, 1896, the plaintiff was a passenger on a cable car of the defendant, on its Wells street line, and that while he was in the exercise of ordinary care the defendant so improperly and negligently managed its cable car and railroad that he was thrown with

great force and violence off the car and upon the ground, whereby he received the injuries complained of. The second alleges that the plaintiff was a passenger upon a cable car of the defendant on its Wells street line, in the exercise of due care, and when the car had passed the intersection of Wells and Eugenie street the car upon which he was riding was suddenly jerked forward, whereby he was thrown from the car to and upon the ground, whereby he received the injuries complained of. The third alleges that on said date and at the said place the plaintiff was a passenger upon the car of the defendant, riding upon its platform, and while such passenger, and while in the exercise of ordinary care, the defendant so negligently and improperly managed its cable car and railroad that the plaintiff was thrown with great force and violence off the platform of the car, upon the ground, whereby he received the injuries complained of. The fourth alleges that at said time and place the plaintiff was a passenger upon a car of the defendant, and was standing upon the platform of the car, and that the defendant so carelessly and negligently managed its car that it was jerked violently, and without notice to the plaintiff, whereby the plaintiff was thrown from the platform of the car to and upon the ground, whereby he received the injuries complained of. To the declaration the defendant pleaded the general issue, and on a trial the plaintiff recovered a judgment, which on appeal was affirmed in the appellate court. To reverse the judgment of the appellate court, the railroad company has appealed to this court.

NOTE.—For negligence in standing on platform of street car, see also *Upham v. Detroit City R. Co.* (Mich.) 12 L. R. A. 129; *Hawkins v. Front Street Cable R. Co.* (Wash.) 16 L. R. A. 45; *L. R. A.*

A. 808; *Elliott v. Newport Street R. Co.* (R. I.) 23 L. R. A. 208; *Muldoon v. Seattle City R. Co.* (Wash.) 22 L. R. A. 794; and *Vall v. Broadway R. Co.* (N. Y.) 30 L. R. A. 626.

Messrs. Egbert Jamieson and John A. Rose, for appellant:

It was incumbent on the plaintiff to establish by affirmative proof that he was in the exercise of ordinary care, and this he entirely failed to do.

Aurora Branch R. Co. v. Grimes, 13 Ill. 536; *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438.

The court erred in refusing to instruct the jury to find the defendant not guilty.

Aurora Branch R. Co. v. Grimes, 13 Ill. 536; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616; *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29; *Chicago & E. I. R. Co. v. Chancellor*, 165 Ill. 438.

If there was any evidence tending to establish care the question would be, of course, one exclusively for the jury; but whether such evidence existed was one exclusively for the court.

Cothran v. Ellis, 125 Ill. 496; *Commercial Ins. Co. v. Scammon*, 123 Ill. 605; *Hinckley v. Horazdowsky*, 133 Ill. 364, 8 L. R. A. 490; *Barlotti v. International Bank*, 119 Ill. 271; *Simmons v. Chicago & T. R. Co.* 110 Ill. 346; *Wabash, St. L. & P. R. Co. v. Coble*, 113 Ill. 117; *Frazier v. Howe*, 106 Ill. 573; *Lake Shore & M. S. R. Co. v. O'Conner*, 115 Ill. 261; *Chicago & A. R. Co. v. Adler*, 129 Ill. 339; *People v. People's Ins. Exchange*, 126 Ill. 468, 2 L. R. A. 340; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003; *Illinois C. R. Co. v. Thompson*, 116 Ill. 159; *Collar v. Patterson*, 137 Ill. 403; *Illinois C. R. Co. v. Nowicki*, 148 Ill. 29; *Phillips v. Dickerson*, 85 Ill. 11, 28 Am. Rep. 607; *Reed v. Deerfield*, 8 Allen, 524; *Simmons v. Chicago & T. R. Co.* 110 Ill. 340; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25.

Messrs. Moran, Kraus, & Mayer, for appellee:

The mere fact of riding on a platform of a street car is not conclusive proof of negligence.

North Chicago Street R. Co. v. Williams, 140 Ill. 275; *Meeael v. Lynn & B. R. Co.* 8 Allen, 234; *Briggs v. Union Street R. Co.* 148 Mass. 72; *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162; *Chicago & A. R. Co. v. Fisher*, 38 Ill. App. 38; *West Chicago Street R. Co. v. McNulty*, 64 Ill. App. 549; *West Chicago Street R. Co. v. Dudzik*, 67 Ill. App. 681; *Upham v. Detroit City R. Co.* 85 Mich. 12, 12 L. R. A. 120; *Nolon v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345; *Huldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794; *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466; *Beal v. Lowell & D. Street R. Co.* 157 Mass. 444; *Springfield Consol. R. Co. v. Hoefner*, 175 Ill. 634; *Maguire v. Middlesex R. Co.* 115 Mass. 239; *Burns v. Bellefontaine R. Co.* 50 Mo. 139; *Matz v. St. Paul City R. Co.* 52 Minn. 159; *Ginna v. Second Ave. R. Co.* 67 N. Y. 596; *Fleck v. Union R. Co.* 134 Mass. 480; *Pray v. Omaha Street R. Co.* 44 Neb. 167; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 796; *Geitz v. Milwaukee City R. Co.* 72 Wis. 307; *City R. Co. v. Lee*, 50 N. J. L. 438. 45 L. R. A.

As the evidence showed precisely what appellee was doing at the time of the accident, the question of whether he was exercising due care was a question for the jury.

Matz v. St. Paul City R. Co. 52 Minn. 159; *Ginna v. Second Ave. R. Co.* 67 N. Y. 596; *Kean v. West Chicago Street R. Co.* 75 Ill. App. 38; *Fleck v. Union R. Co.* 134 Mass. 480; *West Chicago Street R. Co. v. Nash*, 166 Ill. 528.

Craig, J., delivered the opinion of the court:

At the close of all the evidence in the case, the defendant requested the court to instruct the jury to find the defendant not guilty. The court refused the instruction, and the defendant excepted, and the ruling of the court on the instruction is the only error relied upon to reverse the judgment.

It may be conceded, as stated in the argument of counsel for appellant, that, in order to recover, it must appear from the evidence that at the time of the accident plaintiff was in the exercise of ordinary care, and that the defendant was guilty of negligence which was the proximate cause of the injury. It is, however, contended that the plaintiff at the time of the accident was not in the exercise of ordinary care, and that for this reason he cannot recover. In order to determine this question, a brief reference to the facts as established by the evidence is necessary. It appears from the record that plaintiff took the cable car, as a passenger, at Monroe and Dearborn streets, between 12 and 1 o'clock, on the 29th of January, 1896. He procured a paper, and took a seat in the car, and remained seated, reading his paper, until he reached North avenue and Eugenie street, within a block of his home, when he stepped out on the rear platform of the car for the purpose of alighting. While standing on the platform, with his back against the dashboard, the car gave a sudden jerk, throwing him over the dashboard and upon the street. Witnesses on the car testified that the jerk was so violent that passengers were thrown off their seats. It does not appear from the evidence that there was any regulation of the railway company prohibiting passengers from riding on the platform, but, on the other hand, it appears that other passengers did ride on the platform without objection on the part of those in charge of the car. Was the fact, therefore, that plaintiff was standing on the platform when injured such negligence as would preclude a recovery? We think not. Whether the plaintiff's standing on the platform was negligence was a question of fact for the jury to determine from all the facts and circumstances surrounding the transaction. In *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, it was held that whether a person, in getting upon a street car while it is in motion, is chargeable with want of ordinary care, is a question of fact for the determination of the jury under all the circumstances of the case. In the decision of the case, *McDonough v. Metropolitan R. Co.* 137 Mass. 210, and *Briggs v. Union Street*

R. Co. 148 Mass. 72, are quoted with approval, in both of which cases it was held to be a question of fact whether a person riding upon the platform of a street car, or attempting to get upon a street car in motion, was guilty of negligence. *Meessel v. Lynn & B. R. Co.* 8 Allen, 234, is also cited. In the decision of this case it is said: "The seats inside the car are not the only places where the managers of the train expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them even after there is no place for them to stand except on the steps of the platforms. Neither the officers of these corporations nor the managers of the cars nor the traveling public seem to regard this practice as hazardous, nor does experience, thus far, seem to require that it should be restrained upon the ground of its danger. There is therefore no basis upon which the court can decide, upon the evidence reported, that the plaintiff did not use ordinary care. It was a proper case to be submitted to the jury, upon the special circumstances which appeared in evidence." In *Upham v. Detroit City R. Co.* 85 Mich. 12, 12 L. R. A. 129, where a party was injured while riding on the front platform of a street car, in the discussion of the same question involved here the court said: "Defendant's counsel assert that plaintiff left a place of safety inside the car, and voluntarily chose one of danger upon the platform, and that, as his injury was due in part to the fact that he voluntarily took that position, he cannot recover. . . . The answer to the question depends entirely, we think, upon whether or not it is negligence, *per se*, to ride upon the platform of a street car, when one may ride within. Whether one leaves the car, after entering, to ride upon the platform, or whether he steps upon the platform without entering, is of no consequence. His act is as voluntary in the one case as in the other, and the same rule must govern both. The record is entirely silent as to any regulations on the part of the defendant in this respect. But we cannot denude ourselves of the knowledge, which is alike common to all, that passengers are constantly riding upon these platforms with the tacit assent of the defendant, and without any protest, notice, or regulation. . . . In the presence of the fact that passengers are permitted to ride upon these platforms constantly, can courts hold them to be dangerous *per se*?" There are other cases establishing the same doctrine, but the rule is so well settled that the citation of other cases is not deemed necessary. The plaintiff stepped out upon the platform for the purpose of leaving the car when it approached his residence, and there was ample evidence tending to show that he was in the exercise of ordinary care. There was also ample evidence tending to prove that the accident was caused by the negligence of the railway company.

The instruction to find the defendant not 45 L. R. A.

guilty was therefore properly refused, and the judgment of the Appellate Court will be affirmed.

David S. GEER, *Appt.*,
v.

Robert J. FRANK *et al.*

J. L. BENNETT, *Appt.*,
v.

SAME.

(179 Ill. 570.)

1. An agreement by which an attorney is to bear the costs and expense of litigation, in consideration of an interest in the recovery, is champertous and void.
2. A contract giving each of two attorneys an interest in the subject-matter of litigation, in consideration of the legal services to be performed by each of them, and also of the payment of the costs and expenses of litigation by one of them, is void as to both because of the illegal provision as to the payment of costs and expenses by one of them.

(April 4, 1899.)

APPEALS by plaintiffs from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of defendants in a suit brought to compel an accounting of plaintiff's share of the proceeds of a settlement of a law suit. *Affirmed.*

The facts are stated in the opinion.

Mr. Ernest Saunders for appellants.

Messrs. Young, Makeel, & Bradley, and Mitchell & Addington, for appellees: The agreement sued upon is illegal.

The provision that Frank shall not settle or compromise his claim makes the whole agreement void.

North Chicago Street R. Co. v. Ackley, 171 Ill. 100.

The agreement is champertous as to Bennett.

Bennett agreed to pay the court costs and accept a portion of the proceeds of the litigation for his compensation.

Such an agreement is illegal.

Thompson v. Reynolds, 73 Ill. 12; *West Chicago Park Comrs. v. Coleman*, 108 Ill. 591; *Phillips v. South Park Comrs.* 119 Ill. 626.

The agreement is also champertous as to Geer.

Where a promise is based upon several considerations, and one of those considerations is illegal, the entire contract is void, because it is impossible to say which one of the several considerations contributed most to inducing the promise.

Lawson, Contracts, § 341; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Tobey v. Robinson*, 99 Ill. 222; *St. Louis, J. & C. R. Co. v. Mathers*, 104 Ill. 257.

The agreement is void on grounds of public policy.

NOTE.—For champertous contracts with attorneys, see also *Croco v. Oregon Short-Line R. Co.* (Utah) 44 L. R. A. 285, and other cases cited in footnote thereto.

An attorney cannot during the pendency of a suit in relation to a particular subject-matter make any contract with his client which is binding upon the client for a portion of the subject-matter in litigation.

Elmore v. Johnson, 143 Ill. 513, 21 L. R. A. 366; *Rogers v. Marshall*, 3 McCrary, 76.

An attorney must observe the most scrupulous fairness in his dealings with his client.

Mechem, Agency, § 821; *Bishop, Contr.* § 740; *Zeigler v. Hughes*, 55 Ill. 288; *Hopkinson v. Jones*, 28 Ill. App. 409; *Willin v. Burdette*, 172 Ill. 117; *Jennings v. McConnell*, 17 Ill. 148.

Cartwright, J., delivered the opinion of the court:

David S. Geer filed the original bill in this case in the superior court of Cook county, alleging that on August 29, 1895, he entered into an agreement with Robert J. Frank, by which Frank assigned to him an undivided one third of a claim of said Frank against the American Automatic Lighting Company, F. A. Cody, and L. T. Lawton, in consideration of his services to be rendered in prosecuting the same; that Frank agreed that he would not make any compromise, settlement, release, or satisfaction of the claim without Geer's consent; that Geer prosecuted the case, and obtained a judgment in favor of Frank for \$1,007.66 and costs; that Frank settled the judgment with the defendants therein, and satisfied the same, and refused to account; and that J. L. Bennett claimed some interest in the fund. The bill made said parties defendants, together with others who were alleged to have the fund or some portion of it, and prayed for the appointment of a receiver and an accounting, and a decree for the sum due. Bennett answered the bill, admitting its averments, and filed a cross bill setting out the agreement *in hæc verba*, as follows:

It is agreed, by and between Robert J. Frank, David S. Geer, and J. L. Bennett, that said Frank assigns to said Geer and Bennett each a one-third interest in his claim against the American Automatic Lighting Company, Cody, and Lawton. Said Geer, in consideration of said assignment, is to give his legal services, in conjunction with said Bennett, to the prosecution of any suits or other proceedings for the liquidation and settlement of said claim. Said Bennett, in consideration of said assignment, is to pay the necessary expenses, in the way of cash outlays, for court costs, etc., and give an equal amount of his legal services, in the same manner as Mr. Geer. For the costs and expenses already paid, said Bennett has paid said Frank \$25 in cash, and is to pay the balance, as requested by said Frank. It is agreed by all of said parties that no settlement or compromise of said claim shall be made without the assent of all parties.

Chicago, Ill., August 29, 1895.

Robert J. Frank,
David S. Geer,
J. L. Bennett.

Bennett then alleged in his cross bill that he rendered services as an attorney, in conjunction with Geer, in the collection of the claim, and paid Frank \$59.69, on his request, under the agreement to pay costs and expenses, and that Frank settled the judgment for \$700, and refused to account. He therefore asked for a decree for what was due him. The bill and cross bill were answered by the other defendants; and Frank denied the right of Geer and Bennett, or either of them, to an accounting, alleged that the contract was not performed or his suit properly prosecuted, and charged that the agreement was unlawful. Upon a hearing, the superior court dismissed the bill and cross bill, and the complainant in each appealed. The appellate court affirmed the decree, and granted a certificate of importance, by virtue of which Geer and Bennett are in this court as appellants, asking a reversal of the judgment of the appellate court. It appeared, on the hearing, that there had been an agreement between Geer and Frank, previous to the one of August 29, 1895, alleged in the bill and set out in the cross bill, by which previous agreement Geer was to prosecute the claim and receive one half the amount recovered or received, in settlement for his professional services, and Frank was to advance the costs. That agreement is not a subject for consideration here, both because it was not alleged in the bill or made a foundation for any claim, and because it was abandoned, and the agreement so alleged between the three parties was substituted for it.

Disregarding all other questions argued, we are of the opinion that the agreement is illegal and void. It was said in *Newkirk v. Cone*, 18 Ill. 449, that the common law of champerty had been abolished in this state, but this statement was corrected in *Thompson v. Reynolds*, 73 Ill. 11, where it was said the former decision was manifestly a mistake, and that the question was not involved in such former decision, the champertous agreement having been abandoned by the parties, by mutual consent. The law of champerty has been somewhat qualified by our decisions, but it is a part of the law of the state. We have held, in consonance with the great weight of modern authority, that an attorney may make an agreement for contingent fees of a legitimate character, by which he is to receive a certain share or part of the money or thing recovered. *West Chicago Park Comrs. v. Coleman*, 108 Ill. 591; *Phillips v. South Park Comrs.* 119 Ill. 626. In such a case, he has no interest in the litigation, except that of an attorney, and to the extent of his legal services; and if such a contract is not against conscience, and reasonable in its terms, a court of equity would doubtless enforce it. The law, however, does not permit a person having no interest in the subject-matter of a suit to become interested in it, and concerned in its prosecution; and an agreement by which such person, although an attorney, agrees to bear expense and costs of litigation, falls within the definition of

champerty, and will not be enforced, either at law or in equity. *Gilbert v. Holmes*, 04 Ill. 548; *Thompson v. Reynolds*, 73 Ill. 11. Under these rules the agreement between Bennett and Frank was champertous, and the undertakings of Geer and Bennett were so mutually dependent upon each other, as a consideration for the agreement of Frank, that the whole contract was tainted with illegality. The considerations for Frank's promise were the agreement of Geer to render legal services in conjunction with Bennett, Bennett's agreement to render legal services in conjunction with Geer, and Bennett's

agreement to pay the costs and expenses. The agreement could not be performed, and Geer render the services which he promised, except by Bennett carrying out his champertous agreement, and it was so executed. The undertakings cannot be separated, and, one of the considerations inducing the promise of Frank being illegal, the entire contract is void, and a court of equity will not aid in its enforcement.

The judgment of the Appellate Court is affirmed.

Petition for rehearing denied June 7, 1899.

MISSISSIPPI SUPREME COURT.

C. C. COFFEE, *Appt.*,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(.....Miss.....)

1. The ejection of a passenger who has no ticket, because he will not pay more than the regular fare, is wrongful where his failure to get a ticket, for which he otherwise would have had time, was, without any fault of his, due to delay in finding his satchel in the baggage room, where he had left it without any check, at a time when the ticket office was closed, as he was directed to do by the baggage master, who refused to give him a check until he had procured his ticket.
2. A rule that a baggage master shall not receive baggage into the baggage room until a ticket shall have been procured is an imposition on the public, unreasonable, and void.

(March 6, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jackson County in favor of defendant in an action brought to recover damages for wrongful ejection from defendant's train. *Reversed.*

Plaintiff boarded defendant's train at Mobile, and when asked for ticket or fare, stated that he arrived in Mobile earlier on the same day, and went immediately to the baggage room of the defendant company, and asked the baggage master to check his valise, but that the man refused to do so until he got a ticket. The ticket office was not open at that time, so with the baggageman's permission he left the valise with him until he could get a ticket and have it checked. That a few moments before the departure of the train which he was to take he returned to the depot, but could not find his valise. He searched for it until too late to get a ticket, and secured it just as the train was about to move off, so he was compelled to get on board immediately, or be left. The

NOTE.—For validity of extra charge for passenger fare when paid on train, see also *Phettl-place v. Northern P. R. Co.* (Wis.) 20 L. R. A. 483.

45 L. R. A.

conductor insisted on charging conductor's rates which were 1 cent a mile higher than ticket rates. Plaintiff refused to pay them, and the conductor put him off the train. The defendant insisted on its rule, which did not allow baggage masters to receive small baggage unless and until it was checked, as tending to relieve it from responsibility for the delay in finding the baggage. The court instructed the jury to return a verdict in defendant's favor.

Messrs. Denny & Woods for appellant.

Messrs. Mayes & Harris, for appellee:

The defendant's ticket office at the depot in Mobile was open for an hour before the train left, and plaintiff boarded the train without making any effort to obtain a ticket, and, upon being required to pay the conductor's rate for his passage, declined to do so, and was thereupon ordered to leave the train at St. Elmo, Alabama, and did so. The conductor had the right to demand the increased rate, and to eject plaintiff upon his failure to pay it.

Forsee v. Alabama G. S. R. Co. 63 Miss. 73, 56 Am. Rep. 801; 3 Wood, railroads, 1668.

The ejection being lawful, the recovery, if any, must have been for any damage done by the language, and could not include the inconvenience, loss, or expense incident to the lawful ejection.

Texas P. R. Co. v. James, 82 Tex. 306, 15 L. R. A. 347; *Rose v. Wilmington & W. R. Co.* 106 N. C. 168.

The wrongs complained of were consented to for the purpose of obtaining a cause of action, and the doctrine of *velenti non fit injuria* was applicable.

McGhee v. Drisdale, 111 Ala. 599. See also *Alabama & V. R. Co. v. Gibbs* (Miss.) 12 So. 545.

But even if the language used by the conductor caused plaintiff to suffer untold mental anguish, he could not recover, for such mental anguish was not accompanied by any injury to his person or property, and for such damages no recovery can be had.

Gulf, C. & S. F. R. Co. v. Trott, 86 Tex. 412; *Haile v. Texas & P. R. Co.* 23 U. S. App. 80, 60 Fed. Rep. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Western U. Teleg. Co. v. Rog-*

ers, 68 Miss. 748, 13 L. R. A. 859; 3 Sutherland, Damages, 715; *Kennon v. Gilmer*, 131 U. S. 26, 33 L. ed. 112.

When a passenger goes to a depot too late to attend to his baggage and purchase his ticket before entering the train, this will not relieve him from the obligation of purchasing a ticket.

Lake Erie & W. R. Co. v. Mays, 4 Ind. App. 413; *Hoffbauer v. Davenport & N. W. R. Co.* 52 Iowa, 342, 35 Am. Rep. 278.

And if he fails to pay his fare, he may be properly ejected.

Georgia Southern & F. R. Co. v. Asmore, 88 Ga. 529, 16 L. R. A. 53.

Appellant did not even have the right to have the train stop long enough for him to obtain a ticket.

Atchison, T. & S. F. R. Co. v. Hogue, 50 Kan. 40.

Whitfield, J., delivered the opinion of the court:

The case should have gone to the jury. A

rule that baggage shall not be checked until a ticket has been procured is a reasonable regulation to prevent imposition upon the company. But a rule that a baggage master shall not receive into the baggage room baggage until a ticket shall have been procured, if there be such a rule, is an imposition on the public, unreasonable, and void. It would require intending passengers to care for their own baggage in many situations that may readily be imagined, where to do so would be entirely impracticable. Every reasonable facility for travel should be afforded those who are intending passengers, and rules should be so framed as to be just in their provisions, alike to the company and the traveling public. As to the authority of the baggage master, see *Isaacson v. New York C. & H. R. Co.* 94 N. Y. 285, 286, 46 Am. Rep. 142.

Reversed and remanded.

Rehearing denied.

NEBRASKA SUPREME COURT.

NEBRASKA TELEPHONE COMPANY,
Plff. in Err.,
v.

STATE of Nebraska, ex rel. John O. YEISER.

(55 Neb. 627.)

- *1. A litigant will not be permitted to invoke the extraordinary remedy of mandamus when an express statute affords him an adequate remedy for the redress of the grievance of which he complains.
2. A private corporation, engaged in the business of operating a telephone plant, is a common carrier of news and intelligence.
3. Such a public-service corporation is charged with certain public duties, among which are to furnish for a reasonable compensation to any citizen a telephone and telephonic service, and to charge each patron for the service rendered the same price it charges every other patron for the same service under substantially the same or similar conditions.
4. The power—the jurisdiction—to determine what compensation a public-service corporation may exact for services to be rendered by it is a legislative, and not a judicial, function.
5. The jurisdiction of the courts is limited to declaring what the law is, and they are forbidden by the Constitution to perform legislative functions.

(June 23, 1898.)

*Headnotes by RAGAN, C.

NOTE.—For power of legislature to fix tolls, rates, and prices, see note to *Winchester & L. Turnp. Road Co. v. Croxton* (Ky.) 83 L. R. A. 177.

45 L. R. A.

ERROR to the District Court for Douglas County to review a judgment in favor of relator in a proceeding brought to compel defendant to give relator telephone facilities at certain rates which were less than those demanded by defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. Charles Offutt and W. W. Morsman, for plaintiff in error:

The alternative writ contained no averment that the relator had applied to the board of transportation and exhausted the remedy there.

Under the act of 1887, creating the Board of transportation and defining its powers, the board had ample power to fix and establish rates for railroad companies.

State Board of Transportation v. Fremont, E. & M. Valley R. Co. 22 Neb. 313, 23 Neb. 117.

The remedy by writ of mandamus cannot be invoked if the relator has another remedy.

State, Moore, v. Chicago, St. P. M. & O. R. Co. 19 Neb. 482; *State, Mattoon, v. Republican Valley R. Co.* 17 Neb. 647, 52 Am. Rep. 424; *Northern P. R. Co. v. Washington Territory, Dustin*, 142 U. S. 492, 35 L. ed. 1092; *Spelling, Extraordinary Relief*, § 1372.

The relator has no clear, legal right to demand, nor is the respondent under any duty, especially enjoined by law, that its rates be fixed at a sum which will produce no more than a "fair, reasonable, and just dividend" to its stockholders.

The relator's right to have the specific thing he demands performed by the respondent must be clear and certain.

State, Beatty, v. Omaha, 14 Neb. 265, 45 Am. Rep. 108; *State, Hymer, v. Nelson*, 21 Neb. 572; *State, First Nat. Bank, v. Cook*, 43 Neb. 318; *State, Gillilan, v. Home Street R. Co.* 43 Neb. 830; *State, Wyckoff, v. Merrell*,

43 Neb. 575; *Laftin v. State*, Gray, 49 Neb. 614.

There is no principle of law which forbids a corporation, or person, prosecuting a quasi public business, from charging for services performed, or for the use of property furnished, all that the service or use is fairly and reasonably worth, regardless of the amount of profits that may be earned, any more than there is in the case of business of a purely private character.

The state acting through the legislative department undoubtedly possesses the power to fix by law the value of such service, by prescribing the maximum charge which may be taken. What limitation exists upon this power, by the state, has not yet been clearly decided; but it has been repeatedly held that the power is not without limitation.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 395, 38 L. ed. 1022, 4 Inters. Com. Rep. 560.

The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176.

We know of but one case in which such a contention as is made here has been made, and in that the contention was pronounced preposterous.

Canada Southern R. Co. v. International Bridge Co. L. R. 8 App. Cas. 723.

The rates can be made neither too high nor too low, without producing a loss of revenue. To avoid this requires the constant exercise of judgment and discretion and prompt recognition of economic conditions and forces. This necessary discretion and judgment cannot be controlled by mandamus.

Northern P. R. Co. v. Washington Territory, *Dustin*, 142 U. S. 492, 35 L. ed. 1092; *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484.

The alternative writ contained no averment of facts showing that the service sought to be coerced was a duty "specially enjoined by law."

The power to fix the rates is a legislative power.

Baltimore & O. R. Co. v. Maryland, 21 Wall. 456, 22 L. ed. 678; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 156, 24 L. ed. 94; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 169, 24 L. ed. 97; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 181, 24 L. ed. 99; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560; *State* 45 L. R. A.

Board of Transportation v. Fremont, E. & M. Valley R. Co. 22 Neb. 313, 23 Neb. 117.

The averments of discrimination are wholly immaterial.

Western U. Teleg. Co. v. Call Pub. Co. 44 Neb. 326, 27 L. R. A. 622.

Mr. John O. Yeiser, in propria persona: Corporations or natural persons engaged in certain classes of business or business for certain purposes are subject to regulation and control by the state.

This regulation is applicable to any business which may be classified under the three general heads:

1. Common carriers.

People v. Budd, 117 N. Y. 19, 5 L. R. A. 559; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 568, 30 L. ed. 248, 1 Inters. Com. Rep. 31; *Budd v. New York*, 143 U. S. 537, 36 L. ed. 253, 4 Inters. Com. Rep. 45; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 455, 33 L. ed. 979, 3 Inters. Com. Rep. 209; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 217, 29 L. ed. 166, 1 Inters. Com. Rep. 362.

2. Public monopolies.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173; *Brass v. North Dakota*, *Stoeser*, 153 U. S. 403, 38 L. ed. 761, 4 Inters. Com. Rep. 670; *People v. Budd*, 117 N. Y. 16, 5 L. R. A. 559; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 167; *Frederick v. Groshon*, 30 Md. 446, 96 Am. Dec. 591; *State, Webster, v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *Haugen v. Albina Light & Water Co.* 21 Or. 418, 14 L. R. A. 424.

3. Business in which the public have an interest or a public necessity.

People v. Budd, 117 N. Y. 16, 5 L. R. A. 559; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31.

Telephone companies are subject to regulation by reason of the fact of their being engaged in a business partaking of all three of the elements or principles which permit of the regulation of a business by the state, viz.:

1. As a common carrier.

State, Webster, v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404; *Hockett v. State*, 105 Ind. 257, 55 Am. Rep. 201; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 167; *State, Postal Teleg. Cable Co. v. Delaware & A. Teleg. & Teleph. Co.* 47 Fed. Rep. 636; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278; *Central Union Teleph. Co. v. Bradbury*, 106 Ind. 1; *Delaware & A. Teleg. & Teleph. Co. v. State, Postal Teleg. Cable Co.*, 3 U. S. App. 30, 50 Fed. Rep. 678, 2 C. C. A. 1; *Central Union Teleph. Co. v. State, Falley*, 118 Ind. 194; *People v. Budd*, 117 N. Y. 22, 5 L. R. A. 559; *Gillis v. Western U. Teleg. Co.* 61 Vt. 465, 4 L. R. A. 611; *Bell Teleph. Co. v. Com., Baltimore & O. Teleg. Co. (Pa.)* 3 Atl. 825

2. As a public monopoly.

State, Webster, v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404.

3. As a business in which the public have an interest.

State, Webster, v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404; *State, Baltimore & O. Teleg. Co., v. Bell Teleph. Co.* 23 Fed. Rep. 540; *Hockett v. State*, 105 Ind. 258, 55 Am. Rep. 201; *State, Postal Teleg. Cable Co., v. Delaware & A. Teleg. & Teleph. Co.* 47 Fed. Rep. 637; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674.

This proceeding was not for the purpose of fixing rates.

I simply show to the court that I tendered reasonable compensation to a telephone company, to place it under legal obligations to perform a public duty for me. This is a proceeding quite distinct from fixing rates.

If it is not a legislative function for a court in a proper suit to investigate the business of a railroad company including receipts, expenditures, operation, cost, and worth, to set aside a rate fixed by the sovereign power of the state because unconstitutional, confiscatory, or unreasonable, it would not be a legislative act for a court upon the application of a citizen to investigate the same facts and set aside a rate fixed by the corporation when found to be not only unjust, unreasonable, and oppressive, but expressly forbidden by the common law.

Stamford v. Pawlett, 1 Crompt. & J. 81.

If, in the absence of legislation, this corporation demands a specific charge for a service it is obliged to perform upon payment of a reasonable compensation, and a dispute arises as to the reasonableness of the charge, its settlement is a judicial question.

Chicago & A. R. Co. v. People, Koerner, 67 Ill. 18, 16 Am. Rep. 599.

Any citizen has the right, without regard to charters and without any act of the legislature, to hold the company responsible for any breach of its duty as a common carrier in charging exorbitant freight rates or toll.

Sloan v. Pacific R. Co. 61 Mo. 32, 21 Am. Rep. 397.

The compensation determined upon as reasonable is not a rate fixed by the court, but if it is to be regarded as a rate it was fixed by the legislature and merely found by the court.

The common law requires common carriers and similar public servants to render service for a reasonable compensation.

Chapter 15 of the Compiled Statutes enacts the common law in this state.

The legislature thereby fixed rates at what was reasonable, leaving it as a judicial question for the courts to determine what amount in any given case was the rate fixed by the legislature.

People v. Budd, 117 N. Y. 20, 5 L. R. A. 559; *Ruggles v. Illinois*, 108 U. S. 533, 27 L. ed. 815; *Chicago & A. R. Co. v. People, Koerner*, 67 Ill. 18, 16 Am. Rep. 599.

The carrier in assuming this public duty made the public proffer to perform the service and I accepted it, demanding the service. 45 L. R. A.

I asked the court to compel this public servant to perform its duty, and carry out its contract.

Killmer v. New York, C. & H. R. R. Co. 100 N. Y. 402, 53 Am. Rep. 194.

If this proceeding is legislating, and the court is forbidden to legislate to such an extent, railroads could not obtain the aid of the courts to set aside a legislative rate.

2 Bl. Com. p. 455; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Dow v. Beidelman*, 125 U. S. 688, 31 L. ed. 843, 2 Inters. Com. Rep. 56.

A citizen may invoke the aid of a court when imposed upon by a corporation with an unreasonable rate.

Lough v. Outerbridge, 143 N. Y. 271, 25 L. R. A. 674.

Legislative and judicial duties cannot in all cases be separated.

The aid of the court has been invoked in the absence of legislation since the days of Lord Chief Justice Hale down to 1875, and even the present day, and was the practice under the common law.

Stamford v. Pawlett, 1 Crompt. & J. 57; *Allnutt v. Inglis*, 12 East, 527; *Bolt v. Stennett*, 8 T. R. 608; *Gard v. Oallard*, 6 Maule & S. 76; *Chicago & A. R. Co. v. People, Koerner*, 67 Ill. 11, 16 Am. Rep. 599.

Although such business is and has been usually regulated by the legislature, nevertheless, in the absence of legislation, it has been from time immemorial, and is now, the practice and custom to regulate such business by the judiciary.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 458, 33 L. ed. 981, 3 Inters. Com. Rep. 209; *Munn v. Illinois*, 94 U. S. 133, 24 L. ed. 86; *State, Mattoon, v. Republican Valley R. Co.* 17 Neb. 666, 52 Am. Rep. 424; *Dow v. Beidelman*, 125 U. S. 687, 31 L. ed. 843, 2 Inters. Com. Rep. 56; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 589; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 588; *Sterne v. Metropolitan Teleph. & Teleg. Co.* 19 App. Div. 316; *Menachio v. Ward*, 27 Fed. Rep. 533; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 331, 29 L. ed. 644; *Augusta Southern R. Co. v. Wrightsville & T. R. Co.* 74 Fed. Rep. 527; *Camblos v. Philadelphia & R. R. Co.* 4 Brewst. (Pa.) 563; *Beach, Priv. Corp.* § 48; *Schouler, Carr.* § 378; *Gray, Communication by Telegraph*, 21-54; *Ray, Negligence, Imposed Duties*, 599; *People, Hunt, v. Chicago & A. R. Co.* 130 Ill. 181; 8 Am. & Eng. Enc. Law, p. 916; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812; *Chicago & A. R. Co. v. People, Koerner*, 67 Ill. 11, 16 Am. Rep. 599; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; 1 Story, Eq. Jur. §§ 27-33; *Stamford v. Pawlett*, 1 Crompt. & J. 81.

A reasonable compensation was all that could be exacted by common carriers at common law.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 589; *Steenerson v. Great Northern R. Co.* 69 Minn. 353; *People v. Budd*, 117 N. Y. 18, 5 L. R. A. 559;

Killmer v. New York C. & H. R. R. Co. 100 N. Y. 395, 53 Am. Rep. 194; *Chicago & A. R. Co. v. People, Koerner*, 67 Ill. 11, 16 Am. Rep. 599; *Lough v. Outerbridge*, 143 N. Y. 271, 25 L. R. A. 674; 2 Kent, Com. 13th ed. p. 598; *Ruggles v. Illinois*, 108 U. S. 531, 27 L. ed. 815; *Beach, Priv. Corp.* § 834, note 1; *Story, Bailm.* §§ 495, 508; 2 *Parsons, Contr.* 175.

Not the value of the service to the subscriber, and but the reasonable compensation for the service yielded, given, or surrendered by the monopolist, is to be considered in fixing the compensation.

Parker v. Jenkins, 3 Bush, 591; *New Jersey R. & Transp. Co. v. Sugdam*, 17 N. J. L. 47; *Steenerson v. Great Northern R. Co.* 69 Minn. 353; *Sterne v. Metropolitan Teleph. & Teleg. Co.* 19 App. Div. 316; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560; *Ames v. Union P. R. Co.* 64 Fed. Rep. 165; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 594.

An inquiry may be made by the court as to what surplus will remain as dividends upon invested capital, and it may say whether it is reasonable or unreasonable.

Ames v. Union P. R. Co. 64 Fed. Rep. 179.

The burden of showing the rate to be reasonable is on the carrier.

Steenerson v. Great Northern R. Co. 69 Minn. 353.

Relator has no other speedy and adequate remedy at law.

A new remedy being enacted without repealing the common law, the remedy is considered cumulative and a party may elect either.

Gooch v. Stephenson, 13 Me. 371; *Candee v. Hayward*, 37 N. Y. 653; *Crittendon v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462; *People v. New York C. & H. R. R. Co.* 74 N. Y. 307; *Central Union Teleph. Co. v. State, Falley*, 118 Ind. 210; *State, Willard, v. Stearns*, 11 Neb. 107.

The alleged duty of a common carrier is one especially enjoined by law.

People, Hunt, v. Chicago & A. R. Co. 130 Ill. 181; *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63 Me. 279, 18 Am. Rep. 208; *Abbott v. Johnstown, G. & Ky. Horse R. Co.* 80 N. Y. 31, 36 Am. Rep. 572; *People v. New York C. & H. R. R. Co.* 28 Hun, 543; *Stamford v. Pawlett*, 1 Crompt. & J. 81; *Swan v. Williams*, 2 Mich. 439; *Allnutt v. Inglis*, 12 East, 541.

Where such public servants refuse to perform such a service as they are in duty bound to render under the common law, courts will compel it by mandamus.

State, Webster, v. Nebraska Teleph. Co. 17 Neb. 136, 52 Am. Rep. 404; *State, Mattoon, v. Republican Valley R. Co.* 17 Neb. 656, 52 Am. Rep. 424; *State, Lanyon, v. Joplin Waterworks*, 52 Mo. App. 312; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 400, 59 Am. Rep. 167; *Central Union Teleph. Co. v. State, Falley*, 118 Ind. 194; *Chicago & N. W. R. Co. v. People*, 56 Ill. 367, 8 Am. Rep. 90; *State, Postal Teleg. Cable Co., v. Delaware & A. Teleg. & Teleph. Co.* 47 Fed. Rep. 633; *Augusta Southern R. Co. v. Wrightsville & T. R. Co.* 74 Fed. Rep. 527; 45 L. R. A.

People, Hunt, v. Chicago & A. R. Co. 130 Ill. 181; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 582; *Haugen v. Albina Light & Water Co.* 21 Or. 423, 14 L. R. A. 424; *Peach, Priv. Corp.* 1308; *Morawetz, Priv. Corp.* § 1132; *Central Law Journal*, October 1, 1897.

Ragan, C., filed the following opinion:

The Nebraska Telephone Company is a corporation organized and existing under the laws of the state, having its principal office and place of business in the city of Omaha, and owns and operates a telephone plant in that city. John O. Yeiser is by profession a lawyer, and a citizen of said city of Omaha. Yeiser desired a telephone placed in his law office for his own use, and requested the telephone company to furnish him an instrument properly connected, and afford him telephone service. The telephone company refused to comply with this request unless Yeiser would pay it for such instrument and service the sum of \$5 per month in advance. Yeiser claimed that this sum was an unreasonable and exorbitant charge, refused to pay the same, but tendered the telephone company \$9 as compensation for the service required of it for three months, and demanded that it supply him with the telephone and telephonic service for that length of time. This demand was refused, and Yeiser thereupon applied to the district court for, and obtained, a peremptory writ of mandamus directed to the telephone company, commanding it to furnish Yeiser the telephone and telephonic service required by him for three months for the sum of \$9. The telephone company has brought this judgment here for review.

1. Section 1, art. 8, chap. 72, Comp. Stat. 1897, provides that all charges made for any service rendered or to be rendered by the common carriers of the state shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. By § 11 of said article and chapter certain state officers are constituted a board of transportation, and § 12 of said article and chapter defines the powers and duties of said board of transportation with reference to the common carriers of the state. Construing this statute, this court held, in *State Board of Transportation v. Fremont, E. & M. Valley R. Co.* 22 Neb. 313, that the board of transportation had authority to determine what were just and reasonable charges for a service rendered or to be rendered by common carriers, and that said board of transportation was invested with jurisdiction to fix, prescribe, and determine the charges which a common carrier might demand and receive for a service rendered or to be rendered by it, subject only to the limitation that the rate or charge fixed by the board should be just and reasonable. The legislature of 1897 (see Sess. Laws 1897, chap. 56, § 24; Comp. Stat. 1897, chap. 72), conferred upon this board of transportation the same and all powers over the telephone, telegraph, and express companies of the state that it had over common carriers or railroad corpora-

tions of the state. In other words, if the statutes just referred to are valid, and we have placed a correct construction upon them the legislature has conferred upon this board of transportation not only jurisdiction to inquire into charges of extortion and unjust discrimination on the part of the telephone companies, and to make suitable orders for the redress of such grievances upon the complaint of the person aggrieved, but has also invested the board of transportation with authority to fix and determine to what compensation a telephone company shall be entitled for any service rendered or to be rendered by it, subject to the limitation that the scale of prices fixed which the telephone company may charge for services to be rendered by it shall not be unreasonable or unjust either to the telephone company or its patrons. *State, Moore, v. Chicago, St. P. M. & O. R. Co.* 19 Neb. 476, was a mandamus proceeding instituted in this court to compel the respondent to build a depot, side tracks, switches, and cattle yards at a certain point on its road. But this court held that whether the railway company should be compelled to build a depot at the place requested was a question—in the first instance, at least—for determination by the board of transportation; that the legislature, by the statute just quoted, had committed the determination of that question to that board; that because the board was a special tribunal, created for the purpose of determining the question, its powers in that respect must be exhausted before the court would interfere by mandamus to compel the railroad company to build the depot. We think this case controls the one at bar. So far as the record before us discloses, no application has ever been made by the relator to the board of transportation to have it determined whether the charge of \$5 per month demanded by the telephone company for the use of a telephone and telephonic service is unreasonable and exorbitant; whether \$3 per month for the use of a telephone and telephonic service is a reasonable charge; nor that the board has fixed a scale of reasonable charges which the telephone company may exact for a service performed or to be performed by it. It is a familiar principle that the litigant will not be permitted to invoke the extraordinary remedy of mandamus where an express statute affords him an adequate remedy for the redress of the grievance of which he complains, and this is the principle upon which the case just cited rests. A statute of the state of Indiana required each railway company of the state to file with the auditor of the county where its principal office was situate a statement of the amount of its capital stock for the purposes of taxation. This statement was to be filed between the 1st of January and the 1st of June each year. Another statute provided that if a railway company of the state failed to file with such auditor such statement, then it should be the duty of the auditor himself to make the statement, or list, for the purposes of taxation, the amount of the capital stock of such railway company, determining the facts in 45 L. R. A.

the manner provided by statute. A railway company of the state neglected to file with the auditor of the county where its principal office was located between the 1st of January and the 1st of June a statement of the amount of its capital stock, and thereupon the auditor of the state instituted a proceeding in mandamus to compel the railway company to make and file such statement with such county auditor. The district court awarded the mandamus as prayed. But the supreme court reversed the judgment of the district court, saying: "If it were not provided by statute that upon failure of the railroad company to file such statement within the time required by law the auditor of the county shall proceed to make the same, mandamus would doubtless lie to compel the officer of the road to furnish the list after the time had expired. But the rule is well established that mandamus will not lie where the statute has expressly provided another adequate remedy." *Louisville & N. A. R. Co. v. State*, 25 Ind. 181. To the same effect are *State, Wolff, v. Sheboygan County Supers.* 29 Wis. 79; *Marshall v. Sloan*, 35 Iowa, 445.

2. The respondent in the case at bar is a private corporation. By permission of the city of Omaha it is occupying the streets and alleys of that municipality with its poles, wires, and other appliances used in the conduct of the business in which it is engaged. It is a common carrier of news and intelligence. It is a corporation affected with a public use,—a public service corporation,—and as such it has assumed and is charged with certain public duties, among which are to furnish for a reasonable compensation to any inhabitant of the city of Omaha a telephone and telephonic service, and to charge each of its patrons for the service rendered or to be rendered the same price it charges every other patron for the same service under substantially the same or similar conditions. *State, Webster, v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *American Waterworks Co. v. State, Walker*, 46 Neb. 194, 30 L. R. A. 447; *Western U. Teleg. Co. v. Call Pub. Co.* 44 Neb. 326, 27 L. R. A. 622. But the judgment under consideration determines, not only that the telephone company shall render for the relator the service required by him, but fixes and determines as well what compensation the relator shall pay to the respondent for such service. This judgment, then, in effect determines, decides, and fixes the charges which the respondent may lawfully exact for services to be rendered in future by it to its patrons. Where a public service corporation has performed a service, and sues to recover therefor, in the absence of an express contract for a specific compensation the measure of its damages is a reasonable compensation for the services performed; and whether the compensation which it demands is reasonable is a judicial question. Where the legislature has fixed the compensation which a public service corporation may exact for the performance of a service, then the reasonableness of the compensation so fixed by the legislature—that is, whether the

limiting of the corporation to the compensation fixed by the statute would result in a confiscation of the corporation's property—is a judicial question. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819. But the power—the jurisdiction—to determine what compensation a public service corporation may exact for service to be rendered by it we understand to be a legislative, and not a judicial, function. In the case at bar the respondent had not performed services and sued to recover the compensation. If it had, the relator might have defended upon the ground that the compensation demanded was unreasonable, and the court would have had jurisdiction to determine the question. The case at bar is not a suit by the relator for damages against the respondent for its neglect and refusal to render to him for a reasonable compensation the service he demanded. In the case at bar the relator did not pay the compensation alleged to be exorbitant, which the respondent demanded, and then sue to recover back the excess. Had he done so it may be that the court would have had the power to determine whether the compensation actually demanded and received by the respondent was unreasonable. But here the court determines that the respondent shall perform for the relator a specific service for three months for a specific sum of money. This, in effect, was a determination by the court that \$3 per month was a reasonable compensation for the service required to be rendered by the respondent, and a fixing of the compensation for such service at that price for the future.

We think the history of the legislation of the entire country shows that the power to determine what compensation public service corporations may demand for their services is a legislative function, and not a judicial one. If the courts may determine what compensation a telephone company may exact for a service to be rendered in the future, we know of no reason why the courts may not determine the freight and passenger rates which the railway corporations of the state may charge for the transportation of freight and passengers; and yet the framers of our Constitution recognized that this power to fix the compensation of public service corporations was a legislative one, as by that instrument they expressly confer upon the legislature the power from time to time

to pass laws establishing reasonable rates or charges for the transportation of passengers and freight. Const. art. 11, § 4. And it is evident that the legislature has acted upon the theory that this power to fix the compensation of public service corporations is one vested in it by the Constitution. This is evident from its creation of the board of transportation, and the powers conferred upon that board; and as late as 1897 the legislature conferred authority upon the mayor and council of cities of the metropolitan class to fix and determine by ordinance what compensation telephone companies doing business within such cities might charge and exact for services rendered or to be rendered by them. Comp. Stat. 1897, chap. 12a, § 131. Fixing a compensation which public service corporations may charge for services to be rendered by them is legislating; it is lawmaking. The power of the courts is limited to declaring what the law is, and they are precluded by the Constitution from performing legislative functions; and, though the courts of the land have from time to time declared laws fixing the compensation which public service corporations might charge for services to be rendered by them void because the compensation fixed by the law was unreasonable in that the enforcement of the statute would confiscate the corporation's property, and thereby deprive it of its property without due process of law, we know of no court which has ever claimed that it had authority to determine what compensation would be a reasonable one for a service to be performed by such corporation. The relator must address himself for relief from the grievances of which he complains to the legislative power of the state,—to the legislature itself, to the board of transportation, to the mayor and council of the city of Omaha. If the compensation now charged and exacted by the telephone companies of the state is exorbitant and unreasonable, we must presume that the board of transportation, the mayor and council of the city of Omaha, and the legislature of the state, one and all of them, will investigate the matter and prescribe a scale of reasonable charges.

The judgment of the District Court is reversed, and the proceeding dismissed.

Rehearing denied.

NEW YORK COURT OF APPEALS.

William T. GILBERT, Receiver of Commercial Alliance Life Insurance Company,
Resp't.,

v.

Benjamin C. ACKERMAN, Impleaded, etc.,
Appt.

(159 N. Y. 118.)

1. A statute speaks from the moment it takes effect.
2. A statute which shortens the period for bringing an action without providing a reasonable time for bringing it after the statute takes effect is unconstitutional as a deprivation of property without due process of law, even if a period of sever-

NOTE.—The constitutionality of a statute shortening the period of limitations is presented in an unusual way in the above case, in which the statute allows no period for bringing an action after it goes into effect, although the

taking effect of the statute is postponed for several months after its passage.

For a few cases on the general subject, see also note to *Best v. Baumgardner* (Pa.) 1 L. R. A. on page 859. See also *Bates v. Cullum* (Pa.) 34 L. R. A. 440.

al months elapses between the passage of the act and the time when it goes into effect.

(May 2, 1899.)

APPPEAL by defendant Ackerman from an order of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County in favor of defendants in an action to hold them liable for certain acts which they had committed as directors of the insolvent corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Michael H. Cardoso and Raymond Reubenstein, for appellant:

The amendatory act does not impair the obligation of a contract.

Statutes of limitation shortening the time within which actions may be brought, and leaving a reasonable time to sue, affect the remedy only, and do not impair the contractual obligation.

Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Re Brown*, 135 U. S. 701, 34 L. ed. 316; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *People v. Turner*, 117 N. Y. 240; *Reid v. Albany County Supers.* 128 N. Y. 364; *Parmenter v. State*, 135 N. Y. 154.

This action is to recover for a tort, a wrong, and hence there is no question as to the impairment of the obligation of a contract.

Dash v. Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291; *Dubois v. Kingston*, 20 Hun, 500; *Garrison v. New York*, 21 Wall. 196, 22 L. ed. 612; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193; *Louisiana, Folsom, v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925.

The period of four months and fourteen days is reasonable under the authorities.

Terry v. Anderson, 95 U. S. 633, 24 L. ed. 366; *People v. Turner*, 117 N. Y. 227, 145 N. Y. 451, 168 U. S. 90, 42 L. ed. 392; *Wheeler v. Jackson*, 41 Hun, 410, 105 N. Y. 691, 137 U. S. 245, 34 L. ed. 659; *Stine v. Bennett*, 13 Minn. 153; *Horbach v. Miller*, 4 Neb. 31; *Bigelow v. Bemis*, 2 Allen, 496; *Smith v. Morrison*, 22 Pick. 432; *Duncan v. Cobb*, 32 Minn. 460; *Smith v. Packard*, 12 Wis. 371; *O'Bannon v. Louisville, C. & L. R. Co.* 8 Bush, 348.

The interval of time between the passage of the act of 1897 and the date it went into effect must be considered in determining whether a reasonable time was allowed to the plaintiff to institute his action.

Wrightman v. Boone County, 82 Fed. Rep. 412, 60 U. S. App. 100, 88 Fed. Rep. 435, 31 C. C. A. 570; *Stine v. Bennett*, 13 Minn. 153; *Horbach v. Miller*, 4 Neb. 31; *Bigelow v. Bemis*, 2 Allen, 496; *Smith v. Morrison*, 22 Pick. 432; *Duncan v. Cobb*, 32 Minn. 460; *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358; *Eaton v. Manitowoc County Supers.* 40 Wis. 668; *Baker v. Columbia County Supers.* 39 Wis. 444; *Hedger v. Rennaker*, 3 45 L. R. A.

Met. 255; *State, Isaac, v. Jones*, 21 Md. 432; *Sedgw. Stat. & Const. L.* 613, note.

The legislature had power to restrict the right of the plaintiff as receiver to maintain this action.

De Moss v. Newton, 31 Ind. 219; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75.

Mr. Henry D. Hotchkiss, for respondent:

Unless its operation is controlled by the Code, § 414, the act of 1897 was unconstitutional as to existing causes of action.

Koshkonong v. Burton, 104 U. S. 668, 20 L. ed. 886; *Parmenter v. State*, 135 N. Y. 154.

By the amendment of 1897 common-law actions against defaulting or negligent directors were discriminated against without any good reason and in hostility to all previous legislation.

Brinckerhoff v. Bostwick, 99 N. Y. 191.

The act is unconstitutional because it destroys vested rights by depriving us of a reasonable opportunity to enforce them.

Cooley, Const. Lim. *358; *Westervelt v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160.

Code, § 414, exempted us from the effect of the act of 1897 in case we brought suit within two years from September 1, 1897.

Goillotel v. New York, 87 N. Y. 441; *Conyngham v. Duffy*, 125 N. Y. 200; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737.

Gray, J., delivered the opinion of the court:

The plaintiff became the receiver of the Commercial Alliance Life Insurance Company in proceedings instituted to dissolve the corporation upon the ground of its insolvency. He commenced this action against the defendants to recover moneys alleged to have been misapplied or wasted by them while directors of the company. Among other defenses interposed by the answer of the defendant, who is appellant here, to the demand of the plaintiff, was this, viz.: That the cause of action did not accrue within three years before the commencement of the action. To that defense the plaintiff demurred as being insufficient in law. At the special term the demurrer was overruled, but upon appeal to the appellate division in the first department that court reversed the special term judgment, and sustained the demurrer, giving leave to appeal to this court, and certifying this question: "Is the fourth separate defense contained in the defendant's answer herein insufficient in law upon the face thereof to constitute a defense?" When this action was commenced, in 1898, § 394 of the Code of Civil Procedure provided that an action against a director of a moneyed corporation to enforce a liability created by the common law or by statute must be brought within three years after the cause of action has accrued. It had been amended in 1897 so as to include the liability at common law (Laws 1897, chap. 281), whereas prior thereto its reference was simply to an action "to enforce a liability created by law." That language was held to make it applicable to

a liability created by statute law, and to be, therefore, inapplicable to the common-law liability arising from the relation of a director to his corporation. *Brinckerhoff v. Bostwick*, 99 N. Y. 185. The amendment broadened the provisions of the section so as to embrace all causes of action against directors. The present cause of action is alleged to have accrued in May, 1893, and this plaintiff was appointed receiver in 1895. When he commenced this action, in 1898, only about four years and ten months of the six years had expired which had constituted, prior to the amendment of § 394, the limitation of time for its commencement. The question is, Was the amendment of the section in 1897 a valid exercise of legislative power as to the plaintiff, and effectual to bar the remedy formerly available to him? The amendatory act of 1897 became a law on April 16 of that year, but by its 2d section it provided that it should take effect September 1, 1897, thus leaving an intervening period of time of four months and fourteen days between its passage and its taking effect. It was held at the appellate division that the act was invalid, because no time whatever was given to the plaintiff, after it went into effect, within which to commence his action. No reservation was made by the terms of the act in favor of liabilities which were in existence at the time the act went into effect, nor was any time allowed within which to commence an action after the act became effectual. I can find no authority, and I am not referred to any in this state, upon the point which is thus raised; while outside of this state it may be said that a number of cases hold adversely to the view taken by the appellate division. *Smith v. Morrison*, 22 Pick. 430; *Stine v. Bennett*, 13 Minn. 153 (Gil. 138); *Duncan v. Cobb*, 32 Minn. 460; *Eaton v. Manitowoc County Supers.* 40 Wis. 668; *Hedger v. Renaker*, 3 Met. (Ky.) 255; *Hart v. Bostwick*, 14 Fla. 180; *Wrightman v. Boone County*, 82 Fed. Rep. 412.

The doctrine of these cases would seem to be that, if an act affords a reasonable opportunity for parties to commence actions between the time of its passage and the time when, by its terms, it is to go into effect, the legislative power has been constitutionally exercised. The doctrine rests, evidently, upon the theory that, as the act has become the law of the state upon its passage, all persons are to be presumed to have notice of its provisions, and, if the period of time intervening until it becomes effectual is not to be regarded as a saving period for the enforcement of existing causes of action, there is no reason in the provision for its taking effect at a future day. On the other hand, we have the opinion of Judge Cooley in *Price v. Hopkin*, 13 Mich. 318, in support of the proposition that the statute begins to speak the moment it takes effect, and not before, and therefore, that the period of time intervening between its passage and its taking effect is not to be counted. In his work on Constitutional Limitations (*366), that eminent ju-

rist says that, "it is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action." It is true that his opinion in *Price v. Hopkin* had some reference to the provisions of the state Constitution, but the decision was not entirely dependent upon that feature. He takes this position: That a statute has not, *ex proprio vigore*, any force until it becomes the law of the land, and that is when, by its terms, it takes effect; and as, up to that moment, the party is allowed by the existing law a period for the commencement of his action, if, at the instant that the new statute takes effect, the period is cut off, and the remedy forever barred, then the act is unconstitutional. In his language: "Whether passed at that moment or before [referring to the time of taking effect], we conceive to be immaterial, and that the statute cannot be applied . . . without violating a plain principle of constitutional law." I incline to the view that the position taken by the appellate division in this action is, on the whole, the preferable one. It establishes a simple and a salutary rule in the enactment of statutes of limitation, which leaves no room for construction and doubt, and which harmonizes with the principle that recognizes a statute as speaking the moment it takes effect. That a party is chargeable with knowledge of the passage of a statute which alters an existing law, whereby his claim may be affected, is undoubtedly true in law; but I do not consider that that is a sufficient or satisfactory answer to the proposition that, when the legislature makes a new statute of limitations, it should make some provision therein that, after the statute takes effect, parties whose rights of action are to be affected by the new law shall have a reasonable period within which to prosecute their claims. It should not be left to supposition and inference from the circumstances.

There is no question as to the power of the legislature to pass or to shorten statutes of limitation. A party has no more a vested interest in the time for the commencement of an action than he has in the form of the action. The only restriction upon the legislature in the enactment of statutes of limitation is that a reasonable time be allowed for suits upon causes of action theretofore existing. *Reaford v. Knight*, 11 N. Y. 308; *People v. Turner*, 117 N. Y. 227. The question of reasonableness, naturally and primarily, is with the legislature; and when the question is brought before the court the surrounding circumstances are regarded in determining whether the legislature, in prescribing a period of limitation, has erred to the prejudice of substantial rights. The right possessed by a person of enforcing his claim against another is property; and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no

person shall be deprived of property without due process of law.

The plaintiff in the present case, as receiver, is asserting a right of action which existed in the corporation, *viz.*, to hold its directors, as its agents, to a liability to make good the damage caused to the corporate property by their wrongful acts. That was a liability existing at common law, and the statute allowed to him the period of six years from the time it arose within which to prosecute it. When, subsequently, the legislature curtailed his right to sue, by an amendment, in 1897, of the general statute of limitations, which allowed no time in

which he might bring the suit after the statute had come into operation, he had the right, in his representative capacity, to assert its unconstitutionality as affecting the cause of action against the defaulting directors, which had vested in him as receiver. My conclusion is that the appellate division correctly sustained the plaintiff's demurrer to this defense, and that the question certified to us should be answered in the affirmative.

The order should be affirmed, with costs.

All concur.

MICHIGAN SUPREME COURT.

Frank B. HOLMES *et al.*

v.

COMMON COUNCIL OF DETROIT *et al.*,
Appts.

(.....Mich.....)

1. The fact that material to be used in the construction of a pavement or other public work is in the hands or under the control of a single dealer, whether by reason of a patent or otherwise, does not preclude the specification of that material in a contract for such improvement to be let on competitive bidding.
2. Judicial notice may be taken of the prevalence of accusations of corruption in the letting of municipal contracts.

(May 23, 1899.)

APPEAL by defendants from a judgment of the Circuit Court for Wayne County in favor of plaintiffs in a suit brought to enjoin defendants from confirming a street-improvement contract. *Reversed.*

The facts are stated in the opinion.

Mr. John J. Speed, with **Mr. Charles Flowers**, for appellants:

If the rule of *stare decisis* is to prevail, it would seem to be sufficiently established in this state that the city may solicit bids and contract for a patented pavement.

Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185; *Motz v. Detroit*, 18 Mich. 515; *Atty. Gen., Cook, v. Detroit*, 26 Mich. 263; *Detroit v. Hosmer*, 79 Mich. 384.

The bids were for an entire work of paving the street, not merely for the brick alone, and according to the testimony the brick might be purchased by anyone at a fixed price, and the work is done at the general expense and not by assessment.

Re Dugro, 50 N. Y. 513; *Baird v. New York*, 96 N. Y. 567; *Yarnold v. Lawrence*, 15 Kan. 129; *Worthington v. Boston*, 41 Fed. Rep. 23; *Harlem Gaslight Co. v. New York*, 33 N. Y. 309.

NOTE.—On the question of municipal contracts for work or articles which embody patented invention, see *Kilvington v. Superior (Wis.)* 18 L. R. A. 45.

Messrs. Warner, Codd, & Warner, for appellees:

Complainants, as taxpayers, have a right to file a bill to determine the question involved.

Campbell v. Wyandotte, 105 Mich. 2; *Robinson v. Detroit*, 107 Mich. 168; *Cooley, Taxn.* 2d ed. 764 *et seq.*; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; *Campbell v. Western Electric Light Co.* 113 Mich. 333; *Curtenius v. Hoyt*, 37 Mich. 583; *People, Ayres, v. State Auditors*, 42 Mich. 422; *McCoy v. Briant*, 53 Cal. 247; *Withington v. Harvard*, 8 Cush. 66; *Baltimore v. Gill*, 31 Md. 375; *Merrill v. Plainfield*, 45 N. H. 126; 10 Am. & Eng. Enc. Law, p. 963, note.

The provision of the charter is mandatory, and a contract made in violation of its requirements is illegal.

Dill. Mun. Corp. 3d ed. § 466; *Brady v. New York*, 20 N. Y. 312; *People, Coughlin, v. Gleason*, 121 N. Y. 631; *Appleby v. New York*, 15 How. Pr. 428; *Re Eager*, 46 N. Y. 100; *Nash v. St. Paul*, 8 Minn. 172, 11 Minn. 174; *State, Dunn, v. Barlow*, 48 Mo. 17; *Brevcoort v. Detroit*, 24 Mich. 322; *Addis v. Pittsburgh*, 85 Pa. 379; *Campau v. Detroit*, 106 Mich. 414; *Detroit v. Michigan Paving Co.* 36 Mich. 335; *Wickwire v. Elkhart*, 144 Ind. 305; *Platter v. Elkhart County Comrs.* 103 Ind. 360.

All contracts in which the public are interested, which tend to prevent competition, whenever a statute or known rule of law requires competition, are void.

Fishburn v. Chicago, 171 Ill. 338, 39 L. R. A. 482; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *People, Peabody, v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Foss v. Cummings*, 149 Ill. 353; 2 Beach, *Modern Law of Contracts*, § 1108.

Under the charter requirements, the board of public works has not the right to limit the bidding to any definite number of kinds or makes of brick.

Fishburn v. Chicago, 171 Ill. 338, 39 L. R. A. 482; *Carroll v. Philadelphia*, 6 Pa. Dist. R. 397; *Mazet v. Pittsburgh*, 137 Pa. 548; *Re Eager*, 46 N. Y. 105; *Nicolson Pave-*

ment Co. v. Painter, 35 Cal. 699; *Burgess v. Jefferson*, 21 La. Ann. 143.

Where the thing or material desired by the municipality is patented, and the patent is held by a single firm or person, it is held by some courts that the charter or statutory provisions requiring an advertisement and a letting to the lowest bidder has no application. But other courts, and these constitute the majority, take a different view, and hold that the statutory provision still applies.

Nicolson Pavement Co. v. Painter, 35 Cal. 699; *Burgess v. Jefferson*, 21 La. Ann. 143; *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Dean v. Borchsenius*, 30 Wis. 236; *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22, 8 L. R. A. 110; *Dill. Mun. Corp.* 3d ed. § 467.

The existing condition involves a gross monopoly in favor of the Nelsonville people.

The agents of municipal corporations must maintain themselves within the law, in the matter of awarding contracts; and if through fraud, or manifest error, not within the discretion confided in them, they are proceeding to make a contract which will illegally cast upon taxpayers a substantially larger burden of expense than is necessary, the courts will interfere by injunction to the effect of restricting their action to proper bounds.

Times Pub. Co. v. Everett, 9 Wash. 518; *Beach, Pub. Corp.* §§ 634, 635; *Dill. Mun. Corp.* § 922; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; *Baltimore v. Keyser*, 72 Md. 106; *People, Negus, v. Dwyer*, 90 N. Y. 402; *High, Inj.* §§ 1251-1253.

The charter provision was passed to protect the interests of the citizens of the city, and not the interest which the bidders might have in the premises.

Talbot Paving Co. v. Detroit, 109 Mich. 657; *Times Pub. Co. v. Everett*, 9 Wash. 518.

While, however, the lowest bidders may not be entitled to have the bid awarded to them, yet, as taxpayers, they may bring suit to enjoin the performance of a contract therefor, awarded to a higher bidder, though their action is prompted by other considerations than their liability to excessive taxation.

Times Pub. Co. v. Everett, 9 Wash. 518; *Mazet v. Pittsburgh*, 137 Pa. 548.

Hooker, J., delivered the opinion of the court:

The law creating the board of public works of the city of Detroit provides that all paving shall be done "upon contract and upon specifications to be prepared by said board and approved by the common council," and directs that "the board shall advertise for proposals to execute the work according to plans and specifications, and the board may contract with the lowest responsible bidder." 3 Loc. Laws 1873, p. 175, § 18. The board adopted specifications for repaving its streets, and these were approved by the common council. It was apparently designed to have some uniform rule. These provided that all bricks should be of a quality to be 45 L. R. A.

approved by the board of public works, and equal to approved samples in its office, and that each bidder should state in his bid the kind of brick that his proposition was based upon, which should be of such kind as had been approved by the board of public works. In December, 1897, tests were made under the direction of the board, and three kinds of brick were approved, viz., Nelsonville, Metropolitan, and Century. On April 29, 1898, the board advertised for proposals for repaving Atwater and other streets according to these specifications, each bidder being requested to name in his bid a separate price on each of the three kinds of brick mentioned. The complainants were bidders, as was also John McLaughlin. His bid named the kinds of brick which he proposed to use. The bid of the complainants did not, but was accompanied by a letter, which stated that they proposed to furnish "paving blocks of established reputation, that have been tested by the city of Detroit, by your body, and also the common council, and which have demonstrated in that test, and also in use in different cities, to be at least equal to the Metropolitan, Century, and Nelsonville blocks; and we are prepared to enter into a contract, and guarantee these goods equal to those named." The board of public works rejected the bid of Holmes & Strachan for the reason that it did not name the kind of brick, as mentioned in the advertisement, and as required by the specifications, and reported the bid of McLaughlin as the lowest bid to the common council, accompanied with the proper contract for confirmation. The bid of Holmes & Strachan named a lower price than the bid of McLaughlin for which they would do the work. The object of the present suit on the part of complainants is to restrain the common council from confirming the McLaughlin contract. The ground upon which this relief is asked is that the sale of the three kinds of brick in Detroit is controlled by one Stevens, who, as agent for the manufacturer, has exclusive authority in that market, and that there was therefore a monopoly, and no competition in the bidding. The circuit court so held, and the board was enjoined from executing the contract.

Complainants' proposition seems to be that, under the charter, no paving contract shall be let which involves the use of any material which, by reason of its exclusive production, is not subject to competition, or perhaps, more accurately, complainant's claim is that such contract cannot be made for the use of such material except when it has been subjected to a competition with some other material. This would result in some serious consequences. If such is the rule, the city may be denied the right to have the pavement that it wants, because someone is willing to furnish something else, that may be thought equally good, for a less price. One or two blocks of a street may be paved with Nelsonville brick, but, when it is desired to extend the pavement, they cannot take bids, and proceed to pave with the same, if some

other brick can be obtained cheaper. It may be that the cheaper price is made by interested parties, at a loss, to injure a rival, or for some other ulterior purpose, or because of insolvency, or it may be untried brick, or it may happen that the competing brick is not likely to be thereafter obtainable for repairs. But this would make no difference. The city must be subjected to these dangers and inconveniences, because it can obtain a lower bid. Thus, a pavement would be likely to be of a variegated pattern. This doctrine, carried out to its logical consequences, would prevent a city from doing any public work after an intelligent and well-digested plan, and the harmony and beauty of public improvements would be impaired. Whenever any article that should be the subject of a monopoly should be found to enter into a building or other improvement, the contract would be void, and payment could be enjoined by any taxpayer, if complainant's claim rests on solid ground. In this age of improvement and competition, we should not hold that municipalities are denied the most modern methods and improvements, unless it is clear that they have been prohibited. Many valuable innovations involve patents; others are introduced through agencies, as in this case; and they are therefore practically controlled by one person or firm. Again, some kinds of stone come from a single quarry; limes and cements differ in quality, and some may not be safely used; and in many instances the superiority of a given article is generally recognized. In this instance the fact that the Nelsonville brick are handled by a single agent has no especial significance, for back of the agent is the principal; and it goes without saying that he fixes the price, and has his monopoly, whether he has one agent or more.

The gist of the complainants' claim is that the city cannot specify the brick or other material made and controlled by one manufacturer, but must open the proposed improvement to competitors, and submit to the consequences of competition. It is to the interest of the greater number of manufacturers to have such a rule adopted, yet it is not a rule that private persons adopt in their own matters, for obvious reasons. This departure from such business principles is based upon the danger of supposed venality of public officials. The consequence is that, when a public work is to be undertaken, those having it in charge are seldom left to conduct their negotiations, make the contracts, and answer to the public for a faithful performance of duty. Everyone who has anything to sell insists on being heard; one accuses another of bribery; the board having the matter in charge, and its individual members, are accused of corruption; and after the award the work is delayed by litigation and injunctions, to the great inconvenience and cost of the taxpayers, and almost uniformly without any good result. So prevalent are these practices that they have become most serious obstacles to public improvement, and prolific sources of slander and vituperation, 45 L. R. A.

until many of our best citizens refuse to give to municipalities the benefit of their services, lest they be subjected to such charges. These things are so common that we may properly take notice of them, and we may well doubt a construction of a law which shall encourage them and produce such results. A more sensible view to take would seem to be that those charged with the making of an improvement should determine definitely what is wanted, and then advertise for bids, and let the contract to the lowest responsible bidder, leaving him to procure the material required as best he may. Such is the view entertained by many eminent jurists. There are others who have thought it necessary to eliminate every element of monopoly, in a vain effort to prevent any corruption whatever, and permit the use of no materials which could not be bought in the open market, or at least from competitive bidders. Such a case is *Fishburn v. Chicago*, 171 Ill. 338, 39 L. R. A. 482, where it was held that specifications could not lawfully restrict bidders to the use of one kind of asphaltum, which was produced by one concern. The strongest argument of that case is the following, which probably states the merits of the question as strongly as it can be stated. "But it may be said, cities, in the construction of public improvements, ought to have, as have individuals in the construction of private structures, the right to select for use the article or substance best fitted and adapted to the purpose, and that to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the public. The force of this argument must, of course, be admitted; but, upon reflection, it is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed. An ordinance making it indispensable that an article or substance in the control of but a certain person or corporation shall be used in the construction of a public work must necessarily create a monopoly in favor of such person or corporation, and also limit the persons bidding to those who may be able to make the most advantageous terms with the favored person or corporation. If all the ordinances adopted by the city council of the city of Chicago providing for the paving of streets and public places in the city should select the stock in trade of a particular firm or corporation as the only material to be used in making such street improvements, the

evil would be intolerable; and, if they may lawfully select such article in one ordinance, it cannot be unlawful to make it the settled policy of the city that material for paving streets shall be purchased of but one seller. Because the error of the court in ruling the proffered testimony was inadmissible, the judgment must be reversed, and the cause remanded." This case seems to rest on Illinois decisions.

We are cited to the case of *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, where it was held: "Where a city was empowered by its charter to improve streets at the expense of adjoining lotowners, but required to let all such work to the lowest bidder, it could not contract for laying a pavement at the expense of such lotowners, the right to lay which was patented, and owned by one firm." It is obvious that a patented article is much more certain to be the subject of a monopoly than brick manufactured from certain clay and by certain parties, and therefore much more likely to require the application of the rule contended for. Yet this court has held that such may be specified by cities. *Atty. Gen., Cook, v. Detroit*, 26 Mich. 263.

Counsel seeks to draw the line at patented articles, but we see no distinction between brick made by the Nelsonville company under patents, and brick made by the same company, but not under patents. In the concurring opinion of the late Chief Justice Christianity in the case cited, he places a construction upon such laws as that under discussion which commends itself to our approval. He says: "When the pavement of a street is in contemplation, there are two kinds of competition which it is very desirable to create among those who may wish to undertake the work: First, that between the different kinds of pavement, or those prepared to engage in putting them down; and, second, that between parties prepared to put down the same kind. It is the latter species of competition only which the charter requires the city officers to take measures to secure, and it is for this purpose only that it requires publication of the notice, plans, and specifications. . . . But those bids only which had reference to the same particular kind, and to the same specifications, could be considered as competing bids, for the purpose of determining who was the lowest bidder, within the meaning of the charter."

In *Kilvington v. Superior*, 83 Wis. 222, 18 L. R. A. 45, it was held: "The fact that the mode of building the crematory was patented did not render a contract therefor invalid under § 921, Rev. Stat. (requiring it to be let to the lowest bidder), where the entire work was done at the general expense of the village, and the use of the patent was offered to the village and to all contractors at a fixed price, and there was free competition as to everything else. *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, distinguished and limited." The court said: "Upon the authority of *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, it is contended that, as the mode of building the

crematory was a patented one, the contract was void, on the ground that there could not be fair competition in bidding for the work, which by the charter was required to be let to the lowest bidder. Rev. Stat. § 921. The case of *Dean v. Charlton* was decided by a divided court, and there was a vigorous and able dissenting opinion by Chief Justice Dixon. The legislature subsequently validated the assessments so held void in that case, and in *Mills v. Charleston*, 29 Wis. 400, 9 Am. Rep. 578, and *Dean v. Borchsenius*, 30 Wis. 236, the validity of this legislation was sustained. Since that time the direct question involved in that case, which was in respect to assessments against abutting lots for paving the street, has not been before the court; but in *Dean v. Charlton* the majority of the court, after commenting upon the case of *Harlem Gaslight Co. v. New York*, 33 N. Y. 309, expressly disclaimed deciding whether the city might not have contracted for laying such pavement at its own expense, under its general municipal powers, which is really the question here presented. In view of the legislation which followed *Dean v. Charlton*, and the fact that it was decided by a divided court, and the general tenor of subsequent decisions, and the further fact that patented methods and processes now enter so largely into various classes and kinds of public work, we are not disposed to extend the rule of that case beyond the particular point there decided. In *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185, and *Mots v. Detroit*, 18 Mich. 515, decided at about the same time, a contrary conclusion was reached; and in *Nicolson Pavement Co. v. Painter*, 35 Cal. 699, and *Burgess v. Jefferson*, 21 La. Ann. 143, the rule of the majority of the court in *Dean v. Charlton* was sustained. Since then, in *Re Dugro*, 50 N. Y. 513, the question has been decided in conformity with *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185, and other like cases; and in *Yarnold v. Lawrence*, 15 Kan. 129, 131, Brewer, J., notices the diversity of judicial opinion on the question, and is inclined to favor the views of the courts of Michigan and New York. *Baird v. New York*, 96 N. Y. 567. In the present case there was a definite well-settled price for the patent and specifications at which it was held and offered to the city and all contractors, which would limit the recovery of the patentee, so that in fact there was free competition for the work and materials, and all else except the patent. The city had the benefit of all the competition of which the nature of the work admitted; and in such cases, where the entire work is done at the general expense of the city, the statute ought not to be so construed as to exclude the city from availing itself of desirable patented works or improvements, as to which there is but one price, and for which there can, in the nature of the case, be no competition, and when for performing the work and furnishing materials the advantage of competition is secured. While the rule of *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, may be upheld as ap-

plied to assessments charged against abutting lots, where the lotowners have the right secured to them to construct in front of their property the improvements for or in which a patented method or process is used, we cannot see that there is any good reason to hold that the statute applies to the patented mode or process, when in respect to all else the statutory requirement of competition is secured. Under any other theory a municipal corporation would be obliged to forego the purchase and use of all patented implements, modes, or processes, a result which we cannot think the legislature contemplated."

The case of *Newark v. Bonnell*, 57 N. J. L. 424, is in point, also.

The case of *Re Dugro*, 50 N. Y. 517, sustains the authority to use patented articles. In the opinion it was said: "Section 104 of the act is relied upon as a limitation upon the powers of the common council, to the extent of a prohibition to undertake any work, or order or direct the making or paving any street, in a manner or with a material which will not admit of competitive bids or proposals. It requires all work to be done and supplies to be furnished by contract when the expenditure will exceed \$1,000, and directs all contracts to be made or let after an advertisement for proposals, and to the lowest bidder. The statute was complied with, in that the proper officers of the city did advertise for bids or proposals for paving the street, and the contract was let to the only bidder, and at the price named in the bid. The objection is that the 'Nicolson pavement' was patented, and the right to lay it was in a single person or corporation, and that, therefore, the advertisement being for bids to pave the street with that particular pavement, there could be no competition, and the form of advertising for and receiving bids, and acting upon them, was but a form, and was not, and could not be, a compliance with the act looking to competition; and it is claimed that the contract based upon the proceedings was void, and the assessment for the work therefore illegal. It is urged, that because a statute prescribing general rules for the exercise of the powers granted to the municipal corporation are not, in all their detail, applicable to every case that may arise, that, to the extent they cannot be applied, the powers are annulled, and cannot be exercised. This would be to give undue effect to the act prescribing the forms of procedure, and modal in its character, at the expense of the general grant of power. Whether the corporate authorities could or should have known that there could be no possible competition for the work (if such was the fact, which is not entirely certain), and, knowing that, could or should have made a contract without advertising for bids, need not be considered. There is no pretense of fraud, or that the contract, as made, was not a provident and proper contract, and reasonable and right in all its terms and provisions, so that the form of advertising and receiving bids cannot vitiate it, even if no such procedure was necessary. The general rule 45 L. R. A.

is,—and in this case does not form an exception,—that statutes prescribing forms of procedure, and providing for the orderly conduct of proceedings by public officers or bodies, are only obligatory to the extent and in cases to which they are by their terms applicable. The legislature cannot be presumed to have intended to declare that no power should be exercised, or work done, or supplies furnished, unless of a character that would admit of competitive bids. The grant of power was for public purposes, and the discretion vested in the common council was in the interests of the public, and neither the public nor the parties to be benefited by local improvements can be deprived of the benefit of this discretion, or the right to the best or most improved pavements, because full effect cannot in a particular case be given to an act designed for another purpose, to wit, to regulate the exercise of, and not to limit, the power. In other cases in this court a like statute, intended to accomplish the same purpose, that is, the performance of work, and the furnishing of supplies at the lowest price and on the most favorable terms, although sufficiently broad in its terms to include the contracts and the services in question, was held not applicable to, and therefore as not embracing, them. *People, Smith, v. Flagg*, 17 N. Y. 584; *Harlem Gaslight Co. v. New York*, 33 N. Y. 309. This case is not within the precise principle ruled in those cases, but it is quite analogous, and much of the reasoning of the judges who then spoke for the court is entirely applicable here. A thing within the letter is not within the statute, unless within the intention. The act of 1870 can have full effect in cases to which it can be applied, but, if there are cases to which it could not be reasonably applied, they are not within the intention, and therefore not within the statute. It seems to be absurd to say that all powers and all authority are by necessary implication taken from the municipal authorities, except such as can be exercised in strict conformity to this one provision of law,—that this section of the law of 1870 is to be the touchstone to determine the limit and extent of the powers vested in the common council, and that all other acts must conform to it. It should rather be interpreted with respect to the other statutes to which it is ancillary. The decisions of the courts in Wisconsin are adverse, while the Michigan courts are in accord with the views now expressed. If, as alleged, there could be no competition for the paving with the Nicolson pavement, the common council had nevertheless the power to cause the street to be paved with it; and it is simply a case not within the statute, although the words are broad enough to include it. It constitutes one of the necessary exceptions to it. No other question was presented upon this appeal; the counsel, in terms, limiting the discussion to the operation and effect of the provisions of the act of 1870, requiring certain contracts to be given to the lowest bidder after an advertisement for proposals."

In *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 13 L. R. A. 353, the view entertained by Chief Justice Christianity was approved. The Arkansas court said: "When a contract to build a bridge is to be let, there are two kinds of competition that may arise: First, that between persons desiring to build different kinds of bridges; and, second, that between those desiring to build the same kind. And, as was said by Judge Christianity in discussing a provision similar to that under consideration, the bidding which it contemplates is of the latter kind,—bidding for the same particular thing, to be done according to the same specifications: For, says he, no bids for different kinds of work, and referring to different specifications, could be recognized as coming in competition with each other, for the purpose of determining the lowest bid, within the requirement of this section, without opening the door to the same corrupt combinations, and furnishing facilities for the same fraudulent practices which it was the purpose of this provision to prevent. *Att'y. Gen., Cook, v. Detroit*, 26 Mich. 263."

This rule applied to patented articles should extend to any desirable article, although, from the course of business, its manufacturers may have the exclusive sale of it. It is not a question of who makes or sells it,

but of quality. In this case the complainants seek to apply a new regulation, *viz.*, that in all such cases the city must be satisfied with some other article alleged to be equally good. They not only did not comply with the specifications, by naming one of the kinds of brick specified, but bid upon a brick the name of which was not divulged, and they now ask relief upon the ground that such a bid should have been considered. Municipal improvements afford an opportunity for corruption and jobbery, and the public opinion that it is not uncommon may be justified. This is perhaps unavoidable, but, whether it is or not, we think the remedy is not that suggested, *viz.*, to deprive the cities of the power to get what is desired, and compel them to take what is not wanted, or nothing. We think the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified, which, by reason of a patent or circumstances, is in the hands or under the control of a single dealer.

The decree will be reversed, and the bill dismissed, with costs.

Montgomery, J., did not sit.

The other Justices concur.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
A. J. JOHNSON COMPANY, *Appt.*,
v.

James A. ROBERTS, *Respnt.*

(159 N. Y. 70.)

1. Copyrights, like patent rights, are exempt from taxation by state authority because they are Federal grants or privileges.
2. The goodwill of a corporation which is the result of carrying on its business in the state and inseparable from that business is taxable as capital employed in the state, although the corporation is nominally a corporation of another state in which it has never done any business.

(*Gray, O'Brien, and Haight, JJ., dissent from Proposition 2.*)

(April 25, 1899.)

APPEAL by relator from an order of the Appellate Division of the Supreme Court, Third Department, affirming an assessment by the state comptroller of a franchise tax upon the relator corporation. *Reversed.*

Statement by **Gray, J.**:

The relator was organized under the laws of the state of West Virginia, with a capital stock of \$250,000, divided into 150 shares of preferred stock, and 100 shares of com-

mon stock, each share being of the par value of \$100. It was incorporated to publish and sell Johnson's Universal Cyclopædia, under copyrights, of which it became the assignee and owner. The comptroller imposed a tax upon it for the year ending October 31, 1897, of \$782.50, calculated upon a dividend of 20 per cent paid during the year on \$135,500 of preferred stock issued, and upon a valuation of the \$88,000 of common stock issued at \$70,000. Subsequently, upon the relator's application, the tax was revised and settled by the comptroller at the sum of \$612.98, which figure of assessment was reached by stating the amount of the preferred capital stock at \$111,450, and the value of the common stock at \$37,150. The relator has objected to the assessment upon various grounds, among which are these: That its property is nearly all invested in copyrights, and that the capital stock employed within this state constituted only the tangible assets, and did not embrace either those copyrights or the goodwill of the company; that the state has no jurisdiction to tax it for the privilege of publishing a copyrighted production; and that the decision of the comptroller is without any basis in fact or evidence. The tangible assets within the state, as testified to, were the average value of cyclopædias printed within the state during the year, amounting to \$55,000, an average bank ac-

NOTE.—As to the exemption of property in patent rights from state taxation, see note to *Com. v. Petty* (Ky.) 29 L. R. A. on page 793; 45 L. R. A.

also *People, Edison Electric Illuminating Co., v. Brooklyn Bd. of Assessors* (N. Y.) 42 L. R. A. 200.

count of \$1,800, and accounts receivable of \$17,000. From the aggregate of these items, namely, \$73,800, debts for rent and salaries, amounting to \$10,000, were deducted, leaving a sum of \$63,800, which the relator claims represents the value of its tangible assets and the amount of capital employed here. The relator had no office in West Virginia, and substantially the whole business of the corporation was conducted at its office in the city of New York, and consisted in putting upon the market, and selling, a new edition of Johnson's Universal Cyclopedia. The comptroller, in his return to the writ of certiorari, stated "that he determined from the evidence, and from the information from all sources which he was able to obtain, that the amount of capital stock employed by the relator in the state of New York, for the year ending October 31, 1897, was \$148,600, and that among the items of property which went to make up that amount were the books, copyrights, and the goodwill of the corporation, and the goodwill acquired by it, which copyrights, goodwills, and property were determined by me to have their situs and to be amenable, to taxation under chapter 542, Laws 1880, and the acts amendatory thereof, in New York state." The appellate division, in the third department, affirmed the comptroller's decision, and the relator now appeals to this court.

Mr. J. Hampden Dougherty, for appellant:

The capital stock employed within this state consisted only of tangible assets, and did not embrace either goodwills or copyrights.

People, Seth Thomas Clock Co., v. Wemple, 133 N. Y. 323; *People, Singer Mfg. Co., v. Wemple*, 150 N. Y. 49; *People, New England Loan & T. Co., v. Roberts*, 25 App. Div. 16; *People, H. B. Smith Co., v. Roberts*, 27 App. Div. 455.

To be employed within this state, the property, whether money or goods, representing the capital, should be kept on hand in this state, for use in the general business of the company, and its actual value only is subject to taxation.

People, Washington Mills Co., v. Roberts, 8 App. Div. 204; *People v. Equitable Trust Co.* 96 N. Y. 387.

The franchises of a foreign corporation must exist at its place of domicile.

Plimpton v. Bigelow, 93 N. Y. 592; *People, Pennsylvania R. Co., v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694; *People, United Verde Copper Co., v. Roberts*, 156 N. Y. 585.

The relator's copyrights do not constitute capital employed within this state.

Nor is the goodwill of the corporation, or the goodwill of the Cyclopedia, capital employed within this state.

If the revised tax law were to be construed so as to require taxation of the copyrights and goodwill of the relator, such a construction would offend against the Federal Constitution, for patent rights and copyrights are exclusively derived from the Federal govern-

ment, and are not subject to taxation in any sense by the states.

People, Edison Electric Illuminating Co., v. Brooklyn Bd. of Assessors, 156 N. Y. 417, 42 L. R. A. 290; *Patterson v. Kentucky*, 97 U. S. 503, 24 L. ed. 1116; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Ex parte Robinson*, 2 Biss. 309; *Re Sheffield*, 64 Fed. Rep. 833; *Helm v. First Nat. Bank*, 43 Ind. 167, 13 Am. Rep. 395; *Grover & B. Sewing Mach. Co. v. Baker*, 53 Ind. 454, 21 Am. Rep. 200; *Com. v. Petty*, 96 Ky. 452, 29 L. R. A. 786; *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265; *Com. v. Westinghouse Air Brake Co.* 151 Pa. 276; *Com. v. Philadelphia Co.* 157 Pa. 527; *Com. v. Edison Electric Light Co.* 157 Pa. 529; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134.

This state has no jurisdiction to tax the relator for the privilege of publishing a copyrighted production.

California v. Central P. R. Co. 127 U. S. 41, 32 L. ed. 157, 2 Inters. Com. Rep. 153.

Messrs. John C. Davies, Attorney General, and *G. D. B. Hasbrouck*, for respondent:

The relator was engaged in the transaction of business in this state.

It employs its capital stock in the state of New York.

Copyright is property and it is a proper measure of the business tax in this instance, though it may not be taxable itself.

7 Am. & Eng. Enc. Law, *Copyright*; *Palmer v. DeWitt*, 47 N. Y. 539, 7 Am. Rep. 480; *People, Edison Electric Light Co., v. Campbell*, 138 N. Y. 547, 20 L. R. A. 453.

Goodwill has been held to be property which could be used in estimating the amount of capital stock which should be made the measure of the tax.

People, Wiebusch & H. Co., v. Roberts, 154 N. Y. 108.

The situs of these copyrights, and this goodwill, is in the state of New York.

Bradbury v. Dickens, 27 Beav. 53; *Bell v. Locke*, 8 Paige, 75, 34 Am. Dec. 371.

The goodwill of a "business," and this is what the Johnsons sold, is in the same category with place and article.

White v. Jones, 1 Abb. Pr. N. S. 337; *Howe v. Searing*, 6 Bosw. 354; *Dayton v. Wilkes*, 17 How. Pr. 510; *People, Wiebusch & H. Co., v. Roberts*, 154 N. Y. 108.

It would be most unreasonable for these foreign corporations to ask the privilege of doing business under our laws, in competition with domestic institutions, and then to ask exemption from the obligations and liabilities which attach to the latter.

Martine v. International L. Ins. Soc. 53 N. Y. 339, 13 Am. Rep. 529.

Vann, J., delivered the opinion of the court:

Copyrights clearly stand on the same basis as patent rights, with reference to the subject of taxation by the state, and, as we

have held that the former are exempt, the latter should be held exempt also. *People, Edison Electric Illuminating Co., v. Brooklyn Bd. of Assessors*, 156 N. Y. 417, 42 L. R. A. 290. The comptroller, therefore, erred when he included the copyrights of the relator "among the items of property which went to make up" the amount "of the capital employed by it within this state." Laws 1896, chap. 908, § 182; Laws 1880, chap. 542, § 3. No other item is open to discussion except the "goodwill of the corporation and the goodwill acquired by it," neither of which, as the appellant claims, was properly included as an element of value, because each is an intangible asset and beyond legislative control in this state. In the *Wiebusch Case*, 154 N. Y. 101, it was held that "the actual value of the capital stock of" a domestic corporation "is the value of its assets, after deducting its liabilities, and adding to the sum then remaining the value of the goodwill of the business, including its right to conduct it under its franchise." By this decision it is established that the goodwill of a domestic corporation is property which was taxable as a part of its capital stock under the act of 1880. That act was repealed by chapter 908 of the Laws of 1896, known as the "Tax Law," which took effect June 15, 1896. The substance of the earlier act was re-enacted in the later, with a decided change of arrangement and phraseology, but perhaps with no change of meaning, so far, at least, as the question now before us is concerned. By § 182 of the tax law it is provided that "every corporation . . . formed under, by, or pursuant to law in this state, shall pay to the state treasurer annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this state and upon each dollar of such amount. . . . Every corporation . . . formed under the laws of any other state or country, shall pay a like tax for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, to be computed upon the basis of the capital employed by it within this state."

The remaining question presented for decision, therefore, is whether the goodwill of the relator was "capital employed by it within this state." "Goodwill" is a modern but important growth of the law, not mentioned by some of the early writers, but given great prominence at the present time. In 1810, Lord Eldon defined it as "the probability that the old customers will resort to the old place." *Crutwell v. Lye*, 17 Ves. Jr. 335, 346. In 1859, Vice Chancellor Wood, in deciding the case of *Churton v. Douglas*, Johns. V. C. (Eng.) 174, 188, held that goodwill carried more with it than simply the advantage of keeping the premises which were occupied by a former firm, and the chance thereby had of the customers of the former firm being attracted to those premises. He expanded the definition so as to make it embrace "all that good disposition which customers entertain towards the house of business identified by the particu-

lar name or firm, and which may induce them to continue giving their custom to it." In another part of the opinion he said: "Goodwill must mean every advantage . . . that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business." In *Ginesi v. Cooper*, L. R. 14 Ch. Div. 596, 600, Sir George Jessel quoted the latter definition, and added: "Attracting customers to the business is a matter connected with the carrying of it on. It is the formation of that connection which has made the value of the thing which the late firm sold, and they really had nothing else to sell in the shape of goodwill." In 1895 the House of Lords, through Lord Herschell, adopted the position taken in these cases, and also held that where the goodwill of the business is sold without further provision, although the vendor may set up a rival business, he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor or not to deal with the purchaser. *Trego v. Hunt* [1896] A. C. 7. In *Wedderburn v. Wedderburn*, 22 Beav. 84, Sir John Romilly, speaking of goodwill, said: "It seems to be that species of connection in trade which induces customers to deal with a particular firm." In *Bradbury v. Dickens*, 27 Beav. 53, it was said: "The property in a literary periodical like this is confined purely to the mere title, and the title of this work is 'Household Words,' and that forms part of the partnership assets, and must be sold for the benefit of the partners." In *Williams v. Wilson*, 4 Sandf. Ch. 379, it was held that the goodwill of the business built up by a copartnership in conducting an insane hospital and an immigrant lazaretto was an important and valuable interest, which the law recognizes and will protect. So the name and reputation of a newspaper, the carrier's route of a city newspaper, and the name which a firm has rendered valuable by doing business under it, are regarded as belonging to the goodwill. *Hathaway v. Bennett*, 10 N. Y. 108, 61 Am. Dec. 739; *Dayton v. Wilkes*, 17 How. Pr. 510; *Fenn v. Bolles*, 7 Abb. Pr. 202. In *Elliott's Appeal*, 60 Pa. 161, it was held that the goodwill of an inn is local, and does not exist independently of the house in which it is kept; and to the same effect is *Musselman's Appeal*, 62 Pa. 81, 1 Am. Rep. 382. In *Chittenden v. Witbeck*, 50 Mich. 401, it was held that goodwill is the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage, but that it attaches to the property, and, in the case of a lease belongs to the lessee only during its continuance, and on its expiration reverts to the lessor. In *Barber v. Connecticut Mut. L. Ins. Co.* 15 Fed. Rep. 312, it was said that "the goodwill of an established business, which is a

common subject of contract, is nothing but the chance of being able to keep the business which has been established. The sale of a mere chance, which vests in the purchaser nothing but the possibility that the preference which has been usually extended to those whose rights he acquires will be extended to him, has been enforced in equity, and recognized at law as effectual between the parties to the contract." Judge Story, in his work on Partnership (§ 99), says that "goodwill may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." He adds that it may be assigned with the premises and the rest of the effects. In Parsons on Partnership, 4th ed. § 181, it is defined as "that benefit or advantage which rests only on the goodwill or kind and friendly feeling of others;" and in a note it is added "that, so far as it has a transferable value, it consists in the additional value which a business possesses when it can be sold as 'a going concern.'" The learned author also indorses Lord Eldon's definition, and, in another note, says: "This definition, as we have above intimated, makes goodwill local and an incident of the place where business has been carried on, and not of the persons by whom it has been conducted. It is in this sense only that goodwill is recognized by the law as a pecuniary interest." Mr. Lindley, in his treatise on Partnership (vol. 2, p. 439), says: "The term 'goodwill' can hardly be said to have any precise significance. It is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its goodwill has a marketable value, whether the business is that of a professional man or of any other person. But it is plain that goodwill has no meaning except in connection with a continuing business; it may have no value except in connection with a particular house; and may be so inseparably connected with it as to pass with it under a will or deed without being specially mentioned." Mr. Pollock says "that which the purchaser of a goodwill actually acquires, as between himself and his vendor, is the right to carry on the same business under the old name, . . . and to represent himself to former customers as the successor to that business." Pollock, Partn. art. 57. Goodwill embraces at least two elements,—the advantage of continuing an established business in its old place, and of continuing it under the old style or name. While it is not necessarily altogether local, it is usually to a great extent, and must of necessity be,

an incident to a place, an established business, or a name known to the trade.

The relator was incorporated in 1892, under the laws of the state of West Virginia, for the purpose of publishing and selling Johnson's Universal Cyclopædia, and of carrying on a general business of publishing and selling books, maps, charts, etc. The firm of D. Appleton & Co., of the city of New York, owns substantially all the shares of stock that have been issued, and its president, secretary, and treasurer are members of that firm. It never did any business, owned any property, or had an office in West Virginia, and its only connection with that state is its charter, and the payment of an annual license tax of \$50. It also employs a lawyer to represent it in that state, but for what purpose does not appear. While nominally a corporation of West Virginia, for all practical purposes it is a New York corporation. In its petition for a writ to review the determination of the comptroller, referring to that officer it says "that he has erroneously appraised a portion of goodwill as capital employed within this state; that no proof was adduced before him as to the value of such goodwill, or that said goodwill had any value whatsoever, or as to what part, if any, was employed in this state." In its report to the comptroller, made for the year in question, which ended October 31, 1897, it stated that its business for that year was "the putting upon the market and selling a new edition of Johnson's Universal Cyclopædia, completed in eight volumes," and that such business was carried on at "72 Fifth avenue, in the city of New York." The blank in the report, calling for information as to the "nature of business transacted and amount invested outside New York state," was left unanswered. It stated, however, that all its capital was employed within this state except its copyrights, which, it claimed, were not capital employed within the state, and were not taxable for other reasons. Its secretary and treasurer testified that substantially all its stock, so far as issued, or \$225,000 in amount, was transferred for the copyrights, the right to publish, and the goodwill of an old business established and owned by William W. Johnson. The copyrights granted by the United States government to publish the cyclopædia formerly belonged to Mr. Johnson, who transferred them to the relator in exchange for stock, which he subsequently assigned to Appleton & Co. The cyclopædia is a new one, with new articles, prepared under the supervision of a new editor, and the only thing not original about it is the name. All the business of the relator is done, and all its stock owned, in the state of New York. The cyclopædia is sold throughout the country through D. Appleton & Co. as selling agents, and the sales of the relator are made almost exclusively to that firm, and wholly in this state. By an instrument dated October 25, 1892, "William W. Johnson, of the city of Yonkers, Westchester county, New York," assigned to the relator "Johnson's New General Cyclopædia and Copper-Plate Hand

Atlas of the World, including the copyright of the same, the right of publishing, the electrotype plates, the goodwill of the business, the business generally, and the stock on hand." Said electrotype plates were of small value, as new plates were made in this state from new manuscript and new type.

A tax of the kind under consideration is levied upon a foreign corporation "for the privilege of exercising its corporate franchises or carrying on its business" in this state. Tax Law, § 182. The goodwill of the relator, aside from that purchased of Mr. Johnson, is the result of exercising its corporate franchises and carrying on its business in this state, and is inseparable from that business. It is the product of an investment of capital in this state, and the exercise here of the privilege for which the tax was laid. To hold that it was not capital employed in this state, upon the ground that the domicile of the corporation is in West Virginia, where it never transacted any business nor earned any goodwill by fair dealing and efficient methods, would exalt form above substance. As the goodwill is the result of the employment of capital and an incident to an established business, it can exist for no practical purpose in the state where the relator was organized and where it never invested any capital nor did any business. The goodwill of the relator belongs to its old and well-established business, which is conducted wholly in this state. It is as much a part of its business as the books which it publishes. The good name of those books is a portion of it, acquired partly by purchase from the originator of the cyclopædia, who resided in this state. The value of that name has been increased by the enterprise of the relator in expending in this state over \$200,000 to enlarge and perfect the work. The value of the books, and the other tangible property used in their production, is augmented by the goodwill. The mere fact that goodwill is intangible does not take it out of the state, so far as the right of taxation is concerned, because it is inseparably attached to property which is tangible, located in this state. *Re Houdayer*, 150 N. Y. 37, 34 L. R. A. 235. It exists at the place where it has a market value, which is where the relator carried on its business and earned a reputation for superior work and honorable conduct. This reputation was not built up in West Virginia, where it did no business, but in New York, where it did all its business. It could neither be sold nor used to advantage in the former state.

If we hold that the goodwill of a foreign corporation is not taxable here, simply because it is intangible, although it grew up here, has a market value here and nowhere else, we place a premium on nonresident corporations by relieving them of a burden that we place upon domestic corporations. As was said in *Martine v. International L. Ins. Soc.* 53 N. Y. 339, 347, 13 Am. Rep. 529, "It would be most unreasonable for these foreign corporations to ask the privilege of doing business under our laws in competition with

domestic institutions, and then to ask exemption from the obligations and liabilities which attach to the latter." It is a matter of common knowledge, as well as of grave public concern, in this state, that, for the sake of a paltry license tax, certain sister states are competing with each other in granting loose charters without adequate protection for the public, and thus inducing the promoters of corporations to organize under their statutes, when there is no intention of investing capital or doing business in the state where the organization is effected. Such selfish and unfriendly legislation should not be encouraged by the courts of the state which is most injured by it.

While the order of the appellate division must be reversed, we base our reversal solely upon the ground that the copyrights of the relator are not subject to taxation by the state. We have discussed and decided the question relating to goodwill in order to guide the comptroller in readjusting the tax.

The order appealed from and the determination of the comptroller should be reversed with costs, and the matter remitted to the comptroller for readjustment of the tax.

Parker, Ch. J., and Bartlett and Martin, JJ., concur.

Gray, J., dissenting:

The important question which arises upon this appeal is whether a tax could legally be assessed upon the relator which included, in the items going to make up the amount of capital employed within this state, the copyrights and the goodwill of the corporation. The statute provides that the tax upon a foreign corporation "is to be computed upon the basis of the capital employed within this state" (Laws 1896, § 182, chap. 908), and we have held that that means only such of the capital as was represented by the value of property, whether of money, goods, or other tangible things. *People, Seth Thomas Clock Co., v. Wemple*, 133 N. Y. 323. It is the policy of the state, with respect to corporations which are created under the laws of another state or country and do business in this state, that a tax should be assessed upon that business. The jurisdiction to impose the tax is gained by reason of the business which they are privileged to do here under the protection of our laws. *People, American Contracting & D. Co., v. Wemple*, 129 N. Y. 558. So far as the franchises themselves of the foreign corporation are concerned, they are beyond the reach of our tax laws. They are derived from the governments to which they owe their creation, and can only be subjected to taxation by the laws of those governments. When it is sought to exercise them within this state, the condition of the right to do so is the liability to taxation and control by the legislature, so far as the capital can be seen to be employed in business here. The domicile of this relator, in legal contemplation, is in the state of West Virginia, and it is difficult to conceive of any taxation of its properties within this state, unless it be confined to such as are corporeal

and tangible. The only properties of that nature which represented the capital of the relator in this state consisted in cyclopædias which were printed and put upon the market, and in its pecuniary assets, in bank account or in accounts receivable. Its copyrights are Federal grants of privileges, and no more power exists to include them in the valuation for assessment purposes than would exist with respect to patent rights. It has been but recently held by us in *People, Edison Electric Illuminating Co., v. Brooklyn Bd. of Assessors*, 156 N. Y. 417, 42 L. R. A. 290, that patent rights cannot be made the subject of taxation, and, if they are not taxable, clearly the same principle which exempts them from the taxing power of the state should exempt copyrights. In the case just referred to, the assessment included a certain sum for United States patent rights, and we held that the question of the right of the taxing power of the state to assess patent rights was no longer an open one, within the decisions of the United States Supreme Court, there referred to. The doctrine, as settled by authority, is that the incorporeal right of discovery is protected by national authority against all interference; but the use of the tangible property, which comes into existence by the application of the discovery, is not beyond the control of state legislation. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565. The state has not the power to interfere with the privilege of using a person's property in inventions by taxing him upon the same, and, if that be true, the same principle operates to deny to the state any power to tax the owner of a copyright for the privilege of using his right. The property in the plates, instruments, books, etc., and the copyright secured to the author, are altogether different and independent of each other. The latter, as an exclusive right to the multiplication of the copies for the benefit of the author or his assigns, is an incorporeal right, and has no physical existence. *Stephens v. Cady*, 14 How. 528, 14 L. ed. 528. The state should be confined, in the exercise of its taxing power, as in the case of patent rights, to the tangible property which is produced under the protection of the exclusive right granted by the Federal government. It cannot prevent the relator from exercising its franchise here as the owner of copyrights; for they are privileged and protected by the Federal Constitution. To concede a right to tax them would be to concede a power to impede or burden the operation of the laws enacted by Congress to carry into execution a power vested in the national government by the Constitution. I think that the comptroller was in error when he included, as a basis for assessment of the relator's capital employed within this state, its copyrights.

Nor does the power exist to assess a foreign corporation upon its goodwill. That is an intangible asset of the corporation, whose only conceivable situs is at its domicile. It is the reputation of the business. It may be 45 L. R. A.

defined as the right acquired to continue the publication and sale of the cyclopædia, under the protection of the copyrights, and that could not be regarded as capital employed within this state. Its goodwill may contribute a value to its business products, undoubtedly; but it is based on the Federal privilege, and on that account, as for its incorporeal nature, is beyond legislative control here. It appertains to the corporation as such, and can exist only where the corporation exists, *viz.*, within the territory of the government which created it.

There is no authority in the statute for imposing a tax upon a foreign corporation, unless it is imposed upon the amount of "the capital stock employed by it within this state." Laws 1896, chap. 908, § 181. We have had occasion to see in *Seth Thomas Clock Co.'s Case*, 133 N. Y. 323, upon what property of a foreign corporation, which is doing business within this state, a tax can be assessed. It was said in the opinion in that case that "only such part of it [the capital stock] was employed within this state as was represented by the actual value of property, whether in money, goods, or other tangible things. It kept goods for sale here. It had money on deposit, and it may be other property. This, whatever its value, was the basis of taxation. . . . That property represented all the capital employed in this state." The theory of that decision was that there is no basis for taxation, if the foreign corporation does not employ any of its capital stock here, and the exclusion from assessment of any property not of a tangible nature was in accord with what we have considered, in *People, Union Trust Co., v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, to constitute the capital stock of the company. In that case, although the subject for decision was the liability of the relator under the general tax laws of the state, the opinion discussed elaborately the relative significance of "the capital stock of the company and the capital stock held in shares by the corporators." It was said: "The two things are neither identical nor equivalents. The capital stock of a company is one thing; that of the shareholders is another and a different thing. That of the company is simply its capital, existing in money or property, or both; while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend-earning power, of franchise, and the goodwill of an established and prosperous business." And it was observed that "there are reasons in abundance for the conclusion that by the phrase 'capital stock' the statute means, not the share stock, but the capital owned by the corporation; the fund required to be paid in, and kept intact as the basis of the business enterprise, and the chief factor in its safety." It is to be noticed that the goodwill of a corporate business is regarded as something which attaches to the interests of the shareholders, and which is not part of the capital stock of the company, and that it gives an added value to the interests of the former.

The doctrine of that case influenced us in *Seth Thomas Clock Co.'s Case*, and induced the conclusion that, with respect to foreign corporations, their capital stock employed in this state could not exceed the property which they kept here in the transaction of their business. In the case of a domestic corporation, however, the field of assessment is wider, and comprehends both the corporate franchise and the business. Nothing is beyond the reach of the taxing power of the state in such a case which is not rendered exempt by Federal law. Therefore it was that in *People, Wiebusch & H. Co., v. Roberts*, 154 N. Y. 101, we held that, in appraising the capital stock of a domestic corporation at its actual value, the element of the goodwill of the business, "including its right to conduct it under its franchise," might be included in the appraisal; but that the distinction between that which represented the capital stock of the company and that which represented the capital as to the shareholders was recognized is clear from the quotation in Judge Martin's opinion, from the language in the *Coleman Case*, which I have given above. In the *Wiebusch Case* the question was as to what elements the comptroller of the state might include in reaching a determination as to the actual value of the capital stock of a domestic corporation. To apply the reasoning of that opinion in the present case, so as to make of it an authority for including goodwill as an element of value, would be, in my judgment, not only to misapprehend the opinion itself, but would be to lose sight of the fact that the state in the taxation of foreign corporations neither intended, nor is deemed, to have power to reach other properties of the foreign corporation than what are represented in its moneys, goods, or other tangible things, as we said in the *Seth Thomas Clock Co.'s Case*.

The legislative expression of "capital stock employed within this state" negatives the idea that its franchises, or incorporeal rights, or privileges, are intended, and seems to rigidly limit the subject of assessment to tangible things, within the doctrine of the *Coleman Case*. To hold the view that the element of goodwill may be included as a subject of taxation is to extend the jurisdiction of authorities, without authority in reason or in precedent. As well may the state claim to increase the tax upon a foreign corporation according to the greater credit it may enjoy in the community or to the character of its reputation for fair and honest dealing. I think we should hesitate before adding this new feature of illiberality to the tax legislation of our state. The errors committed by the comptroller, in the respects mentioned, are such as necessitate a readjustment on his part. It is not possible to effect any separation in this case, in the comptroller's assessment of the amount of capital employed by the relator in this state, between its tangible property and its copyrights and goodwill. I think that the order appealed from and the determination of the comptroller should be reversed, with costs, 45 L. R. A.

so far as it included for the purposes of taxation the copyrights and goodwill of the relator, and that the matter should be remitted to the comptroller for a readjustment of the tax.

O'Brien and Haight, JJ., concur.

NEW YORK SECURITY & TRUST COMPANY, *Respt.*,

v.

SARATOGA GAS & ELECTRIC LIGHT COMPANY *et al.*

Edward Winslow PAIGE, *Appt.*

(159 N. Y. 137.)

The earnings of a corporation from its business prior to the time possession is actually taken of its property by a mortgage trustee or receiver belong to its general creditors in preference to mortgage bondholders.

(May 2, 1899.)

A PPEAL from an order of the Appellate Division of the Supreme Court, Third Department, reversing an order of a Special Term for Schenectady County refusing to require the repayment to the foreclosure receiver of certain moneys which he had turned over to the sequestration receiver of the defendant corporation and which were alleged to belong to the mortgage, and not to the general creditors. *Reversed.*

The facts are stated in the opinion.

Mr. Edward Winslow Paige, for appellants:

The mortgage gave to the mortgagee no interest in any debts accruing to the mortgagor before the mortgagee took possession.

Jones, Corporate Bonds, § 80; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405; *American Bridge Co. v. Heidelberg*, 94 U. S. 798, 24 L. ed. 144; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415; *Dow v. Memphis & L. R. R. Co.* 124 U. S. 652, 31 L. ed. 565; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Smith v. Eastern R. Co.* 124 Mass. 154; *Holmes v. Turner's Falls Co.* 142 Mass. 590; *Noyes v. Rich*, 52 Me. 115; *Merchant's Bank v. Pittsburg R. Co.* 12 Phila. 482; *Mississippi Valley & W. R. Co. v. United States Exp. Co.* 81 Ill. 535; *Frayser v. Richmond & A. R. Co.* 81 Va. 388; *Gilbert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 645; *De Graff v. Thompson*, 24 Minn. 452; *Re Life Asso. of America*, 98 Mo. 632; *Clay v. East Tennessee & V. R. Co.* 6 Heisk. 421; *Alabama Nat. Bank v. Mary Lee Coal & R. Co.* 108 Ala. 288; *Parkhurst v. Northern C. R. Co.*

NOTE.—As to the effect of a mortgage of the income of a corporation, see also *Spies v. Chicago & E. I. R. Co.* (C. C. S. D. N. Y.) 6 L. R. A. 585, and *note*.

19 Md. 472, 81 Am. Dec. 648; *Government Stock & O. S. Invest. Co. v. Manila R. Co.* [1897] A. C. 81; *Argall v. Pitts*, 78 N. Y. 239; *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197.

A mortgage of personal property not in existence when the mortgage is given is not good as against a creditor who levies.

Rochester Distilling Co. v. Rasey, 142 N. Y. 576.

The appointment of a sequestration receiver is equivalent to there being a creditor with judgment, execution, and creditor's bill.

United States Trust Co. v. New York, W. S. & B. R. Co. 101 N. Y. 478; *Reynolds v. Ellis*, 103 N. Y. 115, 57 Am. Rep. 701.

Messrs. Hornblower, Byrne, & Taylor, for respondent:

The lien of the mortgage fastened, in behalf of the bondholders, upon the indebtedness the moment it became due the light company, or certainly as soon as the default of August 1st occurred. It therefore antedated any possible lien which the sequestration receiver could have.

Wisner v. Ocumpaugh, 71 N. Y. 113; *Fletcher v. Morey*, 2 Story, 555; *Kelly v. Scott*, 49 N. Y. 595; *Cook v. Tullis*, 18 Wall. 332, 21 L. ed. 933; *Beach, Receivers*, § 219; *Gluck & B. Receivers*, 2d ed. 19; *Kridbs v. Alford*, 120 N. Y. 519; *Williams v. Ingersoll*, 89 N. Y. 508; *Hayes v. Dickinson*, 9 Hun, 277.

A sequestration receiver occupies the same position toward a corporation that an assignee in bankruptcy does toward a person.

United States Trust Co. v. New York, W. S. & B. R. Co. 101 N. Y. 478; *Reynolds v. Ellis*, 103 N. Y. 115; *Mitchell v. Winslow*, 2 Story, 630.

An assignment of a chose in action not yet in existence—called in that case an equitable assignment—has priority as against an attaching creditor.

Williams v. Ingersoll, 89 N. Y. 508; *Stevens v. Watson*, 4 Abb. App. Dec. 302; *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y. 43; *Seymour v. Canandaigua & N. F. R. Co.* 25 Barb. 284; *Re Howe*, 1 Paige, 125; *Ells v. Tousley*, 1 Paige, 280; *Maroney v. Boyle*, 141 N. Y. 462.

Income, rents, and profits of mortgaged property not actually paid to and received by the mortgagor in cash prior to the mortgage receivership are to be applied on the mortgage debt although they became due prior to the receivership.

Davidson v. Westchester Gaslight Co. 99 N. Y. 558; *Wyckoff v. Scofield*, 98 N. Y. 475; *Rider v. Bagley*, 84 N. Y. 461; *Hollenbeck v. Donnell*, 94 N. Y. 342; *Lofsky v. Maujer*, 3 Sandf. Ch. 69; *Howell v. Riley*, 10 Paige, 43.

The sequestration receiver's lien takes effect only from the date of his appointment.

Re Christian Jansen Co. 128 N. Y. 550; *Re Schuyler's Steam Tow Boat Co.* 136 N. Y. 169, 20 L. R. A. 391; *Re Muehlfeld & H. Piano Co.* 12 App. Div. 492; *First Nat. Bank v. Shuler*, 153 N. Y. 163.

O'Brien, J., delivered the opinion of the court:

The questions raised by this appeal arise 45 L. R. A.

upon a controversy between the receiver in an action to foreclose a corporate mortgage given to secure bondholders and a receiver appointed at the same time, in a suit by a general creditor of the corporation, brought for the purpose of sequestrating the assets of the corporation after a judgment upon the claim, and an execution returned unsatisfied. While both receivers were appointed at the same instant of time, the sequestration action was commenced before the foreclosure action, and before the appointment of the receiver therein.

On the 1st day of February, 1887, the Saratoga Gas & Electric Light Company, a domestic corporation, executed and delivered to the American Loan & Trust Company a mortgage to secure its bonds, amounting in the aggregate to \$300,000, due in 1907. The bonds so issued had interest coupons attached, payable semiannually, at the rate of 6 per cent. The property covered by the mortgage is described therein as follows: "All the corporate property, real, personal, and mixed, including all lands, easements, rights of way, buildings, fixtures, materials, supplies, machinery, and plant, franchises, contracts, and choses in action, whether now owned or hereafter acquired or constructed by said gas company, together with the appurtenances thereto, and all rents, tolls, issues, income, and profits of said gas company, present and future; to have and to hold the same unto said American Loan & Trust Company, its successors and assigns, forever, upon trust for the equal benefit and security of all holders of said bonds, and subject to the following covenants, conditions, and provisions, which are assented to by both parties, to wit," etc. It must, I think, be admitted that this language is broad enough to cover, not only all the property that the corporation then had, but all that it ever could have by any possibility, whether lands, chattels, moneys, or things in action. But the language here used, broad and comprehensive as it is, is very much qualified and restricted by other provisions of the instrument, as will be seen by reference to the following stipulations: (1) "Until default occurs in some duty, or upon some covenant, agreement, or promise of the gas company hereunder, said gas company, its successors and assigns, shall retain the possession, control, and enjoyment of all the property and franchises hereby mortgaged, and may receive and use the earnings, income, and profits thereof in any manner not inconsistent with these presents, nor tending to lessen the security hereby provided." (2) "The said gas company, for itself and its successors, covenants to pay to the several holders of the bonds hereby secured the principal and interest of said bonds, according to the tenor and true intent of said bonds and the coupons thereto attached." (5) "But, if default be made in any payment of principal or interest upon said bonds when due, or in the performance of any covenant or agreement on the part of the said gas company herein contained, and if such default shall continue for the period of sixty days, then, and in either of said cases, the trustee

may enter into and upon, and take possession, management, and control of, all the property and franchises covered by these presents, and may operate the same, and continue the business, and exercise the franchises of said gas company, making all needful repairs, alterations, and additions, and may collect and receive all earnings and income thereof." (7) "If any default shall occur or continue as in article five specified (that is, 'continue for the period of sixty days') the trustee may, and upon the written request of the holder or holders of one fourth or more of said bonds then outstanding accompanied by indemnity as hereinafter provided, shall, with or without entry as aforesaid, proceed to foreclose this mortgage, either by advertisement or sale according to law, or by proper judicial proceedings." These several provisions of the instrument must obviously be read together in order to ascertain the real intention of the parties, and the true construction which should be placed upon the agreement. Notwithstanding the broad general language used in the description of the property mortgaged, it is plain that the mortgagor was to have, at least until default, the possession and enjoyment of all the property, whether existing at the time or acquired in the future, and was to use the future earnings for the purpose of conducting the business for which the corporation was organized. This must mean that it had a right to sell and transfer the future products of its operations as its own, free and clear from any lien of the mortgagee. The intention was that it should purchase materials for its business, employ labor, contract debts, and discharge all obligations arising therefrom by the use of the products of the business or the earnings of the plant.

In this condition of things the corporation made default in the payment of the interest coupons due on the 1st of August, 1893, and, on November 11 following, the plaintiff, as substituted trustee, brought an action to foreclose the mortgage, and a receiver was appointed on the 16th of November following, and on the same day, and at the same time, the sequestration creditor procured the appointment of a receiver in his action. The receiver in the foreclosure action took possession of the gas plant, and proceeded to operate the works, and to make and sell manufactured gas and electricity. At that time there were moneys in the office of the company, and to its credit on deposit in banks, and due to it on open accounts for gas and electricity manufactured before, and it owed various debts for materials which it had purchased in conducting its business. There came to the hands of the receiver in the foreclosure action, from the moneys on hand prior to the commencement of the action, and from the earnings of the corporation prior to that date and after the execution of the mortgage, in the form of open accounts or notes, the sum of over \$4,000, which the receiver in the sequestration action, represent-

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ing general creditors, claims should be paid to him for distribution among such creditors. In other words, the question is whether the earnings of the corporation from its business, in the sale of its products, prior to the time of the commencement of the action to foreclose the mortgage and the date of the possession by the receiver in that action, belong in equity to the bondholders or to the general creditors. The special term held that the general creditors of the corporation had the prior equitable right to the fund, but the orders of that court were reversed by the appellate division, which held that the fund in equity belonged to the receiver appointed in the foreclosure action for the benefit of the mortgage bondholders. An appeal to this court was allowed, and the following question certified for its opinion: "Under and by virtue of the operation of the mortgage given by the Saratoga Gas & Electric Light Company, has the mortgagee, or the receiver appointed in the foreclosure action, an equitable lien, prior to the right of the receiver in the sequestration action, upon the debts and accounts due to the corporation upon sales by it of products of its plant, produced after the giving of the mortgage, and before the appointment of either receiver?"

The right of the mortgagor to deal with these products and earnings as its own under the stipulations of the mortgage has already been noticed. That right, it seems to me, is entirely inconsistent with the existence of any lien upon future products or earnings by the mortgagee. The latter could not have a lien upon such earnings or products while the mortgagor was permitted to use them for the conduct of its business and the payment of its current debts. We think that the true construction of the instrument is this: Where a mortgage by a corporation to secure the payment of the principal and interest of its bonds, such as this is, is made, although in terms purporting to include future earnings and products, it does not, as against general creditors, operate as a lien upon such earnings until actual entry and possession under the mortgage by the mortgagee. This results from the stipulation in the instrument that until default the mortgagor shall have the use of the earnings in the conduct of its business, and that upon default the mortgagee may go into possession, exercise the corporate franchises, and appropriate the earnings to the payment of the debt secured by the mortgage. The right of the mortgagor in the meantime to the use of the earnings amounts, practically, to absolute ownership, and hence the mortgage cannot operate as a lien upon such earnings, to the prejudice of the general creditors, until actual entry and possession taken, and then only upon what is earned after that time. The lien of the mortgage upon future earnings is consummated as against other creditors only by the fact of the possession of the property, and cannot have any retroactive operation, since it would then deprive the unsecured creditor of the fund, upon the

faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as his own. The lien upon the earnings in favor of the bondholders attaches only upon what is earned after the time when the lien is perfected by entry and possession. This is the construction which has been given to corporate mortgages, expressed in substantially the same terms, by the Supreme Court of the United States, by the English courts, and by the highest courts of many of our sister states. The authorities on this question are quite numerous, and when examined will be found to sustain the proposition that I have stated. It will be quite sufficient to cite some of the cases, without enlarging this opinion by any quotations from the discussions, since the decisions speak for themselves. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. ed. 199; *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405; *American Bridge Co. v. Heidelbach*, 94 U. S. 798, 24 L. ed. 144; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 307, 37 L. ed. 1085, 1091; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415; *Dow v. Memphis & L. R. R. Co.* 124 U. S. 652, 31 L. ed. 585; *Sage v. Memphis & L. R. R. Co.* 125 U. S. 361, 31 L. ed. 694; *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Smith v. Eastern R. Co.* 124 Mass. 154; *Holmes v. Turner's Falls Co.* 142 Mass. 590; *Emerson v. European & N. A. R. Co.* 67 Me. 387, 24 Am. Rep. 39; *Mississippi Valley & W. R. Co. v. United States Exp. Co.* 81 Ill. 535; *De Graff v. Thompson*, 24 Minn. 452; *Government Stock & O. S. Invest. Co. v. Manila R. Co.* [1897] A. C. 81.

I have not been able to find any case in this state, and we are referred to none, where the precise question now under consideration has been determined, but it seems to me the principle which controls the case has been decided. In *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, there was a controversy between the plaintiff, who claimed title to chattels under a sale by the creditor on execution, and the defendant, who claimed title to the same chattels under a chattel mortgage, which, in terms, covered the grass growing upon the premises at the time of the execution of the mortgage, and also the products of the farm thereafter to be produced. The question in that case was whether the farm products not existing at the time of the execution of the mortgage, but coming into existence thereafter by the ordinary operations of farming, were covered by the lien of the mortgage as against the execution creditor, and it was held that they were not. The only difference between that case and the one at bar is that here the fund in controversy was realized from the collection of accounts accruing to the mortgagor from earnings subsequent to the mortgage and before the appointment of either receiver. I can see no distinction in principle, so far as concerns 45 L. R. A.

the question of equitable priority of lien, between the future earnings of a corporation and the future products of a farm, when both are described as covered by the lien of a mortgage. There are numerous cases to be found in the books where the controversy in regard to the lien of a mortgage like the one now under consideration was between the parties to the instrument. These cases are scarcely applicable to the question involved in this appeal, which is one between the general creditors and the mortgage bondholders. Most of them are reviewed in the opinion of Judge Gray in the case last cited, and it is there shown that their authority is limited to controversies between the parties to the mortgage. *Argall v. Pitts*, 78 N. Y. 239, and *Frank v. New York, L. E. & W. R. Co.* 122 N. Y. 197, are cases that bear somewhat on the questions now under consideration, though, perhaps, not directly. In this case, it seems to me that the sequestration creditor occupies the position of a plaintiff in a creditor's bill. If the receiver who represents the mortgage bondholders has the prior right to the fund in question, as the learned court below held, the practical operation and effect of the principle should not be overlooked. The foreclosure of a corporate mortgage does not necessarily mean a sale of the property in the ordinary sense. It simply means a reorganization conducted by or in behalf of the bondholders. Sometimes, but not often, the shareholders may be consulted, but it is rarely that a general creditor has any voice in the matter. The property mortgaged is generally of such a character, and the debt of such magnitude, that a public sale in the ordinary sense is seldom practicable. Whatever may be the real value of the property sold upon the foreclosure, there generally is, and may always be, a deficiency. If the receiver under the mortgage can go back of his appointment and appropriate earnings of the corporation accruing before his appointment and after the execution of the mortgage, in almost every case the only fund upon which the general creditor can rely for the payment of his debt may be absorbed by the bondholders, and this, too, although the receiver may have taken possession of or received the benefit of property furnished at his expense, and on the faith of the current earnings. We think that justice and equity are best promoted by limiting the right or lien of the bondholders to such earnings only as shall accrue after the mortgage trustee or the receiver shall have actually taken possession. The earnings prior to that time should in equity be awarded to the general creditor.

For these reasons we think that the orders appealed from should be reversed, and those of the special term affirmed, with costs, and that the question certified should be answered in the negative.

All concur.

SOUTH DAKOTA SUPREME COURT.

Re William W. TAYLOR.

(7 S. D. 382.)

*Where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence in excess open to question and attack.

(August 30, 1895.)

APPPLICATION for a writ of habeas corpus to obtain petitioner's release from the custody of the sheriff of Hughes County to which he had been committed under a sentence in punishment for embezzlement of which he has been convicted. *Denied.*

The facts are stated in the opinion.

*Headnote by CORSON, P. J.

NOTE.—Effect of excessive sentence.

I. Introduction.

II. General rule.

- a. In state courts.
- b. In United States courts.

III. Effect of application for habeas corpus.

- a. Sentence void, prisoner discharged.
- b. Discharged, proper sentence served.
- c. Discharge refused on habeas corpus.
- d. Discharge refused until legal sentence served.
- e. Sentence corrected or modified and affirmed.
- f. Sentence ordered modified, and case remanded.
- g. Proper sentence imposed, and prisoner remanded.
- h. Execution stayed, bail for future appearance.
- i. Remanded and record corrected.

IV. Effect on appeal, or on writ of error.

- a. In general.
- b. Sentence reversed, prisoner discharged.
- c. Prisoner discharged, legal sentence served.
- d. Judgment reversed in part and affirmed in part.
- e. Sentence corrected or modified, and judgment affirmed.
- f. Judgment ordered modified, and case remanded.
- g. Judgment reversed, and case remanded.
- h. Judgment reversed, and new sentence imposed.
- i. Judgment reversed, and new trial granted.
- j. Execution stayed, bail for future appearance.
- k. Discharged upon suing out writ of error.

V. On certiorari.

- a. Discharge refused.
- b. Judgment reversed, and case remanded.
- c. Prisoner discharged.

VI. English decisions.

This note is confined to the consideration of the effect of a sentence which is excessive in that it exceeds the maximum punishment allowed by the law for the particular crime.

The question of cruel and unusual punishment considered in relation to the constitution—45 L. R. A.

Messrs. Horner & Stewart, for petitioner:

If § 6698 applies to the offense set out in the indictment, then the maximum penalty to be inflicted by the court under a conviction under that statute is two years' imprisonment and \$1,000 fine.

Then the court has exceeded the limit of its jurisdiction in sentencing the defendant Taylor to five years' imprisonment.

When the legislature passes a law defining a particular offense and providing the punishment therefor, it controls and governs an offense of that kind in preference to a general statute defining an entire class or species of crime.

Felt v. Felt, 19 Wis. 193; *State, Luftring, v. Goetze*, 22 Wis. 363; *Potter's Dwarrr. Stat.* p. 273; *Sutherland, Stat. Constr.* §§ 157-159; *Com. v. Huntley*, 156 Mass. 239, 15 L. R. A. 839.

al provisions is considered in note to *State, Garvey, v. Whitaker* (La.) 35 L. R. A. 561.

The correction of a verdict in criminal cases forms the note to *Grant v. State* (Fla.) 23 L. R. A. 723.

I. Introduction.

The doctrine laid down in the principal case is in keeping with the weight of authority upon this question. As therein stated the majority of the decisions shows that, in cases wherein the court has full jurisdiction of the person and subject-matter of the offense, a sentence which exceeds in extent or time that which is authorized by law is not absolutely void so that the prisoner will be entitled to his discharge upon habeas corpus, but is valid so far as it is in keeping with the sentence prescribed by the statute, and void only as to the excess, and will be modified or amended so as to conform to the requirements of the law. In such cases the sentence imposed is looked upon as merely erroneous and reviewable upon writ of error.

This theory is clearly demonstrated by most of the cases cited below.

And it has been expressly declared to be the settled law in New York state. *People, Trainor, v. Baker*, 89 N. Y. 460, 467; *People, Woolf, v. Jacobs*, 66 N. Y. 8; *Re Sweatman*, 1 Cow. 144.

Notwithstanding the flood of authorities upholding the above rule, some of the courts have squarely and distinctly held that a sentence that exceeds in its extent the punishment prescribed by law for the offense in question is absolutely void, and that the prisoner is entitled to his discharge on habeas corpus. This doctrine will be found expressed in *Ex parte Page*, 49 Mo. 291; *Ex parte Cox* (Idaho) 32 Pac. 197; *Miller v. Snyder*, 6 Ind. 1.

There would seem to be some little difference in the course adopted by the courts of the various states in cases holding the sentence erroneous and not absolutely void upon proceedings by way of writ of error.

In some cases the courts have corrected and affirmed the sentence. In other cases they have ordered the judgment to be modified, and remanded the case. In some states the court has reversed the sentence and remanded the case, and in others the courts have reversed the judgment and imposed a new sentence. There are also cases in which the court has simply reversed the sentence, and others where the

When a court in sentencing a prisoner exceeds the limit of its jurisdiction, and imposes a greater penalty upon the prisoner than it is authorized to do in the particular case before it, a writ of habeas corpus will lie in behalf of the prisoner.

If these facts appear the prisoner is entitled to his absolute discharge.

Black, Judgm. § 258; Brown, Jurisdiction of Courts, § 101; Church, Habeas Corpus, § 368; *Re Lackey*, 6 S. D. 526; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149; *Ex parte Lange*, 18 Wall. 176, 21 L. ed. 879; *Ex parte Rowland*, 104 U. S. 612, 26 L. ed. 864; *Nielsen, Petitioner*, 131 U. S. 182, 33 L. ed. 120; *Re Mills*, 135 U. S. 268, 34 L. ed. 109; *Ex parte Virginia*, 100 U. S. 341, 25 L. ed. 676; *Ex parte Siebold*, 100 U. S. 374, 25 L. ed. 718; *Elliott v. Peirce*, 1 Pet. 328, 7 L. ed. 164; *Re Snow*, 120 U. S. 274, 30 L. ed. 658.

Wisconsin has a statute that the prisoner cannot be discharged on habeas corpus until

sentence has been reversed and a new trial granted. The practice in some courts has been to reverse the sentence with instructions to the court below. The proper sentence has been imposed and the prisoner remanded by the courts, in other cases. Execution has been stayed upon the prisoner giving bail for his future appearance in a few instances. The prisoner has also been remanded and the record corrected in some cases, and in one instance the prisoner was discharged upon suing out a writ of error.

In some cases the courts have held that in imposing the excessive sentence the court has exceeded its jurisdiction, and upon this ground has ordered him to be discharged upon habeas corpus. These cases will be found treated of and collected *infra*, III.

In many cases the prisoner has been released from custody upon habeas corpus where the court imposing the sentence had really no power or jurisdiction to commit. These cases are not squarely those in which the sentence exceeds the maximum punishment, and are therefore not within the scope of this note.

If the plaintiff has appealed from the judgment of a magistrate upon the ground of an excessive fine, he cannot subsequently move by way of motion to arrest the judgment. *State v. Tibbetts*, 56 Me. 189, 190.

II. General rule.

a. In state courts.

It is a rule generally admitted, that the judgment must be such, and only such, as the law authorizes, and that no court can give a judgment valid for any purpose not authorized by law. *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, 223, 234; *State v. Norwood*, 93 N. C. 578.

And if the punishment is specifically described by the statute defining the offense, all other degrees of punishment than such as are there prescribed are excluded and unauthorized. *Haney v. State*, 5 Wis. 529, 533.

In *People v. Harrington*, 75 Mich. 112, it is said that the settled law of that state is that for a conviction at the circuit of a crime within the jurisdiction of a justice no greater punishment can be given than can be imposed by a justice.

The court may reduce or lower in extent or degree any sentence so as to make it conformable to law, where a mistake or error is shown to 45 L. R. A.

the time during which he might legally be detained has expired. This explains the position which the supreme court of that state takes in the case of *Re Graham*, 74 Wis. 450.

In New York the statutory provision is that "the court or judge must forthwith make a final order to remand the prisoner if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired.

It is upon that statute that the case of *People, Trainor, v. Baker*, 89 N. Y. 460, rests, and *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, was decided.

A judgment or sentence which exceeds the limit of the jurisdiction of the court to pronounce it is not voidable or irregular merely, but absolutely void.

Com., Davis, v. Lecky, 1 Watts, 66, 26 Am. Dec. 40; *People, Stokes, v. Riseley*, 38 Hun, 280; *People v. Carter*, 48 Hun, 165; *Ex*

exist in it. It may change the form of the judgment, or give a new form to it, so as to bring it within the jurisdictional scope of a legal conviction. *Territory v. Conrad*, 1 Dak. 348, 355.

And if there is an abuse of discretion by the infliction of a cruel punishment, the court has power to set it aside. *Cornellison v. Com.* 84 Ky. 583.

It has been stated that if a jury render a verdict so excessive as to contravene the inhibition of the Constitution, the wrong or vice done lies in the verdict and not in the statute under which the penalty is inflicted, and if a jury impose such a fine it is the province of the court, and its duty, to set the verdict aside. *Southern Exp. Co. v. Com., Walker*, 92 Va. 67, 41 L. R. A. 436.

So, if the penalty defined by a municipal ordinance is within the limits prescribed thereby the city authorities can neither extend nor diminish such sentence. *State v. Bonell*, 42 La. Ann. 1110, 10 L. R. A. 60.

In *Southern Exp. Co. v. Com., Walker*, 92 Va. 67, 41 L. R. A. 436, it is said that the question of an excessive fine is a judicial one, and does not affect the validity of a statute imposing it, and when, if ever, such fine is imposed by a jury, the correcting hand of the court will annul it in accordance with the letter and spirit of the bill of rights.

When there is no power to impose either imprisonment or hard labor, or when the punishment the statute authorizes cannot be carried into effect by reason of the failure of the proper authorities to make the necessary orders, or to provide the necessary machinery for its enforcement, then restraint may, and sometimes does, become unlawful, and the prisoner will be discharged. *Harrington v. State*, 87 Ala. 1; *Ex parte McKivett*, 55 Ala. 236; *State, Marion County, v. Metcalfe*, 75 Ala. 42; *Ex parte Crews*, 78 Ala. 457; *Ex parte Buckalew*, 84 Ala. 460.

The want of power in the court to impose the sentence does not, however, always entitle the prisoner to his discharge, as is shown by the cases cited in the subsequent parts of this annotation, which draw a line between void and voidable judgments.

In *Ex parte Cox* (Idaho) 82 Pac. 197, a distinction is clearly drawn between a sentence which is voidable only, and one which is absolutely void, and the court points out that in the

parte Cox (Idaho) 32 Pac. 197; Idaho Rev. Stat. §§ 8353, 8354; *Ex parte Page*, 49 Mo. 291; *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *Ex parte Bernert*, 62 Cal. 524; *Feeley's Case*, 12 Cush. 598; *Re Long*, 87 Ala. 46; *Ex parte Reynolds*, 87 Ala. 138; *Ex parte McGrew*, 40 Tex. 472; *Re Stewart*, 16 Neb. 193; *Ex parte Tuicher*, 69 Iowa, 393; *Re Dill*, 32 Kan. 668, 49 Am. Rep. 505; *Re Monroe*, 46 Fed. Rep. 53.

The judgment is not severable so that the good part could be separated from the bad.

Ex parte Kelly, 65 Cal. 154; *Ex parte Sylvester*, 81 Cal. 199.

A judgment may be collaterally impeached by habeas corpus or otherwise when void by reason of the court not having jurisdiction to render the particular judgment.

12 Am. & Eng. Enc. Law, p. 247, note 1; 19 Cent. L. J. 102; *Lefforge v. State*, 129 Ind. 551; *Scamster v. Blackstock*, 83 Va. 233.

former case the prisoner should be remanded, while in the latter he should be set at liberty.

A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable and may be dealt with without disturbing the valid portion of the sentence. *State, Doudou-sat, v. Klock*, 48 La. Ann. 67, 72. To the same effect, *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59; *Brooks v. Com.* 4 Leigh, 669; *Murray v. Com.* 5 Leigh, 720, 724; *Hall v. Com.* 6 Leigh, 615, 618, 29 Am. Dec. 230; *People, Tweed, v. Liscomb*, 60 N. Y. 560, 19 Am. Rep. 211; *Feeley's Case*, 12 Cush. 598; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *People v. Markham*, 7 Cal. 208; *People, Trainor, v. Baker*, 89 N. Y. 467; *Sennott's Case*, 146 Mass. 489, 493; *People, Woolf, v. Jacobs*, 66 N. Y. 8; *Bigelow v. Forrest*, 9 Wall. 339, 19 L. ed. 696; *Ex parte Bond*, 9 S. C. N. S. 80, 30 Am. Rep. 20; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *State, Hull, v. Wolfer*, 68 Minn. 465, 466.

b. In United States courts.

In the case of *United States v. Pridgeon*, 153 U. S. 48, 62, 38 L. ed. 631, 637, the court stated the rule to be that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence. This statement of the law overrules the doctrine laid down by the court below in that case.

The ruling of the court below followed that expressed by the court in the case of *Harman v. United States*, 50 Fed. Rep. 921, 922, wherein the court stated that in the courts of the United States the rule was that a judgment in a criminal case must conform strictly to the statute, and that any variation from its provision, in either character or extent of the punishment inflicted, rendered the judgment absolutely void; and further, that although a different rule prevailed in some of the states, yet the rule prevailing in a state, whether by statute or judicial decision, had no force in the Federal courts administering criminal justice under the Constitution and laws of the United States, and that in those courts the doctrine of the Supreme Court of the United States was a paramount authority.

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Messrs. Coe I. Crawford, Atty. Gen., and John A. Holmes, for the State:

If the court had jurisdiction, and the commitment is in proper form, a party committed for contempt cannot be discharged.

People, Mitchell, v. Sheriff of New York, 29 Barb. 622.

Error committed by a criminal court having jurisdiction of the offense and of the person cannot be remedied by habeas corpus.

Re Cavanagh, 10 How. Pr. 27.

An error in the sentence of a criminal court, as to the place of imprisonment, cannot be reviewed on habeas corpus; the criminal court having jurisdiction to determine the question before it.

People, Rice, v. Keeper of Penitentiary, 37 How. Pr. 494.

Where a writ of habeas corpus is directed to a public officer who returns that he holds the relator by legal process, if such process be sufficient on its face to protect the magistrate by whom it was issued, the court can-

In the case of *Harman v. United States*, however, the question was not one of the infliction of an excessive sentence but a case in which the court had neglected to inflict a sentence of hard labor as required by § 3893, U. S. Rev. Stat., upon a conviction of mailing an obscene paper.

In the above case, the court relied upon several authorities which are set forth and discussed later in this note, as upholding the doctrine therein set forth, to the effect that the judgment is absolutely void.

Among these cases is the case of *Re Mills*, 135 U. S. 263, 271, 34 L. ed. 107, 110, in which the court discharged the prisoner on habeas corpus, holding that because the sentence was entirely void, and not merely erroneous, the court below had no jurisdiction to pass it.

Another case relied upon in *Harman v. United States* is *Re Graham*, 138 U. S. 461, 462, *Graham v. Weeks*, 34 L. ed. 1051, 1052, in which the discharge of the prisoner upon habeas corpus was refused, as the sentence was not absolutely void but erroneous, the Wisconsin statute making special provisions for the correction of an excessive sentence by appeal, and denying the right to proceed by way of habeas corpus. In this case, however, Mr. Justice Field distinctly says that it is undoubtedly the general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, in either character or the extent of punishment inflicted, renders the judgment absolutely void. But as the case was held to be governed by the law of the state that statement may be deemed a *dictum*, and is certainly overruled by the case of *United States v. Pridgeon*, 153 U. S. 48, 62, 38 L. ed. 631, 637.

The court in the *Harman Case* also cites *Ex parte Lange*, 18 Wall. 163, 176, 21 L. ed. 872, 870, in which Mr. Justice Miller says that a judgment rendered without power or authority, or one rendered in excess of the authority of the court, is void; but he was discussing judgments that are void *in toto*, and not speaking of those which are merely excessive, or in some other way differ from the provisions that should be imposed.

In *Ex parte Karstendick*, 93 U. S. 396, 403, 23 L. ed. 889, 891, the court showed that upon a void commitment the prisoner would be discharged upon habeas corpus; but in that case the court refused to discharge the prisoner. as

not go into the evidence on which it was founded.

Bennac v. People, 4 Barb. 31. See also *Ex parte Milburn*, 9 Pet. 704, 9 L. ed. 281; *Ex parte Clawson* (Utah) 5 Pac. 74.

In case of excessive sentence the only remedy is by writ of error. If the sentence in any case is found to be excessive, the supreme court may modify it upon writ of error.

Territory v. Conrad, 1 Dak. 355; *Hussy v. People*, 47 Barb. 503; *O'Leary v. People*, 17 How. Pr. 316; *People v. Vanard*, 6 Cal. 362; *People v. Wilson*, 9 Cal. 260; *People v. Murat*, 45 Cal. 281; *Ex parte Hartman*, 44 Cal. 35; *Ex parte Max*, 44 Cal. 579; *Ex parte McLaughlin*, 41 Cal. 220, 10 Am. Rep. 272; *Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90; *Ex parte McCullough*, 35 Cal. 100; *People, Mitchell, v. Sheriff of New York*, 7 Abb. Pr. 96; *People v. Cassels*, 5 Hill, 167; *Ex parte Gibson*, 31 Cal. 619, 91 Am. Dec. 546.

Jurisdiction of the "matter" or "subject-

the commitment to the penitentiary in another state was within the power of the court.

And *Re Johnson*, 46 Fed. Rep. 477, 481, is also relied upon as sustaining the same doctrine. In this case the court exceeded its authority, and the prisoner was discharged on habeas corpus.

But in the case of *United States v. Pridgeon*, 153 U. S. 48, 62, 38 L. ed. 631, 637, without reviewing all the authorities or attempting to reconcile them, the court stated that they all conceded that neither irregularities nor error, so far as they were within the jurisdiction of the court, could be inquired into upon habeas corpus, although they differed widely as to what constituted error, and what should be regarded as rendering the judgment or proceedings void. But this case distinctly lays down the rule stated at the beginning of this subdivision, holding that a sentence may be enforceable in part though invalid in another part.

And so, in *Re Swan*, 150 U. S. 637, 653, 37 L. ed. 1207, 1211, relied upon by the court in the *Pridgeon* Case, the court also refused to discharge the prisoner upon habeas corpus until he had served so much of the sentence as was legally imposed upon him, and held that it was only the excessive part of the sentence that was void, and that this did not affect the whole sentence or such part as the court had power to impose.

III. Effect of application for habeas corpus.

a. Sentence void, prisoner discharged.

In some cases the sentence has been declared absolutely void, and the prisoner has been discharged from custody upon habeas corpus.

In *Re Johnson*, 46 Fed. Rep. 477, 481, it was contended that if the court found that the sentence was erroneous the prisoner might be held for a new sentence in the district court, but the court held that an erroneous sentence, after it has been partly executed, cannot be revised and a new sentence imposed, even at the same term of court, and relied upon *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872. In this case the court discharged the prisoner upon habeas corpus, on the ground that the court exceeded its authority in sentencing him to simple imprisonment when the sentence should have been to hard labor. This decision seems to be overruled by *United States v. Pridgeon*, *infra*, III. c.

In *Kirby v. State*, 62 Ala. 53, 57, the applicant for a writ of mandamus, convicted of lar-

matter" in a criminal case means the offense.

Ex parte Gibson, 31 Cal. 619, 91 Am. Dec. 546.

Embezzlement was the subject-matter of the offense, and the court had jurisdiction over that offense. *Hunt v. Hunt*, 72 N. Y. 229, 28 Am. Rep. 129; *Sweet v. Merry*, 109 N. Y. 94; *Ayers v. Russell*, 50 Hun, 298; *Jacobson v. Miller*, 41 Mich. 93.

If this judgment and sentence is excessive it is the excess only that is void. The judgment still remains valid, to the extent authorized by law.

Brown, Jurisdiction of Courts, § 106, pp. 288, 289; *Re Sweatman*, 1 Cow. 144; *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People, Woolf, v. Jacobs*, 66 N. Y. 8; *People, Trainor, v. Baker*, 89 N. Y. 461; *Shepherd v. People*, 25 N. Y. 406; *Rutzky v. People*, 20 N. Y. 125; *McKee v. People*, 32 N. Y. 239; *People, Devoe, v. Kelly*, 97 N. Y. 212; *Ex parte Bigelow*, 113

ceny of merchandise, was found guilty of petit larceny and fined \$500, and in default of payment was sentenced to hard labor for the county under directions of the county commissioner, for the period of one hundred and forty days in satisfaction of the fine, and for an additional period of five hundred and forty days at fifteen cents per day in satisfaction of the costs of the suit, and also in satisfaction of the value of the goods stolen. The applicant was discharged as the sentence was illegal and not warranted. In that case it was expressly shown that the commissioners had not established any system of hard labor, and the court expressly pointed out that he could not be indefinitely held by the sheriff until such time as the commissioners had established a system of hard labor, and that imprisonment in jail could not be substituted for the same.

In *Ex parte Montgomery*, 79 Ala. 275, the city council by writ of certiorari petitioned to review the proceedings of the judge of the probate court in discharging the prisoner from the custody of the municipal authorities on habeas corpus. The prisoner had been convicted of larceny and sentenced to pay a fine of \$100 and the costs of the prosecution, and in addition was sentenced to six months' hard labor for the city, and in default of payment of fine and costs he was sentenced to hard labor for the city for —days under the city ordinance, as violations of the laws were punishable by fine or imprisonment, or by fine and imprisonment, or by hard labor upon the streets or public works of the city or for the city, and the fine was not to exceed \$100, and the sentence to imprisonment or hard labor was not to exceed six months. The question was whether, under such ordinance, there could be for one and the same offense a sentence of both a money fine and to perform hard labor. The court held there could not, as the ordinance gave the option of inflicting a money fine or imprisonment, one or both, and it also gave the option of sentencing to hard labor, but it gave no such option when either a money fine or imprisonment had been imposed, except as a means of coercing the payment of the fines and costs, and the prisoner was therefore rightly discharged.

In *Ex parte Ah Cha*, 40 Cal. 426, the prisoners, indicted for an assault to commit murder, but found guilty of an attempt to commit great bodily injury only, and sentenced to pay a fine of \$500 each, and, in default of payment, to

U. S. 328, 28 L. ed. 1005; *Ex parte Curtis*, 106 U. S. 371, 27 L. ed. 232; *Ex parte Carll*, 106 U. S. 521, 27 L. ed. 288; *Sennott's Case*, 146 Mass. 489; Bishop, Crim. Proc. 3d ed. § 1373, 1st ed. 946, 947; *Drew v. Com.* 1 Whart. 279; *Daniels v. Com.* 7 Pa. 371; *Com. v. Ellis*, 11 Mass. 465; *Kane v. People*, 8 Wend. 203; *Com. v. McKisson*, 8 Serg. & R. 420, 11 Am. Dec. 630; *Com. v. Church*, 1 Pa. 105, 44 Am. Dec. 112; *Jacquins v. Com.* 9 Cush. 279; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 432; *Lowery v. Howard*, 103 Ind. 440; 9 Am. & Eng. Enc. Law, p. 222.

An excessive sentence is not void *ab initio*. It is good so far as the power of the court extends, and invalid only as to the excess.

Crandall's Petition, 34 Wis. 177; *Re Petty*, 22 Kan. 477; *Feeley's Case*, 12 Cush. 598; *Williamson's Case*, 26 Pa. 9, 67 Am. Dec. 374; *Platt v. Harrison*, 6 Iowa, 79, 71 Am. Dec. 389; *Ex parte Lehmkuhl*, 72 Cal. 53;

Re Rolfs, 30 Kan. 758; *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59; 21 Am. & Eng. Enc. Law, pp. 1082, 1083; *State, Williams, v. Stordock* (Minn.) 39 N. W. 65; *People v. Harrington*, 75 Mich. 112; *Herrington v. State*, 87 Ala. 1; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631; *Harman v. United States*, 50 Fed. Rep. 921; *Re Pridgeon*, 57 Fed. Rep. 200; *Sennott's Case*, 146 Mass. 489; *People, Devoe, v. Kelly*, 97 N. Y. 212; *Re Graham*, 74 Wis. 450; *Elsner v. Shrigley*, 80 Iowa, 30; *Ex parte Bond*, 9 S. C. N. S. 80, 30 Am. Rep. 20; *Com., Davis, v. Lecky*, 1 Watts, 66, 26 Am. Dec. 46, note; *Vaughan v. State*, 83 Ala. 55; *People v. Seller*, 58 Mich. 327; *People v. Jones*, 49 Mich. 591.

If the indictment and plea were based upon the crime of embezzlement, the sentence is not excessive; if, on the other hand, the indictment and plea specify another and different offense for which the penalty can-

imprisonment in the state prison for the term of two years each, sought their discharge upon habeas corpus. Under the California statutes the defendants were found guilty of a simple assault, which was a misdemeanor, upon conviction of which a fine of not exceeding \$500 or imprisonment in the county jail not exceeding three months might be imposed. The prisoners were ordered discharged as the judgment was not merely erroneous, but absolutely void, for the reason that it showed upon its face that they had been by the verdict acquitted of the charge of felonious assault, and committed for misdemeanor, and the punishment inflicted upon them was one which was not permitted by law for a conviction of the latter class of offenses.

In *Ex parte Bernert*, 62 Cal. 524, the court imposed a sentence of fine and imprisonment when the law only prescribed a fine, and allowed imprisonment only as an alternative for nonpayment of the fine. The judgment was declared void upon habeas corpus for the reason that there could be no imprisonment except as an alternative for nonpayment of the fine.

In *Ex parte Baldwin*, 60 Cal. 482, the petitioner sought to be released from imprisonment on habeas corpus. He was convicted of a misdemeanor punishable by fine only, but the judgment was entered against him of fine or imprisonment. The court held that as the sentence was not imposed in conformity with the provisions of the California Penal Code, the judgment rendered and entered was beyond the power vested in the justice so far as it adjudged imprisonment, and was therefore to that extent void, and that there was no authority for any officer to hold him in custody, and, relying upon the decision in *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, released the prisoner.

In *Ex parte Cox* (Idaho) 32 Pac. 197, the applicant for a writ of habeas corpus was indicted for an assault with an intent to murder, and was convicted of an assault with a deadly weapon likely to produce great bodily harm. He was sentenced to confinement in the state prison for a term of five years. Idaho Rev. Stat. § 6732, prescribed the punishment of the crime of which he was convicted to be imprisoned for a term not exceeding two years, or fine of \$5,000, or both such imprisonment and fine. The court held that the judgment was not authorized by law, and was therefore wholly void.

In *Re Millington*, 24 Kan. 214, 221, the petitioner for habeas corpus was committed for 45 L. R. A.

contempt of court and ordered to pay a fine of \$200. He contended that the punishment imposed was one beyond the power of the court, and was therefore void. The Kansas Appeal Laws of 1879, chap. 28, § 2, provides that judges of the district court shall have power in vacation or at chambers, as may be provided by law, to hear and determine motions to vacate or modify injunctions, discharge attachments, etc., and to punish for contempt in open court, or at chambers, by fine not exceeding \$100 and imprisonment or both. The court ordered the prisoner's discharge. In this case, however, an additional objection was taken to the power of the court to adjourn prior to the sentence passed upon the prisoner, and the adjournment in that case was also held to be void.

In *Re Ryan*, 45 Mich. 173, the petitioner for habeas corpus was committed by a justice of the peace of one county to the state house of correction as a disorderly person in default of finding sureties. The statute under which the proceedings were taken was chap. 53, Mich. Comp. Laws, and by Sess. Laws 1879, § 12, persons convicted under the first-named statute might be sentenced to the reformatory. The court held that it was not the intention of the legislature to act for and leave the person so sentenced without any means of giving security as provided in chapter 53 of the former statute, and as the same was not expressly repealed the petitioner could not be deprived of his rights, and therefore ordered him discharged.

In *Re Stewart*, 16 Neb. 193, the relator, convicted by a justice of the peace of an unlawful and wilful assault and battery, was fined \$50 and sentenced to three months' imprisonment in the county jail. He sought to be discharged upon habeas corpus upon the ground that the sentence was unauthorized. Under § 18 of art. 6 of the Constitution, justices of the peace had no jurisdiction in a criminal case where the punishment exceeded three years' imprisonment or a fine of over \$100. It was held that the justice could not impose both fine and imprisonment, and that the sentence of imprisonment was in excess of the power, and a nullity, and the prisoner was therefore discharged.

In *State v. Gray*, 37 N. J. L. 368, the relator on habeas corpus was sentenced to imprisonment at hard labor in the state prison for the term of six months by the special sessions of the county, for adultery, and claimed that the judgment was illegal as the court had no power to impose hard labor as part of the sentence for the

not exceed two years' imprisonment, the sentence is excessive.

Section 6212 applies to cases only where no "different punishment is prescribed by the Code, or by some existing provision of law."

This provision was enacted as a sort of saving enactment, to prevent an accidental failure of justice in cases where the legislature had failed to provide any other penalty for a public offense declared to be a felony.

The offense defined in the subdivision of § 6698 is declared to be a felony.

So, the offense committed by defendant is a felony. Is it not also that particular felony known as embezzlement for which "a different punishment is prescribed?"

The violation of law defined in subdivisions 1 and 4 of § 6698 will be held to constitute the crime of embezzlement, and the punishment therefor will be held to be the same as that provided for embezzlement elsewhere in the Code.

The court cannot here inquire in habeas

offense. The court ordered him discharged as the judgment was illegal and void, and the prisoner could not be retained in custody, as a new judgment could not be passed either in that court or in the court below.

The South Dakota laws do not authorize a justice of the peace to commit a defendant for the nonpayment of costs which are no part of a fine imposed as a penalty for his offense. *Re Lackey*, 6 S. D. 526. In this case the court ordered the prisoner discharged upon habeas corpus.

A justice in a criminal trial for a misdemeanor imposed a fine of \$10, and \$54.60 costs, and entered judgment that the defendant should stand committed until the fine and costs should be paid. The justice based his right to so commit on § 6985, S. D. Comp. Laws (Penal Code), upon the ground that such section justified him in adding the taxable costs to the imposed fine, but the section in question simply provided that in all cases of conviction the costs of the prosecution should be taxed against the defendant, and enforced as other judgments in criminal actions. The court was therefore of opinion that the section, if applicable at all to proceedings in justices' courts, did not authorize such court to commit a defendant for the nonpayment of the fine imposed as a punishment for his offense, and the judgment, so far as it provided that the defendant was to stand committed until the costs were paid, was unauthorized, and he was discharged after five days' imprisonment. *Ibid.*

In *People, Stokes, v. Riseley*, 38 Hun, 280, the sentence of a justice of the peace to pay a fine of \$250, and to stand committed to the county jail until the fine was paid, not exceeding one year, imposed upon the petitioner for habeas corpus, was held void, and the prisoner was released as his remedy was not confined to appeal. In this case § 717 of the Code of Criminal Procedure was before the court, and it was suggested that the sentence was valid to the extent of \$50 fine, and the liability to fifty days' imprisonment, but the court held otherwise, and also that the illegal sentence confined him in jail when the legal one would not do so, and in this respect it distinguished the case from *People, Trainor, v. Baker*, 89 N. Y. 460, and relied upon the case of *People, Devoe, v. Kelly*, 97 N. Y. 215, in support of its contention that habeas corpus was the proper remedy.

In this case the court also relied upon the 45 L. R. A.

corpus as to whether or not the facts stated in the indictment were sufficient. A demurrer was interposed and overruled, and the sufficiency of the indictment can only be examined, if at all, upon writ of error.

1 Black, Judgm. § 259.

Corson, P. J., delivered the opinion of the court:

The petitioner, William Walter Taylor, presented to this court his petition for a writ of habeas corpus, alleging therein that he was illegally restrained of his liberty by the sheriff of Hughes county. The petitioner set forth in his petition a copy of the indictment, his plea thereto, and judgment of the circuit court of Hughes county. This court thereupon issued its writ of habeas corpus to the sheriff of said Hughes county, who, in obedience to the command in said writ contained, brought before this court the said petitioner, and made return of the cause of his imprisonment and detention by him as

case of *People, Tweed, v. Liacomb*, 60 N. Y. 559, 19 Am. Rep. 211, as explained by *People, Woolf, v. Jacobs*, 66 N. Y. 10, as establishing the doctrine that, when in pronouncing its sentence the court had exhausted its authority, if it proceeds further to impose additional sentences, such sentences are void. Thus, "the final judgment" must be "of a competent tribunal," and where the competency to pronounce it is exhausted, or never existed, it does not come within the definition of a final judgment as to which habeas corpus is ineffective.

The court further pointed out that it had no power to detain the relator upon his sentence, and could not itself impose any in such a proceeding, and discharged him, as it was impracticable to remand him.

In *People v. Carter*, 48 Hun, 165, the relator on habeas corpus was sentenced to a fine of \$100, or to imprisonment in the county jail until the fine was paid, not exceeding one hundred days, for a violation of the excise law. He refused to pay the fine, and was committed to jail. The court had no power to fine the defendant \$100, or to imprison him until the fine was paid, as by § 717 of the Code of Criminal Procedure its power was limited to a fine not exceeding \$50 or imprisonment for six months. The judgment was therefore held void, while the conviction was proper. The court in this case affirmed the order of the court below discharging the prisoner upon habeas corpus, as no power existed to remit the case to the court of special sessions for further judgment, under chap 266 of the Laws of 1863, which gave the supreme court or the appellate court power to remit a record of conviction to the trial court to pass a proper sentence, but did not include courts of special sessions.

Again, in *People, Knowlton, v. Sadler*, 2 N. Y. Crim. Rep. 438, the court upon habeas corpus released the prisoner convicted at a court of special sessions of the crime of petit larceny, from a sentence to imprisonment in the county penitentiary for the term of one year, under the same section of the Code of Criminal Procedure, as the commitment showed upon its face that it was issued to enforce a judgment that the court not only had no power to render, but was actually prohibited from rendering, and the judgment was not merely erroneous or unauthorized, but it was positively forbidden by law.

In the above case the court pointed out that if, under any circumstances, or upon any state

sheriff of said county. From the petition and the return, which contain copies of the same indictment, plea, and judgment, it appears that the petitioner was indicted by the grand jury of Hughes county for the crime, as stated generally in the indictment, of "embezzlement." To this indictment the prisoner pleaded guilty as charged in the indictment, and the petitioner was thereupon adjudged by the circuit court of the sixth judicial circuit, in and for Hughes county, to be imprisoned in the state's prison of the state of South Dakota for the period of five years. The learned counsel for the petitioner contend that the law under which the petitioner was indicted did not authorize the court to impose a sentence of imprisonment for a period exceeding two years, and that as the sentence imposed was for a period of five years the judgment is void and the petitioner is entitled to be discharged from custody. The learned attorney general and state's attorney insist that the court was au-

thorized to impose a sentence of five years under the law. But they further insist that, if the sentence for five years was not authorized by law, the judgment is a legal and valid judgment for two years, and hence the petitioner would not be entitled to be discharged until the end of the two years, in any event.

The last proposition of counsel is, in our view of the case, the only one necessary to be discussed on this application; and we have not, therefore, considered, and do not express any opinion upon, the first proposition of the counsel, namely, as to whether or not the sentence should have been limited to two years. Assuming, then, for the purposes of this decision only,—but, as before stated, without deciding or expressing any opinion upon the question,—that the circuit court had no authority to sentence the petitioner for a period exceeding two years, is the judgment of the circuit court void *in toto*, or is it only void as to the period in excess of two

of facts, a court of special sessions had power to inflict the punishment specified in the commitment, it might be held that the error was not one that could be reviewed upon habeas corpus, as the detention would be by virtue of a penal judgment by a competent tribunal of criminal jurisdiction, and the only remedy in such a case would be by appeal for modification or correction of the sentence. It also distinguished the case from the earlier one of *People, Devoe, v. Kelly*, 97 N. Y. 212, in which the prisoner was still in custody under a valid judgment, and the void part of the sentence had not been executed, while in the case then before the court the prisoner's sentence was absolutely void.

And the prisoner was released upon habeas corpus in *Feeley's Case*, 12 Cush. 598, 600, as the only correction in the error would be in reversing and annulling that part of the judgment which imposed any imprisonment, and upon such correction no judgment would remain warranting imprisonment, and therefore the prisoner would be entitled to his immediate discharge from custody.

In some cases the courts have held the judgment to be void, and have discharged the prisoner upon the ground that the court has exceeded its jurisdiction.

It has been held that jurisdiction to render the particular sentence imposed is as essential to its validity as jurisdiction of the person or subject-matter. *Ex parte Cox* (Idaho) 32 Pac. 197.

In New York state all punishments are prescribed by the statute as well as to character as to extent, and a sentence not conformable to law as not warranted by statute, or which is in excess of the legal punishment, is *ultra vires*, and, like every other act, whether judicial or ministerial, done without legal authority, is void. *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, 234.

But, as appears below, this case did not actually relieve the prisoner from all imprisonment, but only from punishment under other cumulative sentences after having served the first of the sentences.

No court is or can be competent to pronounce a sentence or give judgment in open and palpable violation of a positive statute, and a judgment thus given is simply void. *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, 233, 234.

If the punishment for the offense is fixed by 45 L. R. A.

statute, a judgment in excess of the statutory limits is void for the excess, and a party held only by virtue of judgments thus pronounced, and therefore void for want of jurisdiction, or by reason of the excess of jurisdiction, is not put to his writ of error, but may be released by habeas corpus. *Ibid.*

And if the record shows that the judgment was not merely erroneous, but such as could not, under any circumstances or upon any state of facts, have been pronounced, the applicant for a writ of habeas corpus must be discharged. *Ibid.*

In this case the prisoner was discharged on habeas corpus after serving out the first of several cumulative sentences passed upon him upon the ground that the other sentences pronounced were entirely beyond the right of the court to pronounce under any state of facts which could have been shown on the trial.

The real question, however, at issue in the *Tweed Case* was the validity of cumulative sentences, and upon this question the court held that if several judgments be pronounced by a sentence, the same in the aggregate distributing such punishment and apportioning it to the convictions upon the several counts, according to the demerits of the offense charged in each, each and every of the judgments and sentences in excess of that limit is *coram non iudice*; and further, that a judgment in the form and to the extent allowed by law once pronounced, the power of the court is *functus officio*, in respect to that prosecution and the indictment, except to see that the judgment is executed, and the further sentences are absolutely void, and not merely erroneous.

In the *Tweed Case* the ground of the decision of the court was that there was not in that state any real or true warrant for several and distinct judgments upon a single indictment in the law.

Where the jurisdiction of the court is limited, and the punishment imposed is in excess of such jurisdiction, the whole judgment is void, and the prisoner will be discharged on habeas corpus. *State, Erickson, v. West*, 42 Minn. 147, 153; *State, Hull, v. Wolfer*, 68 Minn. 465, 466.

In *Ex parte McKivett*, 55 Ala. 236, which was a similar case, the court upon habeas corpus proceedings, stated that when the justice passed beyond the term specified in the statute as a term for hard labor for the county he exceeded his jurisdiction, and the sentence was

years? If the judgment is absolutely void, then the petitioner would be entitled to his discharge. But if valid for the two years, and only void for the excess, he must be remanded, as his detention at this time is legal.

There is an irreconcilable conflict in the authorities upon the question as to whether such a judgment is void as to the entire sentence, or only void as to the excess. After a careful consideration of the subject, and an examination of nearly all the authorities cited, we are of the opinion that the weight of authority at the present time is that such a judgment is valid to the extent that the court had power or authority to sentence a defendant, and only void as to the excess, and that a defendant may lawfully be held under such a judgment for the period for which the court had power and authority to sentence him. This seems to have been the view taken by the supreme court of New York in *Ex parte Sweatman*, reported in 1

Cow. 144, decided in 1823, and that decision has since been generally followed in that state. *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People, Woolf, v. Jacobs*, 66 N. Y. 8; *People, Trainor, v. Barker*, 89 N. Y. 460. The supreme court of Ohio has taken the same view. *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426. The Massachusetts supreme court holds a similar doctrine. *Sennott's Case*, 146 Mass. 489. In the latter case the court says: "The better rule seems to be that, where a court has jurisdiction of the person and of the offense, the imposition, by mistake, of a sentence in excess of what the law permits, is within the jurisdiction and does not render the sentence void, but only voidable by proceedings upon a writ of error." The supreme court of Wisconsin, in the cases of *Re Graham* and *Re McDonald*, 74 Wis. 450, clearly announces the same doctrine. In those cases the sentence was in one case for thir-

consequently void, and the mittimus expressing it as a cause of detention was also void. The same principles were asserted and sustained in the cases of *Ex parte Montgomery*, 79 Ala. 275, and *Ex parte Anniston*, 84 Ala. 21, which were both habeas corpus cases.

In *Ex parte State*, 87 Ala. 46, which was also a case in which the prisoner had applied under habeas corpus, the prisoner was convicted and fined for vagrancy by a justice of the peace. The justice's mittimus directed the jailer to take the prisoner into custody in default of payment of the fine and costs, and detain him until he performed twenty days' hard labor for the county for the fine, and sixty days' for the payment of the costs, subject to the order of the board of revenue. Hard labor was in excess of the punishment prescribed, and it was held that the sentence was a nullity and not merely void as to such excess, and the prisoner was therefore discharged upon habeas corpus. In this case the sentence of twenty days' hard labor for the county for the fine and sixty days' for the costs was in excess of the jurisdiction.

In *Ex parte Reynolds*, 87 Ala. 138, 143, the prisoner sought relief under the writs of habeas corpus and certiorari from a sentence to hard labor upon the streets for violating a prohibition ordinance. The town ordinances punished the offense by fine, imprisonment, or hard labor. The prisoner was ordered to be discharged as the state statute only empowered municipal authorities to punish by fine or imprisonment, and the act conferring such authority upon them did not authorize them to impose labor on the streets as a punishment. The sentence was therefore declared illegal and void.

In *Ex parte Bernert*, 62 Cal. 524, a petitioner for habeas corpus, convicted in the police court for violating an ordinance, was adjudged to pay a fine of \$20, and in default of payment to be imprisoned in the county jail for the period of ten days. Under the ordinance and the act referred to in it, the police court had only power to fine in the sum of \$100 or a greater sum not exceeding \$1,000, and imprisonment was only to be imposed in case such fines were not paid. The court ordered the prisoner discharged upon habeas corpus as the police court transcended its jurisdiction.

In *Ex parte Kelly*, 65 Cal. 154, the petitioner for habeas corpus, convicted of a battery, was sentenced to be fined \$650, or to be imprisoned in the county jail in the proportion of one day's

imprisonment for every dollar of the fine until the fine, not exceeding \$650, was satisfied. Under such imprisonment the petitioner performed labor on the streets. Under Cal. Penal Code, § 243, the offense was a misdemeanor punishable by fine not exceeding \$1,000, or by imprisonment in the county jail not exceeding six months, and under § 1446 of the Penal Code the court had also power to direct the imprisonment until the fine be satisfied in proportion to one day's imprisonment for every dollar of the fine, but it did not allow an addition to this substituted mode of payment, and there was no power to adjudge that he perform labor on the streets. The court held that such portions of the sentence were outside of the jurisdiction, that the judgment was a unit and void if one portion of it was without the jurisdiction, and that there was no authority in the court to hold a portion of it surplusage because not authorized by law, and, on exceeding such portion, order what remained to be carried into execution, but that if any material portion of it was in excess of the jurisdiction it was void.

In a case in which the prisoner failed to appear pursuant to his recognizance in the district court to answer a criminal charge, and was convicted and imprisoned for contempt, but the charge against him did not constitute a contempt for which he was punishable by fine or imprisonment, he was ordered to be discharged upon habeas corpus as the judgment was not warranted and the court had no jurisdiction to render it, and the imprisonment was illegal. *Re Dill*, 32 Kan. 668, 49 Am. Rep. 505.

In *Clarke's Case*, 12 Cush. 320, a proceeding for contempt was not within the jurisdiction of the magistrate, and the order for the imprisonment of the petitioner for habeas corpus was not legal, and he was therefore entitled to be discharged from custody because the justice exceeded his jurisdiction.

Violations of municipal ordinances, punishable by fine or imprisonment, are criminal offenses within the meaning of art. 1, § 7, of the Minnesota Constitution, and consequently, where the prescribed punishment may exceed three months' imprisonment or \$100 fine (the limitation of jurisdiction of justices of the peace) the person can be held to answer for them upon an indictment or information of a grand jury; and in such cases the municipal court of the city has no jurisdiction to try any case for the violation of the city ordinance,

teen years, and in the other for fourteen years, while the law under which the convictions were had limited the punishment to ten years. The defendants applied for writs of habeas corpus, upon the ground that "the sentences were for a term in excess of the period fixed by statute," and therefore void. The court, in its decision, says: "We deny the writs for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of habeas corpus. The judgments are doubtless erroneous, and would be reversed on a writ of error. . . . But the judgments are not void." Graham made a second application for the writ, which was again denied; and the case was brought before the Supreme Court of the United States upon writ of error, and the decision in the latter court affirmed. The case is reported as *Re Graham*, 138 U. S. 461, *Graham v. Weeks*, 34 L. ed. 1051. In its decision the

where the prescribed punishments may exceed the limits referred to. Its judgment in such a case is absolutely void, and as the imprisonment of the defendant under it is without authority of law, he may be discharged therefrom on habeas corpus. The judgment in such a case is not merely erroneous and irregular, but absolutely void for want of jurisdiction. *State, Erickson, v. West*, 42 Minn. 147.

In *Ex parte Page*, 49 Mo. 291, where a sentence was for ten years while the law allowed only seven, it was pointed out that the error did not arise out of the matter of fact, but was patent on the face of the record which showed that the judgment of the court in passing sentence was illegal, not simply erroneous or irregular, but absolutely void under Wagner (Mo.) Stat. 690, § 35, as exceeding the jurisdiction of the court, because not in the exercise of an authority prescribed by law.

The court also stated that there was no authority to reduce the term so as to bring it within that prescribed by statute, as the statute making it the duty of the court to examine the record and award a new trial, reverse or affirm the judgment or decision of the lower court, or give such judgment as the court ought to have given, was confined by express terms to appeals and writs of error, and had no application in habeas corpus cases.

In *Ex parte Jiltz*, 64 Mo. 205, 208, 27 Am. Rep. 218, the petitioner for habeas corpus, convicted of criminal abortion, was sentenced to imprisonment in the county jail for a term of one year and to pay a fine of \$500. He sought to be released from confinement upon the ground that the court had exceeded its power in sentencing him to confinement in the county jail for one year, and contended that the sentence and commitment were void upon the ground that the court had only jurisdiction to sentence him to imprisonment for a period of six months. The court discharged the prisoner. In this case the court relied upon the case of *Ex parte Page*, 49 Mo. 291.

In the case of *Crandall's Petition*, 34 Wis. 177, *et infra*, the court pointed out that if there had been no authority of law to punish the petitioner by both fine and imprisonment, a case of excess or want of jurisdiction would have been presented, and the petitioner would have been entitled to his discharge on habeas corpus.

Where the sentence of imprisonment on two convictions was, one for one year, and the other 45 L. R. A.

Supreme Court of the United States, speaking through Mr. Justice Field, says: "That the prisoner should not have been sentenced for any time in excess of ten years is very evident. When the ten years have expired, it is probable the court will order the prisoner's discharge, but until then he has no right to ask the annulment of the entire judgment. Such being the ruling of the state court, and there being nothing in it repugnant to any principle of natural justice, we think that the reason given for a refusal of the writ of habeas corpus in the court below at the present time was a sound one." The same doctrine is held by the supreme court of Iowa (*Elser v. Shrigley*, 80 Iowa, 30), and the supreme court of South Carolina (*Ex parte Bond*, 9 S. C. N. S. 80, 30 Am. Rep. 20).

The counsel for the petitioner have cited quite a number of decisions made by courts whose opinions are entitled to great consideration, holding that such a judgment is en-

for six months, the orders directing the sentences to be executed in a penitentiary were held void. *Re Mills*, 135 U. S. 263, 34 L. ed. 107. In this case the prisoner was sentenced to confinement in the penitentiary under a judgment of the district court for an offense against the liquor laws as provided in § 3242, Rev. Stat., and it appeared that the court below was without jurisdiction to pass any such sentence. The acts were held void and the prisoner was released upon habeas corpus, the court stating that the case was not one of mere error, but one in which the court below had transcended its powers, as it is only in cases where the punishment by imprisonment is for a longer term than one year that the prisoner can be sent to the penitentiary.

b. Discharged, proper sentence served.

In cases in which the sentence originally imposed is excessive, but the prisoner has served such portion thereof as the court had power to inflict, the discharge of the prisoner has been ordered upon habeas corpus proceedings.

The rule is thus laid down in *Ex parte Lange*, 18 Wall. 163, 176, 21 L. ed. 873, 879, when the court has imposed fine and imprisonment where the statute only confers power to punish by fine or imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence, and the judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offense is at an end and the prisoner must be discharged.

The prisoner, however, must perform so much of the judgment or serve out so much of the sentence as it is within the power of the court to impose, and in default thereof cannot be discharged on habeas corpus. *Re Swan*, 150 U. S. 637, 37 L. ed. 1207, 1211. In this case the court exceeded its jurisdiction in requiring the prisoner to pay costs.

When a criminal judgment, which is erroneous because an excessive penalty is imposed, has been satisfied in that particular or to that extent which would have been lawful if no further penalty had been inflicted, it is a satisfaction of the demands of the law, and a new sentence would for that reason be void. In other words, the judgment, although erroneous, is not void, but of legal effect. *State, Williams, v. Stor-*

tirely void, and that the party is entitled, in such case, to his discharge from custody. In the cases of *Ex parte Page*, 49 Mo. 291, and *Ex parte Cox* (Idaho) 32 Pac. 197, the supreme court of Missouri and the supreme court of Idaho held, squarely, that such a judgment is void. We are inclined to the opinion that the case cited from California, of *Ex parte Kelly*, 65 Cal. 154, and other late cases in that state, fairly support the contention of counsel; and we are inclined to include that state with Missouri and Idaho, as holding the doctrine that such a judgment as we are assuming exists in this case would be void, and the defendant entitled to his discharge. Indiana may also be included as holding a similar doctrine, though by a divided court. *Miller v. Snyder*, 6 Ind. 1. Mr. Black, in his work on Judgments (§ 258), takes a similar view of such a judgment. But his work was evidently written before the later decisions in Massachusetts and Wisconsin, and the deci-

sions of the Supreme Court of the United States, that we shall subsequently refer to. And we think that if that learned law writer was to revise his work, in view of these later decisions, he would arrive at a different conclusion. In the light, therefore, of these later decisions, we are unable to give to his conclusions the consideration that they otherwise might be entitled to. And counsel for the petitioner insists that this court has decided this question in *Re Lackey*, 6 S. D. 526. But it will be noticed, by the statement of facts in the opinion in that case, that Lackey had served out the legal part of his sentence, and this court held that, such being the case, he was entitled to his discharge, as the latter part of the sentence was void. If the petitioner in the case at bar had served his two years, for which he could have been, as it seems to be conceded, legally sentenced, this court, under the rule laid down in the *Lackey Case*, if it should be of opinion that two years was the extent to which he could

doek (Minn.) 39 N. W. 65, wherein the prisoner sought to be discharged upon habeas corpus.

In *Ex parte Bulger*, 80 Cal. 438, the petitioner for habeas corpus was convicted of battery and sentenced to three years' imprisonment in the house of correction. Penal Code, § 243, punished battery by fine not exceeding \$1,000 or imprisonment in the county jail not exceeding six months, or both. The prisoner was ordered to be discharged as he had served the six months' imprisonment.

In *Ex parte Erdmann*, 88 Cal. 579, the prisoner, convicted of simple assault, was sentenced, under § 1205, Cal. Penal Code, to pay a fine of \$500, and in default of payment to imprisonment in the county jail at the rate of one day for each dollar of the fine until the same was paid. The maximum imprisonment for the offense under § 241 of the Penal Code was "not exceeding three months," although a fine of \$500 might also be imposed. The court ordered the prisoner discharged upon his petition for habeas corpus. In this case the prisoner had already been imprisoned for over a year.

The prisoner was ordered discharged on habeas corpus in *Feeley's Case*, 12 Cush. 598. He was sentenced in the police court to pay a fine, and the costs of the prosecution, and to stand committed until the sentence was complied with, or until he was discharged in due course of law, for an assault and battery. He appealed the case to the municipal court, and was there sentenced to pay a fine and the costs of the prosecution, and to be imprisoned in the county jail for six months if the same was not paid within two days, and if the fine was paid he was then to be imprisoned in the county jail for three months. He paid the fine and then sought to be released upon habeas corpus. The court held he was entitled to be so discharged even though the proceedings appealed from were a mere error in judgment, and a writ of error might be the more ordinary remedy. Here the real punishment had been suffered, and the remaining punishment (imprisonment) was not warranted by the law, and the only correction of the error was in reversing and annulling that part of the judgment which imposed imprisonment. In this case the court distinctly pointed out that upon the correction of the sentence no judgment would be left warranting imprisonment, and for that reason the prisoner was entitled to his immediate discharge from custody.

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In *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, 233, 234, the prisoner applied on habeas corpus to be released from custody. He was tried under an indictment containing 220 separate counts each charging a misdemeanor, was found guilty on 204 counts, and upon 12 was sentenced to twelve successive terms of imprisonment of one year each, and to pay a fine of \$250 for each count, and upon other counts to additional fines, amounting in all to \$12,500. The maximum punishment fixed for a misdemeanor of the character charged was one year's imprisonment and a fine of \$250. The prisoner had been imprisoned for one year and paid a fine of \$250. The court ordered the judgment to be reversed and the prisoner to be discharged, as the power of the court was exhausted by one sentence of imprisonment for one year and the payment of the fine of \$250.

In *Re Lewis*, 10 Utah, 47, where it was held that a justice exhausted his authority in sentencing a defendant to imprisonment in default of payment of the fine, and that he reached the limit of his jurisdiction in adjudging him to be imprisoned in the county jail for six months, the prisoner, who had already served such period of six months, was discharged.

c. Discharge refused on habeas corpus.

In *United States v. Pridgeon*, 153 U. S. 48, 62, 38 L. ed. 631, 637, it is said that under a writ of habeas corpus the inquiry is addressed, not to errors, but to the question whether the proceedings and the judgment rendered therein are for any reason nullities, and unless it is affirmatively shown that the judgment or sentence under which the prisoner is confined is void, he is not entitled to his discharge. *Re Pridgeon*, 57 Fed. Rep. 200, reversed.

In the above case the prisoner had been sentenced to imprisonment in the penitentiary at hard labor for the term of five years, and to pay the costs of the prosecution for horse stealing. The conviction was had under U. S. Stat. Feb. 15, 1888, under which any person convicted in the United States courts having jurisdiction over the Indian territory of horse stealing when the theft is committed in the territory is punishable by a fine of not more than \$1,000, or imprisonment not more than fifteen years, or both, at the discretion of the court. The court below had ordered the prisoner to be released upon habeas corpus upon the ground that hard labor was an excessive punishment under the statute.

be sentenced, might discharge him. But that is not the case now before us.

We have omitted a number of cases cited by counsel for petitioner, for the reason that, in our view, they involve entirely different questions from the one now before us, or support the contention of counsel for the state. As, for example, *Ex parte Lange*, 18 Wall. 170, 21 L. ed. 879, is confidently relied upon as supporting the contention of the petitioner. But that case, even without the aid of subsequent decisions of the Supreme Court of the United States, to which we shall refer, seems to us to clearly sustain the view that we take of this judgment. In that case a circuit court of the United States had rendered a judgment, and sentenced a defendant to pay a fine and to imprisonment, when the law only authorized the court to impose a fine or imprisonment. The defendant paid the fine, and subsequently that court set aside the judgment it had rendered, and sentenced the defendant to imprisonment. The

defendant, being taken into custody upon the latter judgment, applied to the Supreme Court of the United States for a writ of habeas corpus. The Supreme Court held that the first judgment was not void, and, the defendant having paid the fine imposed, the circuit court had no power to render the second judgment, and that the second judgment was void. That court, speaking of the first judgment, on page 174, L. ed. 878, says: "The judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void." It will be seen that the supreme court held the first judgment valid so far as it imposed a fine, and, that fine having been paid, the circuit court had no power to set aside the judgment so satisfied and ren-

Upon the case being appealed to the United States Supreme Court, however, that court held that the term of imprisonment imposed could not be considered void by reason of the additional punishment at hard labor.

And in *Ex parte Brown*, 63 Ala. 187, 188, it is said that illegality, and not irregularity, must infect the proceedings in order to authorize a discharge on habeas corpus upon the ground that a sentence is excessive. And if in this case the prisoner was convicted by a justice of assault and battery with a knife, the claim is discharged upon the ground that the sentence was excessive, but the court held that if the knife was a deadly weapon the sentence to hard labor for twelve months as therein imposed was fully authorized and not excessive.

If the error in the sentence is not such as to render it absolutely void the prisoner cannot be relieved by habeas corpus. *State, Dudosat, v. Klock*, 48 La. Ann. 67, 72.

In *Re Payson*, 23 Kan. 757, the petitioner for habeas corpus, convicted of an alleged felony, was sentenced to imprisonment in the penitentiary for five years at hard labor. The contention was that there was no law authorizing any punishment for the offense charged, and that the court had no jurisdiction to render the judgment. The court pointed out that the sentence was not void, and therefore refused the writ.

In *State, Williams, v. Stordock* (Minn.) 39 N. W. 65, the writ was refused because the sentence was merely erroneous as to the term of the sentence imposed, and the court pointed out that it might have been corrected by appellate proceedings, and that the writ of habeas corpus cannot be made use of to secure the discharge of a prisoner where the judgment is not wholly void.

In *Ex parte Crenshaw*, 80 Mo. 447, the relation in habeas corpus proceedings had been found guilty in the circuit court of contempt in disobeying a restraining order in a civil suit. He was commanded to pay the costs and expenses of \$150, and also a fine of \$500, and to restore the property and be committed to jail until he paid the sums of money and returned the property. The sentence as to the payment of the fine and the \$150 costs was illegal and void. Notwithstanding such errors in the proceedings, however, the court refused to discharge the prisoner, as the order of commitment until he obeyed the order of the court by restoring the

goods was a legitimate exercise of the court's power, the proceedings in that case being merely irregular.

Sections 15, 222, N. Y. Penal Code, make assault in the third degree a misdemeanor punishable by imprisonment in the penitentiary or county jail for not more than one year or by fine of not more than \$500, or both, and if a person is sentenced to imprisonment at hard labor in the state prison upon a conviction for such offense, although the sentence may be void, yet he will not be entitled to a discharge on habeas corpus, where the conviction is valid, but the proper course is to remand such party to the custody of the sheriff in order that the court may deal with him according to law. *People, Devoe, v. Kelly*, 97 N. Y. 213, 32 Hun, 538.

In *Re Tutt*, 55 Kan. 705, the prisoner was charged with burglary in a freight car under Kansas Laws 1871, chap. 121, § 1, and also with larceny under the 3d section of such act. He was found guilty of burglary in the second degree and larceny, and the value of the property stolen was found to be \$6. It was held that a sentence confining him at hard labor in the penitentiary for five years was not void as being excessive, and that while his conviction for burglary was a nullity, yet the conviction of larceny was sufficient to support the imposition of the punishment as the sentence of five years was within the limits authorized for larceny. In this case habeas corpus was refused.

In *Ex parte Clark*, 50 Ohio St. 649, the petitioners on habeas corpus were sentenced to imprisonment in the penitentiary at hard labor for the period of six years, and adjudged to pay the costs of the prosecution for the crime of burglary. They alleged that that part of the sentence which required them to be kept at hard labor and the judgment for costs were without any authority of law and void and excessive. They were remanded to custody, as, under § 6799, Ohio Rev. Stat., the court had power to provide how long they shall be kept at hard labor, and also in solitary confinement, and for the payment of the costs of the prosecution.

In *Ex parte Bond*, 9 S. C. N. S. 80, 30 Am. Rep. 20, the prisoner was sentenced to confinement in the state penitentiary at hard labor for four years for an assault with intent to kill. He sought to be relieved upon habeas corpus upon the ground that the sentence was unauthorized by law, and the question before

der a second judgment, and that, consequently, the second judgment was absolutely void. The circuit court had no jurisdiction or power to render the second judgment. Its attempt, therefore, to render a second judgment, was an idle and futile act, without any validity for any purpose. Not only is this decision important in holding that the first judgment of the circuit court, which imposed a sentence of fine and imprisonment, when it was only authorized to impose a sentence of a fine or imprisonment, was not void, but for the reason that the court, in the opinion, clearly announces the principle that where a judgment includes that which a court has a right to include, and something more, the excess only is void. The court, in commenting upon the case of *Bigelow v. Forrest*, 9 Wall. 339, 19 L. ed. 696, says: "But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because, in the very act of render-

ing a judgment of confiscation, it condemned more than it had authority to condemn. In other words, in a case where it had full jurisdiction to render one kind of a judgment, operative upon the same property, it rendered one which included that which it had a right to render, and something more, and this excess was held simply void. The case before us is stronger than that, for, unless our reason has been entirely at fault, the court, in the present case, could render no second judgment against the prisoner. Its authority was ended. All further exercise of it in that direction was forbidden by the common law, by the Constitution, and by the dearest principles of personal rights, which both of them are supposed to maintain." We have considered the case of *Ex parte Lange* at considerable length, for the reason that that case is often cited to sustain the opposite theory.

The counsel for petitioner also cite *Ex parte Rowland*, 104 U. S. 604, 26 L. ed. 861;

the court was whether, as the offense was not punishable by confinement in the state penitentiary, the judgment under which the prisoner was detained was void or voidable. The court found that such verdict was not void, but only voidable, and therefore refused to discharge the prisoner upon habeas corpus, and pointed out that relief from such a judgment might be obtained by appeal.

In *Crandall's Petition*, 84 Wis. 177, the petitioner for a writ of habeas corpus, charged with an assault with intent to kill, was found guilty of a simple assault, and acquitted of the intent to kill, and sentenced to imprisonment in the county jail for six months, and to pay a fine of \$500 and costs of the prosecution, and to be committed until the same be paid. He claimed that the imprisonment was illegal because the court had no power or jurisdiction both to imprison and to fine, and that the court had sentenced him for a crime of which he was not convicted,—assault and battery. The court refused to discharge him, and remanded him to custody, as the defect was not in the jurisdiction.

In *People, Peck, v. Schantz*, 13 Misc. 563, the relator on habeas corpus proceedings, convicted at the court of special sessions for violation of the excise law, was sentenced to be imprisoned in the county jail for fifty days or to pay a fine of \$50, and be imprisoned until it be paid, not exceeding fifty days. It was claimed that such judgment was disjunctive and void. The court found that the conviction was proper and no attempt had been made to review it, and that he was not entitled to a discharge merely because of a technical error in the mittimus. As, however, the judgment pronounced by the court did not appear even to be erroneous, as it could be sustained by excluding words which were mere surplusage, the court remanded the prisoner and dismissed the writ.

In this case the court relied upon and approved of the case of *People, Devoe, v. Kelly*, 97 N. Y. 212, and regarded that case as overruling *Ex Hoffman*, 1 N. Y. Crim. Rep. 484.

The prisoner's discharge upon habeas corpus was also refused in *Ex parte Karstendick*, 98 U. S. 396, 23 L. ed. 889, in which case the prisoner, convicted of conspiracy, was sentenced to the penitentiary of West Virginia for sixteen calendar months, and to pay a fine of \$2,000, and contended that the sentence to the penitentiary was void and illegal as without authority. It was held, however, that the court exercised

its discretion in the matter, and that its judgment could not be reviewed in such proceedings, as the order of commitment was not shown to be absolutely void.

In *People, Henderson, v. Allen*, 160 Ill. 400, the petitioner for habeas corpus was sentenced to the penitentiary for robbery, and there was some question as to whether the judgment was erroneous or not. The court held that as the judgment was not void since the court had jurisdiction of the person and subject-matter, the writ could not issue, but any error committed by the court in the sentence of the prisoner might be reviewed by a writ of error.

A sentence of a fine imposed for the violation of a city ordinance, and, in default of payment, of imprisonment in the city jail in the proportion to one day's imprisonment for each \$2 of the unpaid portion of the fine, was held to be merely erroneous, and not wholly void, so as to authorize a discharge on habeas corpus. *Ex parte Soto*, 88 Cal. 624.

In *Sennott's Case*, 146 Mass. 489, the prisoner, a minor fourteen years old, was sentenced to be "committed to the state board to be sent to the Lyman School" while the statute provided either for commitment to the school or to the state board, but did not authorize such a sentence as was made. It was held that he could not be discharged upon habeas corpus, and that his remedy was by way of writ of error. The court therefore remanded the prisoner.

In *People, Woolf, v. Jacobs*, 66 N. Y. 8, the prisoner on habeas corpus was imprisoned under a warrant committing him for contempt of court in violating an injunction order for which he was fined, and directed to be imprisoned thirty days and until the fine should be paid. The fine included \$160 as counsel fees, which was claimed to be erroneous. The court held that it had jurisdiction to ascertain and determine the amount of the costs and expenses, and that if in determining such amount it included items which ought not properly to be allowed as costs or expenses, it was merely an erroneous decision, and not an excess of jurisdiction or power, and that such an error would not render the commitment void or be reviewed on habeas corpus.

In the above case, the case of *People, Tweed, v. Liscomb*, 60 N. Y. 568, 19 Am. Rep. 211, was cited in support of the application for the writ, but the court held that it had no analogy to

Re Mills, 135 U. S. 203, 34 L. ed. 107; *Nielson, Petitioner*, 131 U. S. 176, 33 L. ed. 118; *Re Coy*, 127 U. S. 731, 32 L. ed. 274; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Re Snow*, 120 U. S. 274, 30 L. ed. 658; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89. But, in our view, these cases do not support the contention of counsel. In several of these cases the judgments were held void upon various grounds, and the defendants discharged, but none of them involved the question we are now considering. We do not deem it necessary to further discuss them. The cases of *Re Petty*, 22 Kan. 477, and *Re Dill*, 32 Kan. 668, 49 Am. Rep. 505, cited by counsel, do not seem to us to support their contention. The head-note in the first case is as follows: "Where the court has jurisdiction of the person of the prisoner, and of the offense with which he is charged, and the verdict is valid, and the judgment pronounced is not void, but merely irregular, held, such prisoner cannot

be relieved under a petition for habeas corpus." This certainly does not indicate that the court held the doctrine contended for. We also fail to find anything in the second case to support counsel's contention. Though there is this conflict in the decisions of the state courts we have shown exists upon this question, the Supreme Court of the United States, in two late cases, clearly hold the doctrine that a sentence of a court having jurisdiction of the offense and of the person of the defendant is legal so far as it is within the provisions of the law, and only void as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portions of the sentence. In *Re Bonner*, 151 U. S. 258, 38 L. ed. 152, decided in January, 1894, the Supreme Court of the United States, speaking through Mr. Justice Field, says, "If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess." Further on in

the case then before the court, although it admitted that if the court had committed the prisoner for the full term of six months allowed by the statute, and had superadded a further commitment of six years, and the prisoner had paid his fine and served the six months, and had applied to be discharged on habeas corpus, the principles and the doctrine laid down in that case would have applied.

In *Re Graham*, 74 Wis. 450, the petitioners for habeas corpus, convicted of a wilful and felonious assault with intent to do bodily harm, and with feloniously robbing, were respectively sentenced to imprisonment in the state prison for thirteen and fourteen years, but under the statute the punishment was by imprisonment in the state prison for not more than ten years, nor less than three. It was held that the sentence was excessive in that it exceeded the period fixed by statute, but that the error did not render the judgments void, or the imprisonment under them illegal in that sense which entitled them to be discharged, as the judgments were erroneous and could be reversed on writ of error under the state statute expressly providing the remedy as the courts had jurisdiction of the persons and subject-matter of the offense. Upon appeal to the United States Supreme Court this judgment was affirmed. *Re Graham*, 138 U. S. 461; *Graham v. Weeks*, 34 L. ed. 1051, *et supra*, II. b.

The writ was also refused in *Dillon v. State*, 38 Ohio St. 586, where relief was sought from an erroneous sentence of one year's imprisonment in the penitentiary and to pay the costs, when the state statute provided for a fine and imprisonment in the penitentiary of not more than three years, or in the county jail not more than six months.

And the writ was refused in *Ex parte Van Hagan*, 25 Ohio St. 426, 432, where relief was sought from an erroneous and voidable sentence inflicted in excess of that prescribed by the law then in force upon a conviction of petit larceny, and the prisoner was remanded to the custody of the workhouse superintendent. *Ex parte Shaw*, 7 Ohio St. 81, followed.

The prisoner in such cases is not entitled to the writ of habeas corpus as of right under Mass. Rev. Stat. chap. 3, § 2, and this is especially so where the error is in the judgment. *Feeley's Case*, 12 Cush. 598, 600.

And the prisoner's discharge upon habeas corpus was refused in *Re Swan*, 150 U. S. 637, 45 L. R. A.

653, 37 L. ed. 1207, 1211, as he had not performed the legal part of the sentence.

Habeas corpus was also denied in *Ex parte Mitchell*, 70 Cal. 1, 3, where the illegal portion of the sentence which imposed imprisonment for nonpayment of a fine was separable from the rest, and the prisoner was remanded to custody.

And it was also denied in *Ex parte Henshaw*, 73 Cal. 486, where the judgment for contempt imposed costs in addition to the fine and imprisonment.

So, the writ was denied in *Ex parte Hunter*, 16 Fla. 575, where relief was sought from a sentence to pay a fine and costs and to stand committed to the county jail to be employed at such manual labor as the county commissioners might direct not exceeding ninety days, on the ground that the sentence was not wholly void.

Habeas corpus was refused in *Ross's Case*, 2 Pick. 165, and in *Riley's Case*, 2 Pick. 172, wherein the prisoner sought to be released from an additional punishment wrongfully awarded, and the prisoners were remanded. See same case *infra*, IV. a.

d. Discharge refused until legal sentence served.

In *Re Sweetman*, 1 Cow. 144, as the sentence was valid in part and only void in so far as it exceeded the punishment prescribed for the offense, the prisoner was remanded for the residue of the valid portion of the sentence upon habeas corpus proceedings.

And in *People, Gately, v. Sage*, 17 Misc. 712, the court upon habeas corpus refused to modify the sentence, but ordered the prisoner to be released upon his serving the valid portion of the sentence.

So, in *People, O'Brien, v. Woodworth*, 78 Hun. 586; the court upon like proceedings refused to consider the legality of a portion of the sentence until the lawful portion had been served.

And the same course was pursued in *People, Trainor, v. Baker*, 89 N. Y. 460, wherein the court refused to discharge the prisoner until he had served the valid portion of his sentence.

Again, in *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59, the court refused to release the prisoner upon habeas corpus until the legal portion of the sentence imposed for unlawful wounding under the state statute governing the offense had been served.

And the release of the prisoner upon habeas corpus was refused in *Re Paschal*, 56 Kan. 123, 124, as the minimum time of punishment for

the opinion that learned judge says: "A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges,—perhaps, with the majority,—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that therefore the writ of habeas corpus cannot be invoked for the relief of a party until the time has expired to which the judgment should have been limited." Subsequently, in April of that year, the question was squarely decided, by a unanimous court, in *United States v. Pridgeon*, 153 U. S. 62, 38 L. ed. 636. In that case the court, speaking through Mr. Justice Jackson, says: "Without undertaking to review the authorities in this and other courts, we think the principle is established that, where a court has jurisdiction

of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess, when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence. Many well-considered authorities, in England as well as in this country, hold that, where there is jurisdiction of the person and of the offense, the excess in the sentence of the court beyond the provisions of law is only voidable in proceeding upon a writ of error. *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Sennott's Case*, 146 Mass. 489; *People, Devoe, v. Kelly*, 97 N. Y. 212; *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211;

the crime actually charged had not expired, and the sentence was not absolutely void.

It was also refused in *Re Sloan* (N. M.) 25 Pac. 930, 937, where the petitioners had been punished by fine and imprisonment in the county jail until the fine and costs were paid for disobeying an injunction, as the fines were partly legal and the petitioners could be held for such valid portion.

The theory upon which the courts base their decisions is that the sentence imposed is not absolutely void, but only void as to the excess, and therefore the legal portion must be served before the prisoner will be granted his discharge.

Thus, in *Re Swan*, 150 U. S. 637, 653, 37 L. ed. 1207, 1211, where it was not within the power of the court to require payment of costs, and its judgment was to that extent in excess of the authority of the court, the prisoner was not entitled to his discharge until the legal portion of the sentence was carried out. See also, to the same effect, *Ex parte Henshaw*, 73 Cal. 486; *Ex parte Mitchell*, 70 Cal. 1, 3; *Ex parte Hunter*, 16 Fla. 575.

e. Sentence corrected or modified and affirmed.

In *Burch v. State*, 55 Ala. 136, the prisoner, convicted of gaming, was fined \$50, and sentenced to hard labor for the county for the space of thirty days on account of the fine. The statutory limit of the term of hard labor on account of the fine was twenty days. The record disclosed a regular judgment of conviction and the sentence was proper in form and only erroneous in so far as it imposed a greater punishment than the law authorized. The court on habeas corpus corrected the sentence so as to conform to the law, and affirmed the judgment in all other respects.

f. Sentence ordered modified, and case remanded.

In *Herrington v. State*, 87 Ala. 1, the circuit court had exceeded its authority in the matter of fixing the punishment, but the only error was in declaring the kind of punishment the prisoner was to undergo. The court upon habeas corpus and writ of error heard together refused to discharge the prisoner as he was subject to imprisonment and rightly in custody, and the law had declared what kind of punishment might be inflicted on him, and no obstacle was shown in the way of such infliction. 45 L. R. A.

The judgment of the circuit court was therefore reversed back to the conviction but no further, and the cause was remanded in order that the circuit court might order a proper sentence.

In *Re Harris*, 68 Vt. 243, the prisoner, convicted of the offense of open and gross lewdness, was sentenced to two years and nine months in the state prison. The sentence was held void upon habeas corpus because the imprisonment should be in the house of correction. As, however, the record showed that the petitioner was properly convicted, and that the error was in the sentence, the court stated that there was no good reason why jurisdiction should not be reassumed by the court in which he was convicted in order that he might be properly sentenced, and for that reason it remanded the prisoner in order that the proper sentence might be imposed.

And in *Ex parte Simmons*, 62 Ala. 416, the case was remanded in order that proper sentence might be imposed on habeas corpus proceedings.

g. Proper sentence imposed, and prisoner remanded.

In *Ex parte Bethurum*, 66 Mo. 545, the prisoner, convicted of forgery in the third degree, was sentenced to imprisonment in the penitentiary for a term of eight years. The maximum punishment for that offense as fixed by law was seven years' imprisonment in the penitentiary. He sought to be released and discharged from such imprisonment, on the ground that it was illegal, on a petition for habeas corpus. The Missouri statute of March 1, 1877, gave power to any court to which application was made by writ of habeas corpus for the release of a prisoner under sentence, erroneous as to time or place, to pronounce the proper sentence with respect to such place and the correct length of time, and also gave power to such court to correct such sentences passed prior to the date of such act. The court in that case refused his discharge upon habeas corpus, and proceeded to pass the sentence which the court below should have passed upon him, and directed the marshal to remand the prisoner to the penitentiary and to keep him there as directed by law until the sentence of the court was complied with.

h. Execution stayed, bail for future appearance.

In *Ex parte McGrew*, 40 Tex. 472, the peti-

People, Woolf, v. Jacobs, 66 N. Y. 8; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426; *Re Graham*, 74 Wis. 450; *Elsner v. Shrigley*, 80 Iowa, 30; *Ex parte Maas*, 44 Cal. 579. Under a writ of habeas corpus, the inquiry is addressed, not to errors, but to the question whether the proceedings, and the judgment rendered therein, are, for any reason, nullities; and, unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge. It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion. By Rev. Stat. § 761, 'the court or justice or judge shall proceed in a summary way to determine the facts of the case [in habeas corpus] by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' There is

no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void. In the present case the five-years term of imprisonment, to which Pridgeon was sentenced, cannot properly be held void because of the additional imposition of 'hard labor' during his confinement. Thus, in *Re Swan*, 150 U. S. 637, 37 L. ed. 1207, it is stated that 'even if it was not within the power of the court to require payment of costs, and its judgment, to that extent, exceeded its authority, yet he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose.' We have not deemed it necessary to review, or to attempt to reconcile, the authorities on the question, for the reason that while all concede that neither irregularities nor error, so far as they

tioner for habeas corpus was sentenced to imprisonment in the county jail for one year, and fined \$500 by a justice of the peace upon a conviction for an aggravated assault and battery, while under the statutes the extent of the fine which he had power to impose was limited to \$100 as a maximum. The court therefore discharged the prisoner from his imprisonment upon his entering into a bail bond with sufficient sureties to be approved of by the court to appear at the district court to answer the charge.

1. Remanded, and record corrected.

If the judgment of conviction by a court of record is void by reason of a want of power to impose the punishment pronounced by it, the prisoner in a habeas corpus case may be remanded for sentence, and the record may be corrected. *People, Johnson, v. Webster*, 92 Hun, 378, 380; *People, Devoe, v. Kelly*, 32 Hun, 536, 97 N. Y. 212. In that case the length of the sentence was not definitely stated.

Substantially the same course was taken in the case of *Re Harris*, 68 Vt. 243, and in *Ex parte Simmons*, 62 Ala. 416, *supra*, III. f.

IV. Effect on appeal, or on writ of error.

a. In general.

The weight of authority, however, would seem to be in favor of the theory that if the judgment is that of a court having full jurisdiction, and the sentence imposed is merely excessive as being beyond the limit of the punishment prescribed by law, the party aggrieved can only have relief by writ of error or other process of review, and that it is only when the court pronounces judgment in a criminal case which is not authorized by law under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void so as to justify the discharge of the defendant held in custody by such judgment. *Kirby v. State*, 62 Ala. 51; *Ex parte Simmons*, 62 Ala. 416; *Ex parte Brown*, 63 Ala. 187, 188; *Ex parte Gibson*, 31 Cal. 628; *Ex parte Max*, 44 Cal. 579; *Lark v. State*, 55 Ga. 435; *Elsner v. Shrigley*, 80 Iowa, 30; *Platt v. Harrison*, 6 Iowa, 79, 71 Am. Dec. 889; *Re Paschal*, 56 Kan. 123, 124; *Re Petty*, 22 Kan. 477; *Re Dill*, 32 Kan. 668, 49 Am. Rep. 505; *State, Dudoussat, v. Klock*, 48 La. Ann. 67, 72; *State v. Tibbetts*, 86 Me. 45 L. R. A.

189, 199; *Phinney's Petitioner*, 32 Me. 440; *Lynn v. State*, 84 Md. 67; *Sennott's Case*, 146 Mass. 489, 493; *Clarke's Case*, 12 Cush. 320; *Herrick v. Smith*, 1 Gray, 1, 50, 61 Am. Dec. 381; *Adams v. Vose*, 1 Gray, 51; *Christian v. Com.* 5 Met. 530, 531; *Hopkins v. Com.* 3 Met. 460; *Ross's Case*, 2 Pick. 165; *Feeley's Case*, 12 Cush. 598; *Re Underwood*, 30 Mich. 502; *People, Devoe, v. Kelly*, 97 N. Y. 212; *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, 233, 234; *People, Woolf, v. Jacobs*, 66 N. Y. 8; *People, Peck, v. Schantz*, 13 Misc. 563; *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 426; *State, Welch, v. Sloan*, 65 Wis. 647, 651; *Re Perry*, 30 Wis. 263; *Crandall's Petition*, 34 Wis. 177; *Semler's Petition*, 41 Wis. 517; *Hauser v. State*, 38 Wis. 678; *Re Graham*, 74 Wis. 450, 138 U. S. 461, 402; *Graham v. Weeks*, 34 L. ed. 1051, 1052; *United States v. Pridgeon*, 153 U. S. 48, 38 L. ed. 631; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Watkins*, 3 Pet. 193, 7 L. ed. 650; *Ex parte Slebold*, 100 U. S. 371, 373, 25 L. ed. 717, 718.

It is not, however, to be inferred that the rule as laid down in the above cases of *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *People, Tweed, v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; and *People, Woolf, v. Jacobs*, 66 N. Y. 8, necessarily implies that every judgment which a court having jurisdiction of a person and of his offense might render would be held to be within its jurisdiction, and not open to inquiry upon habeas corpus, and it is always a pertinent question, whether or not the act under consideration was done in the exercise of the existing jurisdiction, as a sentence might be so foreign to the law and the case before the court, and so far in excess of the power conferred upon the court, as to furnish ground for an argument that it was not merely erroneous, but entirely outside of the jurisdiction. *Sennott's Case*, 146 Mass. 489, 493; *Clarke's Case*, 12 Cush. 320; *Adams v. Vose*, 1 Gray, 51.

So, in *Feeley's Case*, 12 Cush. 598, 600, the court expressly pointed out that the error was in the judgment, and that in such cases the ordinary remedy was by writ of error, under which the court had power, by virtue of chap. 87, Mass. Stat. 1851, to render such judgment as ought to have been rendered, and that where some informality not affecting the merits of the case is found this power of correcting the judgment was important.

were within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the functions of a writ of error, in relation to proceedings of a court within its jurisdiction,—they differ widely as to what constitutes error, and what should be regarded as rendering the judgment or proceedings void.”

In the case at bar, we see no difficulty in separating the sentence for two years, for which it is conceded the petitioner might have been sentenced, from the three years assumed by us and claimed by counsel to be in excess of the time the petitioner could have been sentenced. Neither the supreme court of Wisconsin nor the Supreme Court of the United States seems to have discovered any difficulty in so separating the valid from the invalid portions of the sentence in *Graham's Case*. The decision in *Re Pridgeon*, read in connection with *Re Graham*, 74 Wis. 450, 138 U. S. 461, 34 L. ed. 1051,

fully interprets the meaning of that court in the use of the expression, “when such excess is separable, and may be dealt with without disturbing the valid portions of the sentence.” Ten years, says the court, in effect, in *Re Graham*, is easily separable from the three years,—the void excess in the judgment. “When the ten years have expired,” says the court, “probably the court will order the prisoner's discharge, but until then he has no right to ask the annulment of the entire judgment.” So we say here, when two years shall have expired, no other proceedings having been taken in the meantime to correct the judgment, if, upon examination, it should prove to be erroneous as to the term imposed, the petitioner would be in a position to ask for his discharge. But he is now held under legal process from a court of competent jurisdiction.

It was urged by the counsel for the petitioner that the statutes in the states of Wisconsin and New York materially influenced

In *Ex parte Van Hagan*, 25 Ohio St. 426, 432, a punishment inflicted upon a charge of petit larceny in excess of that prescribed by the law then in force was held to be erroneous and voidable, but not absolutely void so that a writ of error to reverse the proceedings or sentence was the remedy to obtain his discharge from such illegal imprisonment. In this case the court relied upon and followed *Ex parte Shaw*, 7 Ohio St. 81, 70 Am. Dec. 55.

In *Dillon v. State*, 38 Ohio St. 586, the prisoner, convicted of the offense of throwing stones at railroad cars, was sentenced to imprisonment in the penitentiary for one year and to pay the costs, but no fine was assessed. The statute provided for a fine not exceeding \$500 and imprisonment in the penitentiary not more than three years, or in the county jail not more than six months. In that case it was stated that if the fine or imprisonment imposed be either less or greater than that prescribed in the statute the sentence was not void but erroneous, and error to reverse the proceedings or sentence was the proper remedy.

In this case the court did not pronounce the additional penalty, which it had power to do, the statute giving it power to punish both by fine and imprisonment.

In *Skaggs v. State*, 108 Ind. 53, the defendant, convicted of assault and battery with intent to commit a rape, objected to the judgment upon the ground that the trial court imposed a penalty which was not assessed by the jury in their verdict, or authorized by the statute defining the offense of which he was found guilty and prescribing its punishment, in that it was adjudged by the court that he “be disfranchised and rendered incapable of holding any office of trust or profit for five years.” It was held that this was an error in the judgment and was shown in the record, but it was an error of which the prisoner could not complain in that court and for which he could not obtain a reversal of the court below in whole or in part, as the record did not show that any objection was taken or that he moved for the modification of such verdict.

A sentence which is merely bad for excess may be reversed for the excess, and left to stand for so much as could lawfully be imposed. *People v. Sailer*, 58 Mich. 327.

An additional imprisonment imposed for non-payment of a fine cannot be imposed unless the court has special power conferred upon it to 45 L. R. A.

render such judgment, and to the extent of the additional penalty the judgment will be held to be void. *Ex parte Rosenheim*, 83 Cal. 388, 392.

And the part of the sentence which inflicts the proper punishment for the crime of which the accused is convicted must remain intact. *State v. Brannon*, 34 La. Ann. 942, 947; *Re Sweatman*, 1 Cow. 144; *Brown v. State*, 18 Ark. 96.

b. Sentence reversed, prisoner discharged.

In *McDonald v. State*, 45 Md. 90, the prisoner, indicted for murder, was found guilty of manslaughter and sentenced to five years' imprisonment in the jail of Baltimore city, while the statute provided for confinement in the penitentiary not more than ten years, or, in the discretion of the court, a fine of not more than \$500 or imprisonment in jail of not more than two years. He sought to review the proceedings by way of writ of error. It was conceded that the judgment must be reversed, but the question was whether upon such reversal the court had the power to impose a proper sentence, or to remand the case to the court of original jurisdiction for that purpose. It was held that in the absence of legislation conferring that authority the court had no power to do either of these things, and could only reverse the judgment.

In the above case, the court adopted the ruling in *Christian v. Com.* 5 Met. 530, to the effect that whatever other remedy the state might have, it was not competent for that court to pass a new sentence upon the prisoner, nor to remit the case to the criminal court.

In *Shepherd v. Com.* 2 Met. 419, a writ of error was sought to reverse a judgment of the municipal court upon a conviction for simple larceny. The prisoner was sentenced to solitary confinement and hard labor in the house of correction for four years. The error assigned was that the prisoner, if sentenced for a longer term than three years, could only be sent to the state prison, and not to the house of correction. The court reversed the judgment, and the prisoner was ordered to be discharged.

In the above case the cause was not sent back to the municipal court to render a new judgment, as the court considered it had no power to do so, neither had it the power to render a new judgment itself.

In *Stevens v. Com.* 4 Met. 360, the prisoner, convicted of simple larceny of property of the

those courts in holding such judgments only erroneous, and not void. But we fail to see how the statute affects the question of what constitutes a void judgment. The learned counsel for the petitioner also seem to attach much importance to the clause in our habeas corpus act which provides that a defendant "can be discharged only for some one of the following causes: (1) Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum, or person. . . . And they strenuously contend that when the court, in this case, sentenced the petitioner to the penitentiary for the period of five years, when, as they contend, his sentence should not have exceeded two, the court exceeded the limit of its jurisdiction. Now, what is jurisdiction? Bouvier defines it as "the authority by which judicial officers take cognizance of and decide cases; power to hear and determine a cause." "Jurisdiction of the cause is the power over the subject-matter, given by the law of the sover-

eignty in which the tribunal exists." When and how does the court exceed the limit of its jurisdiction? As a court of general jurisdiction, the circuit court had jurisdiction over the offense charged in the indictment, and over the person of the petitioner. The court has not exceeded the limit of that jurisdiction. It may be, as claimed, that it has committed an error in sentencing the petitioner to a term longer than the law permits. The excess beyond the limit of the law would constitute error, and render the excess void. But, to our minds, there is no excess of jurisdiction. As an illustration of what constitutes excess of jurisdiction, take the *Tweed Case*, 60 N. Y. 559, 19 Am. Rep. 211. The court sentenced the defendant to the limit of the law, upon the first count in the indictment. In imposing the second sentence upon the second count, it exceeded its jurisdiction, because it had heard and decided the case, and pronounced judgment,—all the judgment it was authorized to pronounce.

value of over \$100, was sentenced to two years' hard labor and three days' solitary imprisonment in the house of correction. The error assigned was that the three days' solitary confinement was not warranted by the law and that the judgment was erroneous and void. It was held that the court could not sentence him to hard labor for the maximum term and add solitary confinement thereto, but that the hard labor and solitary confinement must be within the maximum term fixed. The judgment was therefore reversed.

Excessive sentences were reversed upon writs of error in *Tully v. Com.* 4 Met. 357; *Christian v. Com.* 5 Met. 530; *Ross's Case*, 2 Pick. 165; *Elley's Case*, 2 Pick. 172.

In *Christian v. Com.* 5 Met. 530, 531, it is said that it is not competent for the court to reverse in part where the judgment is entire, nor to enter up such judgment as the court below ought to have entered, and the fact that the prisoner has yet suffered no part of the sentence on the erroneous judgment does not vary the case in principle; but if one has suffered a part of a sentence awarded on an erroneous judgment, it may add weight to the reasons why a new judgment should not be rendered or pronounced.

In *Howard v. People*, 3 Mich. 207, the prisoner, convicted of assault and battery before a justice of the peace without a jury, was fined, ordered to pay the costs of the suit, and to stand committed to prison until they were paid. On writ of error judgment was reversed as the justice had exceeded his authority in sentencing him to stand committed until the fine was paid, as the only power he had was to fine or imprison within the limits fixed by the statutes.

In *Elliott v. People*, 13 Mich. 365, the prisoner, convicted of embezzlement, was sentenced to the house of correction for two years. The court reversed the judgment and discharged the prisoner because the sentence to that place for more than one year was unauthorized. The court further held that it could not substitute a sentence which the court below might have given, but did not in fact give, and relied upon the cases of *King v. Ellis*, 5 Barn. & C. 395; *King v. Bourne*, 7 Ad. & El. 58; and *Shepherd v. Com.* 2 Met. 419.

In *Shepherd v. People*, 25 N. Y. 406, a wrong judgment upon a conviction for arson in the first degree was reversed, and although the trial and conviction were regular, yet upon such

judgment of reversal the prisoner was discharged. In this case the decision was founded upon the idea that prior to the New York act of April 24, 1863, the appellate court had no authority, on the reversal of a judgment wrongfully pronounced when the trial and conviction were regular, either to pronounce the proper judgment or to remit the record to the court where sentence was pronounced with directions to that court to pass the appropriate sentence. For that reason the court held that the prisoner was entitled to his discharge. In that case the sentence imposed upon the prisoner was that he should be imprisoned and be kept at hard labor for the term of his natural life.

c. Prisoner discharged, legal sentence served.

In *People v. Harrington*, 75 Mich. 112, the prisoner, charged with assault with intent to do great bodily harm, was convicted of assault and battery only, and sentenced to forty days' imprisonment and to pay a fine within such time, or, in default, to be imprisoned until the fine was paid, the whole imprisonment not to exceed four months. Three months' imprisonment was all that could be awarded by the justice, and the question was whether the sentence of imprisonment separately for forty days and a fine, which was to be followed by imprisonment till paid, not beyond four months from sentence, was entirely void, or void only as to the excessive punishment. The court upon proceedings by way of error held the sentence was not wholly void as the court could have imprisoned absolutely for three months, and could have imprisoned three months in default of payment of the fine, and the intention was evident that in default the defendant should remain imprisoned for four months of which time only one month was excessive. The judgment as to the term of imprisonment beyond the three months was therefore reversed, and as the time had expired the prisoner was discharged from custody.

In *Clellans v. Com.* 8 Pa. 223, 226, 229, the prisoners, convicted of a riot, were sentenced to pay a fine of \$1 and undergo imprisonment for three years in the Eastern penitentiary in solitary confinement at hard labor. They objected to the sentence upon proceedings in error upon the ground that the court had no power to commit them to the penitentiary, on the ground that the proper punishment was in the county jail. The court reversed the judgment upon the ground that the statutes did not au-

When, therefore, the court assumed to add a second judgment and sentence it exceeded the limit of its jurisdiction. In other words, the court had no power to make the second or additional judgment. When it rendered the judgment, and all the judgment the law authorized, its power was exhausted, and its attempt to add a second judgment or sentence was an attempt to do an act without, or in excess of the limit of, its jurisdiction. *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, also illustrates what is meant by the term "exceeding the limit of its jurisdiction," as applied to a court. In that case the circuit court had rendered one judgment, which had been satisfied, and the court then attempted to set that aside and render a second judgment, and the Supreme Court of the United States says that it had no jurisdiction to render the judgment. "The power was exhausted; its further exercise was prohibited. It was error, but it was error because the power to render any further judgment did

not exist," 18 Wall. 176, 21 L. ed. 879. But when the circuit court, in the case at bar, was rendering judgment, it was doing precisely what it was authorized to do by virtue of its jurisdiction over the offense charged, and of the petitioners, and it rendered a judgment in its nature such as it was authorized to render, namely, a judgment of imprisonment in the state's prison of this state. Assuming that in rendering that judgment it should have designated the term two years, instead of five, the court committed an error, but it never exceeded the limit of its jurisdiction. It simply imposed a sentence in excess of what the law permits, while properly exercising its jurisdiction. Upon this question we may be justified in again quoting the language of the supreme court of Massachusetts in *Sennott's Case*, 146 Mass. 489: "The better rule seems to be that, where a court has jurisdiction of the person and of the offense, the imposition, by mistake, of a sentence in excess of what the

authorize the sentence, and as the prisoners had been confined in the penitentiary for three fourths of a year they deemed it as severe a punishment as if they had been confined in the county jail where they should have been sent for two years, and the prisoners were therefore discharged.

For similar cases under habeas corpus, see III. b, *supra*.

d. Judgment reversed in part and affirmed in part.

In *People v. Sellar*, 58 Mich. 327, the prisoner was sentenced to imprisonment in the state prison for eight years under the ordinary charge of larceny of a horse and harness of the value of \$175, to which offense he pleaded guilty and the judgment was reversed to the extent that the sentence imposed imprisonment beyond five years.

In this case the court stated that as the law then stood a sentence which was merely bad for excess might be reversed for the excess, and left to stand for so much as could lawfully be imposed. This would appear to be the course pursued in that case.

In *State v. Kearney*, 8 N. C. (1 Hawks) 53, the prisoner, convicted of manslaughter after praying the benefit of clergy, was sentenced to pay a fine of \$250, and to receive thirty-nine lashes on the bare back, and to stand committed until the fines and costs of the prosecution were paid. He appealed upon the ground that the court could not render such a judgment. The court ordered the judgment to be reversed so far as the order relating to the whipping was imposed, but affirmed it as to the fine, as it was clearly wrong to impose both a corporal punishment and a pecuniary fine, for the reason that the statute imposed the punishments in the alternative, "to receive one or more public whippings, or to pay a moderate pecuniary fine in the discretion of the court."

In *People v. Jones*, 49 Mich. 591, the prisoner was sentenced to imprisonment in the state prison at hard labor for the period of seven years for horse stealing, under Mich Stat. 1877, chap. 102, and the court questioned the validity of the statute in that it imposed a severer penalty for the offense than what was imposed by law for manslaughter, and held all over five years would be an excessive sentence. The court, however, affirmed the judgment as to the five years.

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The cases included in the next section are similar in their effect upon the prisoner.

e. Sentence corrected or modified, and judgment affirmed.

In some cases the court has corrected the sentence and affirmed the judgment of the court below.

In *Vaughan v. State*, 83 Ala. 55, the prisoners, convicted of adultery and fined \$100 each, were sentenced to hard labor for the county for nonpayment of the fine and costs. Under the state statutes the maximum punishment for misdemeanor was eight months. The court stated that if this were the only error found, they would not reverse, but would correct and affirm the judgment; but as other errors were found in the admission of testimony the court reversed the judgment in each case, and remanded the cause.

In *State v. Shaw*, 23 Iowa, 316, the defendant, found guilty of selling intoxicating liquors contrary to law, was sentenced to a fine of \$20 and costs of the prosecution, and to stand committed until the fine and costs were paid. He appealed to the district court, where he was again tried and that court inflicted a fine of \$25 and costs, and ordered him to stand committed until the fine be paid at the rate provided by law. It was held that there was error in the district court adjudging him to pay a fine of \$25, but as the attorney general confessed the error and offered to remit the fine of \$5 the judgment was modified, and as so modified was affirmed. The court also modified that part of the sentence which committed him until the fine was paid at the rate provided by law in accordance with the provisions of the section of the statute, which provided that he should stand committed for ten days unless the same was sooner paid.

In *People v. Pierce*, 18 Misc. 83, the defendant was convicted before a justice for violating the game laws (Laws of 1895, chap. 974, § 102), and was sentenced to pay a fine of \$40, and to imprisonment for thirty days in the county jail. The court directed the judgment of conviction to be modified by remitting the fine, as under § 102 of the game laws the punishment was imprisonment for not less than thirty days, but there was no authority to fine, and as so modified the court affirmed the judgment of conviction and sentence.

In *Daniels v. Com.* 7 Pa. 371, the prisoner,

law permits, is within the jurisdiction, and does not render the sentence void." We conclude, therefore, that the court in this case did not exceed the limit of its jurisdiction, but simply, if the term fixed is in excess of that authorized by law, committed an error in the exercise of its jurisdiction.

These conclusions necessarily require us to remand the petitioner to the custody of the sheriff of Hughes County, and it is so ordered.

It is due to the learned counsel, both on the part of the petitioner and the state, to say that their exhaustive researches and able presentation of the questions have greatly aided the court in the investigation of the question involved, and in arriving at a conclusion.

Fuller, J., concurs.

Kellam, J., concurring:

I concur in this decision only in deference to what appears to be the weight of au-

thority. This decision, and others which it follows, under Constitutions and statutes like our own, seem to me to rest upon made ground, improvised by the courts, upon which to plausibly rest a ruling designed to prevent a failure of justice, and upon the ordinarily dangerous doctrine that the end justifies the means. Habeas corpus lies where a court whose act is the subject of inquiry "has exceeded the limit of its jurisdiction, either as to the matter, place, sum, or person." Section 7841, Comp. Laws. The circuit court, although a court of general jurisdiction, gets its power to sentence in any case from the statute, and the same statute which gives the power also limits it. Its power to sentence is its jurisdiction to sentence, and I am unable to comprehend why a court which assumes to sentence for twenty years, in a case where its authority is limited to a sentence for ten years, does not exceed "the limit of its jurisdiction" in that respect. The cases all concede that if a court imprison where it only has authority

convicted of obtaining goods by false pretenses, was sentenced to pay a fine and to imprisonment in the county jail at hard labor for nine months. The appellate court ordered the words "hard labor" to be struck out, but affirmed the sentence in all other respects.

In *Gardes v. United States*, 58 U. S. App. 219, 87 Fed. Rep. 172, 183, 30 C. C. A. 596, the prisoners had been sentenced to "be conveyed to, and be imprisoned at hard labor in, the . . . penitentiary . . . for and during the term and period of eight years" for embezzlement of bank funds. By the statute under which the prisoners were convicted the court had no power to confine them to hard labor. It, however, appeared that hard labor was a part of the discipline and treatment in the state penitentiary at which, by statute, the courts were authorized to sentence convicted offenders. The court held there was a substantial difference between having to submit to hard labor as a part of the discipline, and having it pronounced against him as a brand or mark of the grade of the punishment for the offense, and it therefore ordered that the sentence should not go beyond the language of the statute in describing the character of the confinement, and should be modified by striking out the words "at hard labor," and as thus modified the judgment should stand affirmed.

In *State v. Brannon*, 34 La. Ann. 942, 947, the prisoner, indicted for larceny, was sentenced to work upon the streets for sixty days and pay costs, and in default of payment was condemned to work twenty days longer. On appeal the court held that under no law applicable to the case could the accused be condemned to additional punishment exclusively to pay the costs of the prosecution, and decreed that the judgment should be amended by striking therefrom that part which imposed additional labor in default of payment of costs, and as thus corrected the sentence should be affirmed.

In *Lowrey v. Hogue*, 85 Cal. 600, the defendant, convicted of battery, was ordered to be confined in the county jail for a period of thirty days, with a further penalty of \$200 fine with the usual alternative of imprisonment in the county jail until the fine was paid. The appellate court ordered the portion which provided for the collection of the fine by imprisonment, in case the money was not paid, to be stricken out from the judgment.

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1. Judgment ordered modified, and case remanded.

In some cases the court has ordered the judgment to be modified and remanded it in order that proper sentence may be imposed, and there would appear to be no practical difference, so far as the ultimate results are concerned, between this practice, and that where the court has reversed the sentence, and remanded the case for proper sentence as shown, *infra*, IV. g.

The cases cited below are those in which the courts have ordered the judgment to be modified and have remanded the case for proper sentence.

This would seem to be the practice in North Carolina in cases where the prisoner has been convicted and illegally sentenced when the case is taken to the supreme court by appeal or otherwise, as the case is there sent back for such judgment as the court allows. *State v. Lawrence*, 81 N. C. 522; *State v. Sue*, 1 N. C. (Conference) 55; *State v. Cook*, 61 N. C. (Phill. L.) 535.

In *State v. Driver*, 78 N. C. 423, the prisoner, indicted for assault and battery, pleaded guilty, was sentenced to five years' imprisonment in the county jail, and then to enter into a recognizance with sureties in \$500 to keep the peace for five years longer. The court reversed the judgment as erroneous, and ordered its judgment certified to the court below in order that a proper judgment might be rendered. In this case the sentence was held to be unconstitutional as excessive.

In *State v. Lawrence*, 81 N. C. 522, a general verdict of guilty was returned against the prisoner, indicted for horse stealing and also for receiving property knowing it to have been stolen, and he was sentenced to twenty years' imprisonment at hard labor in the state prison. It was held that the court below had no authority to inflict a punishment of twenty years' imprisonment, and that the sentence was illegal as it exceeded ten years. The judgment was reversed and the case remanded in order that the defendant might be brought before the court upon a writ of habeas corpus *ad subjiciendum*, in order that the proper judgment upon the verdict might be pronounced upon him.

In *State v. Norwood*, 93 N. C. 678, the prisoner, found guilty of assault with a deadly weapon, was sentenced to imprisonment in the

to fine, or fine where it only has authority to imprison, such judgment is not merely erroneous, but is absolutely void, because in excess of its jurisdiction; thus distinctly making the very judgment which the court rendered in a case in which it confessedly had jurisdiction of the person and the offense a controlling test of whether it kept within its jurisdiction or not, and teaching the doctrine that in determining whether a court had exceeded its jurisdiction the judgment which it renders is to be considered, as well as the other elements of person and offense, and that a court may have ample jurisdiction to try a defendant for the offense charged against him, but that it may exceed its jurisdiction in rendering a judgment which it had no legal power to render. But that the trial court has exceeded the limit of its jurisdiction is precisely the condition named in our statute for relief by habeas corpus. But the cases which this decision follows, hold that if the statute ex-

pressly limits the power of the court to sentence to five years, but the court courageously imposes a sentence of twenty years, there is no excess of jurisdiction, but only an error in its interpretation of the law. It is held that a sentence which sends a defendant to jail for a year, when he ought to have gone to the penitentiary for the same time, is void for excess of jurisdiction, because the court had no authority to pass such a sentence, but a sentence for twenty years, when the only authority of the court is to sentence for five years, is not jurisdictionally excessive, because the court had authority to sentence for five years, and for so much it is good. But the difficulty is that the court made no sentence for five years. It deliberately declined to exercise the authority which it did have, and assumed an authority and power which it did not have. The question is not whether it might have made a judgment within its jurisdiction, but whether it has done so;

county jail for six months. Four months of such six he was to be confined in any other place as the county commissioners might direct, and he was ordered to pay the costs, and in default of such payment to be confined in the workhouse until the costs were paid, such latter sentence to commence when the six months' imprisonment had expired. As the court had no authority to imprison the defendant elsewhere than in the county jail, nor to delegate to the county commissioners power to change the punishment imposed by the court to imprisonment in the workhouse or elsewhere, and also as the court could not direct the additional imprisonment upon failure to pay the costs, the judgment was reversed, and the case remanded back in order that a proper judgment might be rendered, and the defendant was refused a new trial.

In *State v. Johnson*, 94 N. C. 863, the prisoner, charged with assault with intent to commit rape, was only convicted of a simple assault, the punishment for which was not to exceed a fine of \$50 or thirty days' imprisonment, but was sentenced to be imprisoned for twelve months and to be hired out by the county commissioners. The court ordered the sentence to be modified, but refused a new trial.

Although it is error to impose both fine and imprisonment under N. C. act 1885, chap. 248, for seduction under promise of marriage, the court held that the defendant was not entitled to a new trial, but it remanded the case in order that the proper sentence might be imposed. *State v. Crowell*, 116 N. C. 1052.

In case of imprisonment for a longer term than is necessary to pay the fine, costs, and allowances, by laboring at the wages per month mentioned in an order in bastardy proceedings, the court remanded the case and ordered the judgment to be modified. *State, Williams, v. Nelson*, 119 N. C. 797, 804.

In *State v. Williams*, 40 S. C. 373, where so much of the sentence as required defendant to work in the chain gang was void, the court remanded the case with instructions to modify the sentence.

Also, in *State v. Taylor*, 124 N. C. 803, the court remanded the defendant for a proper sentence.

In *Territory v. Conrad*, 1 Dak. 348, 355, where the sentence was in excess and illegal, but the defendant was legally and regularly convicted of a misdemeanor, the court affirmed the 45 L. R. A.

conviction, but modified the judgment and remitted the case to the court below so that the proper judgment might be imposed. In this case, instead of imprisonment in the territorial prison, the court sentenced the prisoner either to undergo an imprisonment in the county jail not exceeding one year, or to pay a fine not exceeding \$1,000, or to be sentenced to both fine and imprisonment.

In *Hathcock v. State*, 88 Ga. 91, the prisoner was sentenced to pay a fine, or to be confined in the county jail for twelve months, for making fraudulent representations as to his financial responsibility while under the statute of that state six months in jail was the limit. The court directed a modification of the imprisonment part of the sentence so as not to exceed the limits authorized by the statute.

Although the report of the above case does not show that it was remanded or remitted to the court below in order that a proper sentence might be imposed, yet it is to be presumed that such was the course pursued, as the opinion shows that there was a direction to the judge to modify the sentence.

If the sentence imposed is in excess of the maximum fixed by the statute, the court will remand the case with instructions to the court below to pronounce such sentence as the law directs. *State v. Nicholson*, 14 La. Ann. 798. In this case the defendant was found guilty of uttering a forged and counterfeit bank check, and sentenced to imprisonment at hard labor, while the maximum punishment under the statute was three years without any hard labor.

Where sentence of death was passed under a statute that did not govern the case, and differed in some particulars from the sentence that should have been imposed, it was reversed, and the record remitted to the court below with directions to pronounce the judgment prescribed by the statute governing the case. *Ratsky v. People*, 29 N. Y. 124.

The same was done in the similar case of *McKee v. People*, 32 N. Y. 239.

In *Harris v. People*, 59 N. Y. 509, 603, the punishment imposed was greater than that fixed by law, but as the trial was legally conducted and the conviction was legal, and the sentence alone illegal, the court refused to reverse the judgment of conviction, but remanded the case to the court below that the proper sentence might be given, under the power conferred by

not whether a judgment which it did not make would have been good, but whether the judgment which it did make was one it had authority to make. This court, upon this inquiry, has nothing to do with a judgment which was not made, but should look at the judgment which was made, and compare it with the statutory authority of the trial court to make it; and if it had no power to make the only judgment which it did make, or attempt to make, it seems to me, personally, that it has exceeded its jurisdiction. A court commits an error when it does something which it has the legal power to do, but ought not to do. It exceeds its jurisdiction when it does something which is beyond its legal power to do. To me the distinction seems as plain in principle as it is momentous in fact.

How does it help the matter to say that the court which pronounced the sentence is one of general jurisdiction? It surely is not general in the sense that its jurisdiction is

broader than the law itself, or that the exercise of its power—its authority—may not be limited and circumscribed by law. The legislature has the same power to regulate the punishment which it may inflict for certain offenses as though it were a court of limited jurisdiction. If the statute made but one offense punishable by imprisonment, and fixed the term at twenty years, I think it would be accepted that a court, even of general jurisdiction, which sentenced a defendant to thirty years, would exceed the limit of its jurisdiction. It seems to me that in such case "jurisdiction" means more than control of the person of the defendant, and authority to try the question at issue, and includes also power in the court to render the judgment which it does render. If it does not, then the court, having acquired jurisdiction of the person, may sentence a defendant to be hung for larceny committed within its jurisdiction, and there would be no relief by habeas corpus, for the answer

the act of 1863, chap. 226, amending 2 Rev. Stat. 741, § 24.

In *Beale v. Com.* 25 Pa. 1, where a statute provided for imprisonment by separate and solitary confinement at labor, a sentence was imposed upon a prisoner to undergo hard labor. The court held that this was a departure from the statutory rule, not so much in the use of the word "hard" as in omitting the qualification of separate or solitary confinement, which must be strictly followed when it was plainly enjoined. The sentence was therefore reversed, and the record ordered remitted to the court below for further proceedings in conformity with the opinion of that court.

For similar practice under habeas corpus, see *supra*, III. f.

Almost the same course was pursued in cases *infra*, IV. g and h.

g. Judgment reversed, and case remanded.

And almost the same practice mentioned above has been resorted to by the courts in other cases, the only distinction being that in the following cases the court has reversed the sentence of the court below, and there remanded the prisoner for proper sentence.

If the judgment is not warranted by the law it will be reversed, and the prisoner will be remanded into custody in order that the proper judgment may be rendered. *Lacy v. State*, 15 Wis. 14. To the same effect, *Benedict v. State*, 12 Wis. 314; *Peglow v. State*, 12 Wis. 535.

In *De Bardelaben v. State*, 50 Ala. 179, the prisoners, indicted and convicted upon the charge of larceny of a ball of cotton over \$100 in value and receiving and concealing or aiding in concealing the same knowing it to have been stolen, were sentenced, one on the first count, and the other on the second count, the former to two years' imprisonment in the penitentiary and the latter to two years in the county jail. It was contended that the latter imprisonment was unauthorized by law as the punishment prescribed was either imprisonment in the penitentiary or hard labor for the county. The court ordered such judgment to be reversed, and the cause remanded as to him, not for a new trial, but in order that the court might pronounce the proper sentence; the court, however, affirmed the judgment as to the other prisoner.

Under art. 5, § 78, Md. Code, if the sentence imposed in a criminal case is unauthorized the court of appeals has authority in reversing the 45 L. R. A.

judgment to remand the record so that the right sentence may be pronounced. *Lynn v. State*, 34 Md. 67.

In *People v. Riley*, 48 Cal. 549, the defendant was found guilty of the crime of house breaking in the daytime, which offense was punishable by imprisonment in the state prison for a term not exceeding five years under § 462 of the Penal Code. He was sentenced, however, to ten years in the state prison. The court reversed the judgment and remanded the case with directions to the court below to proceed to judgment on the verdict.

In *People v. Wilson*, 9 Cal. 260, the defendant, found guilty of an assault with a deadly weapon, was sentenced to two years' imprisonment in the state penitentiary. The court reversed the judgment, and remanded the cause for further proceedings upon the ground that the offense of which he was found guilty was not a felony, but a simple assault, and that the court had erred in assessing the punishment.

In *Ex parte Edwards*, 11 Fla. 174, the prisoner, convicted for contempt of court, was ordered to be committed to jail without bail until he should purge himself fully of the contempt, either by restoring the goods he had removed, or paying the full value thereof. The state statutes gave the court power to punish for contempt by fine or imprisonment and not otherwise, but expressly provided that the fine in any case should not exceed \$100, or the imprisonment thirty days. The court held that the punishment could in no case extend beyond the limits mentioned in the statute, and reversed the judgment and remanded the cause for further proceeding.

In *De Beukelaer v. People*, 25 Ill. App. 400, 464, the defendants were each sentenced to imprisonment in the county jail for a term of thirty days, and to pay a fine of \$500 for contempt of court. The court considered the punishment unusual, immoderate, and excessive, and reversed the conviction and remanded the cause.

A sentence to pay a fine and the costs of the prosecution, and to stand committed until said fine and costs be paid, was held to be illegal and void in that it did not limit the time of such imprisonment, in *State v. Prince*, 42 La. Ann. 817, 824, where the state statute required that such imprisonment should not exceed one year. The court directed that the verdict, judgment, and sentence should be annulled and set

would be—apparently as adequate in that case as in this—that the court did not exceed its jurisdiction, for it had jurisdiction of the person and of the offense, and only committed an error in imposing a wrong sentence. And so the court or judge who happened to hear the habeas corpus would, in its mind, substitute a judgment which the trial court had authority to and ought to have rendered for the judgment which it did in fact render, and which stands upon the record as the sole, entire, and only judgment in the case; that is, a court or judge who had no authority to try the case, or render judgment of any kind in it, would, in order to prevent a failure of justice, substitute in its imagination a legal judgment for an illegal one, and so hold the defendant under his counterfeited judgment, so improvised for the occasion. It may not be absurd to say that one solid sentence for a definite term is separable, and that this court, on habeas corpus, will pick out of it as many years as the

court was authorized to sentence for, and say that as to so much the court has not exceeded its jurisdiction; but no court ought to be compelled to resort to such a subterfuge to accomplish by judicial legislation what ought to be done by the legislature.

A man has power, under the statute, to make a verbal lease for one year. He makes one for two years, and asks the court to apply the same rule it applies here, and help him to enforce it for a year; but the court wisely shakes its judicial head, and says, "You have attempted to do something which you had no authority to do, and your act is all void." By statute the power of a judge to render an *ex parte* order, staying proceedings, is limited to twenty days. He makes such an order for fifty days, and the courts do not hold it good for the twenty days for which he might legally have made it, but hold it void *in toto*. "The judge has transcended his jurisdiction," is the language of the court. I can see a basis of reason for

aside, and remanded the case to the lower court for further proceedings.

In *State v. Hord*, 8 S. C. N. S. 84, the prisoner, convicted of an assault with intent to kill, was found guilty and sentenced to confinement in the state penitentiary at hard labor for one year. He appealed upon the ground that the sentence was contrary to law in that it directed the imprisonment in the state penitentiary and not in the county jail. The court set aside the sentence and remanded the case and ordered the prisoner to surrender himself to the court below to receive such sentence as the presiding judge might impose according to law.

Practically the same course was followed in the following cases, in which the court reversed the sentence with instructions to the court below.

In *People v. Vanard*, 6 Cal. 562, the defendant, indicted for an assault with intent to commit murder, was found guilty of an assault with intent to do bodily injury, and sentenced to one year's imprisonment and to pay a fine of \$3,000 and the costs of the prosecution. He was therefore only found guilty of an assault which could not be punished as for a felony. The court set aside such judgment, and directed the court below to enter judgment for the crime of assault, and to fix the punishment according to the provisions of § 143 of the Criminal Code.

In *Hussy v. People*, 47 Barb. 503, the prisoner, found "guilty of an assault with intent to do bodily harm," was sentenced to imprisonment in the state prison at hard labor for one year and ten days. The verdict of the jury was in legal effect that the prisoner was guilty of a simple assault. The sentence was held to be unauthorized as being one imposed for a felony, and the court therefore upon writ of error reversed the judgment, but remitted the record to the court below with instructions to pronounce the proper judgment under the power given by the laws of 1863. In this case the court intimated that if it were not for the New York statute it would be the duty of the court to discharge the prisoner, as was done in *Shepherd v. People*, 25 N. Y. 406; *People v. Taylor*, 3 Denio, 91; and *O'Leary v. People*, 4 Park. Crim. Rep. 187.

In *State v. Austin*, 121 N. C. 620, 622, where the defendant, convicted of a forcible trespass, was sentenced to work on the public road, which was not authorized by statute, the judgment was reversed, and the case sent back to the court below.

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See also *State v. Lawrence*, 81 N. C. 522, and *State v. Norwood*, 93 N. C. 578, *supra*, IV. 1, and *infra*, h. 1.

h. Judgment reversed, and new sentence imposed.

In *Brooks v. Com.* 4 Leigh, 689, the judgment was held to be erroneous in that the court sentenced the prisoner to be kept in solitary confinement, etc., in the penitentiary for one-sixth instead of one-twelfth part of the term of imprisonment for two years, as directed by Acts 1832-33, chap. 19, § 2, and the court reversed the judgment and ordered a judgment to be entered that the prisoner should be confined in the penitentiary for the term of two years, and kept in solitary confinement for one twelfth of the term.

In *Oliver v. State*, 5 How. (Miss.) 14, 19, the court reversed a sentence on a charge of larceny, and pronounced the proper judgment under the statute. In this case the jury found a verdict of guilty, and found the value of the property stolen to be \$60 and the verdict was amended according to § 63, Miss. act 1839, under which the prisoner convicted of feloniously taking and carrying away personal property to the value of more than \$25 was to be found guilty of grand larceny, and imprisoned in the penitentiary for a period not exceeding five years, and the prisoner was sentenced for one year under the statute.

i. Judgment reversed, and new trial granted.

In some cases the courts have reversed the sentence and granted a new trial, either because the jury assessed the punishment, or because there was prejudicial error on the trial of the case.

In *Lefforge v. State*, 129 Ind. 551, the prisoner was sentenced to imprisonment in the state prison for eight years for the crime of incest. At the time of his conviction, Ind. act March 7, 1891, which amended the prior act, and limited the maximum punishment to imprisonment for a term of five years, was in force. The court held that the sentence was wholly unauthorized, and reversed the judgment with instructions to award a new trial, as no law was then in force which authorized imprisonment for a period of eight years. Here it seems that the jury fixed the punishment.

In *People v. Murray*, 72 Mich. 10, a sentence of fifty years' imprisonment was reversed

holding that where a judgment or sentence consists of two or more separable and distinct elements or parts, as fine and imprisonment, only one of which the court had power to impose, the illegal or unauthorized part may be excised, and leave the legal part operative; for, as said by Earl, J., in *People, Trainor, v. Baker*, 89 N. Y. 467, the legal part "is a separate portion of the sentence, complete in itself, and the balance of the sentence can be held void, and disregarded." This application is made to, and the writ issued by, this court, which, under the Constitution, has a general superintending control over the circuit court and its judgments. It is not in the nature of a collateral attack. This court is competent, and it is the proper tribunal, to say whether the judgment rendered by the circuit court was one within its jurisdiction to render.

My confidence in the logical and legal cor-

rectness of the views I have expressed is greatly strengthened by the deliberate declaration of the United States Supreme Court as to what the law is, in the *Graham Case*, 138 U. S. 461, 34 L. ed. 1051, referred to in Judge Corson's opinion. It says: "It is undoubtedly the general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void." It is true, discharge was refused in that case, but it was denied upon the distinct ground "that under the law of Wisconsin [from which state the case came], a judgment in a criminal case which merely exceeds in the time of punishment prescribed by the sentence that which is authorized by law is not absolutely void, but only erroneous, and that the error must be corrected on appeal and

on writ of error as excessive, and because of error on the trial a new trial was granted and the prisoner was let out on bail. In this case the offense was carnally knowing a girl under fourteen years of age.

In *State v. Nash*, 109 N. C. 824, 837, the prisoner indicted for an assault with intent to commit rape, was convicted and found guilty of a simple assault only, and was adjudged to be confined in the county jail for a term of two years. The court held that there was error in imposing a greater punishment than a fine of \$50 or an imprisonment for thirty days, as there was no evidence tending to show that the prosecutrix suffered from bodily pain, and because of error on the trial granted the defendant a new trial.

In *Howell v. State*, 1 Or. 241, the prisoner, convicted of larceny by feloniously taking and carrying away \$61, was sentenced to one year's solitary confinement, and kept at hard labor in the penitentiary of the state. He contended that the sentence of the court was without authority of law. By the Oregon statutes, in every case in which punishment in the penitentiary is awarded against any convict the form of the sentence is to be punishment by confinement at hard labor, and the prisoner may also be sentenced to solitary confinement for such term as the court shall direct, not exceeding twenty-one days at one time, and the execution of the punishment by solitary confinement is to precede the punishment at hard labor, unless the court otherwise orders. It was held that the sentence to one year's solitary imprisonment was unauthorized, and therefore the court ordered that the judgment should be reversed and a new trial granted, but held that it had no power to modify the order. Why it was deemed necessary to order a new trial does not appear. The error in the sentence does not furnish any evident reason for reversing the conviction and ordering a new trial. But there is nothing to show that there was any other ground for the order.

j. Execution stayed, bail for future appearance.

In *State v. Walters*, 97 N. C. 489, the defendant was sentenced to be imprisoned for the term of twelve months, and to pay a fine of \$1,000 for slandering an innocent woman in violation of § 1113, N. C. Code, which makes the offense a misdemeanor punishable by fine or imprisonment in the discretion of the court. The judgment was held erroneous, and the execution was stayed, and the defendant was al-

lowed to give bail for his appearance at the next term of court in order that a proper judgment might be entered against him.

k. Discharged upon suing out writ of error.

In *Sumner v. Com.* 3 Cush. 521, 522, the prisoners were severally sentenced to imprisonment for a joint offense for a longer term than was prescribed by the law. The court reversed the judgment and issued an order directing them to be discharged from the imprisonment to which they were sentenced upon their suing out a writ of error jointly.

V. On certiorari.

a. Discharge refused.

In *State v. Hatley*, 110 N. C. 522, the petitioners for a writ of certiorari pleaded nullity to an indictment for keeping a disorderly house. The court ordered the defendants to be imprisoned twelve months in the county jail, but if they left the state in thirty days no capias was to issue, otherwise it was to issue, and they were to be imprisoned for the twelve months. It was held that although the court had no power to pass a sentence of banishment, yet the judgment of the court could not be fairly construed as such, as the words "but if the defendants leave" constituted no part of the sentence or judgment and were a mere direction to the clerk of the court to postpone the period at which the sentence should go into execution. The writ was therefore denied.

b. Judgment reversed, and case remanded.

In *Papworth v. Fitzgerald* (Ga.) 32 S. E. 363, the prisoner was found guilty of a violation of a city ordinance prohibiting the sale of intoxicating liquors in the city, and was imprisoned in the city jail under the provisions of the city ordinance. He was properly found guilty, but the sentence of the municipal court was illegal as it imposed imprisonment in addition to the fine. The court therefore upon a petition of certiorari ordered the sentence to be set aside, and directed the court below to impose upon the defendant a fine of the amount stated in the ordinance, and, in default of its payment, imprisonment in the city jail as prescribed under the ordinance. In this case the judgment was excessive in that it imposed both fine and imprisonment, and was *ultra vires* in that it imposed an absolute penalty of imprisonment.

cannot be corrected by a writ of habeas corpus. . . . When the highest court of a state holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the state authorized the punishment, and only void for the excess, we cannot treat it as wholly void, there being no principle of Federal law invaded in such ruling." What the court would have done if it had not felt controlled by the decision of the Wisconsin court, I do not undertake to say, but it would seem to me that is formal declaration of what the "general rule" is, as quoted above, in which it is said that a sentence exceeding "in extent" the punishment allowed by law is "absolutely void," would afford substantial ground for an inference.

A number of the highest state courts in the Union have also distinctly avowed the same views, and, probably recognizing their force,

the legislatures of a number of states have provided by statute that no person can be discharged on habeas corpus until the time has expired for which he could legally have been detained. I think there should be such a statute here, and the courts left to their constitutional function of declaring what the law is, rather than what they think it ought to be. In other words, if further affirmative provisions of law are needed to prevent a failure of justice, or to accomplish any other desirable ends, the legislature, and not the courts, should supply them. While I do not in this case, and shall not in any case, hesitate to declare my own views upon any question before this court, I do now, as I have sometimes before, vote to follow the weight of adjudicated cases, rather than my own judgment, less fully supported by authorities.

c. Prisoner discharged.

In *State, Smith, v. Gouldy*, 58 N. J. L. 562, no penalty had been provided for the violation of a city ordinance, and the conviction under it was therefore a nullity and of no force or effect whatever. In that case where the prisoner had been convicted of violating an ordinance relating to mercantile licenses, and fined \$10 and \$1.90 for costs, the conviction was set aside upon certiorari.

VI. English decisions.

In *Rex v. Collyer, Sayer*, Rep. 44, the prisoner was ordered to be discharged on habeas corpus from imprisonment under the judgment, which was illegal.

In that case the judgment or sentence was excessive in that it required the prisoner to advertise the sentence in a certain paper, to ask pardon on his knees at the place where the assault took place, and to pay the fees before discharge.

In *Holland v. Queen*, 2 Jebb & S. 357, it was held that where a judgment for the Crown in a criminal case is held on a writ of error to be bad, the court will reverse the judgment and discharge the prisoner unless the sentence be rectified in the same term in which it is pronounced.

Upon a conviction for stealing in a dwelling house above the value of £5 under statute 1 Vict. 90, § 1, the prisoner cannot be sentenced for seven years' transportation, or any other punishment not mentioned in the statutes, and a judgment imposing seven years' transportation will therefore be reversed on writ of error as not within the terms of the statute. *Whitehead v. Queen*, 1 Cox, C. C. 199.

Under the English statute 3 Geo. IV. chap. 38, § 2, providing that a servant who steals any money from his master, and who is convicted thereof, and entitled to the benefit of clergy, shall, instead of being subject to such punishment as may by law be inflicted upon persons so convicted, and entitled to benefit of clergy, be transported for fourteen years, it was held that a servant convicted of petit larceny was not 45 L. R. A.

within the meaning of the statute, and was subject to transportation for seven years only, and the sentence was therefore reversed upon writ of error. *King v. Ellis*, 5 Barn. & C. 395, 400, 8 Dowl. & R. 173. In this case the court refused to send the judgment back to be amended.

In a criminal case a judgment which is bad in part is bad altogether. *Holland v. Queen*, 2 Jebb & S. 357. In this case solitary confinement, which was not authorized by the statute, had been added to the punishment.

In *Reg. v. Drury*, 3 Car. & K. 190, 193, 200, the sentence originally imposed upon the prisoner was found to be excessive, and was therefore reversed upon writ of error. Upon a subsequent trial for the same offense they pleaded *autrefois acquit*. The plea was held bad upon the ground that they were never in jeopardy, the court stating that a reversed judgment was the same as no judgment at all. The prisoners were, however, ordered to enter into recognizances to appear when called upon, and upon doing so were discharged, as the term of imprisonment already suffered was considered sufficient.

In *Silveraides v. Queen*, 2 Gale & D. 617, 3 Q. B. 406, 6 Jur. 805, it was held that where a person was erroneously sentenced at a court of sessions to imprisonment at hard labor, the court after reversing the judgment in error had no alternative but to discharge the prisoner. In this case the prisoner was charged with having in his possession certain naval stores contrary to the statute 39 & 40 Geo. III. chap. 89, and was punished with hard labor which the court had no power to impose.

In *Bourne v. King*, 2 Nev. & P. 248, 7 Ad. & El. 58, it was held that where an erroneous judgment is given by an inferior court on a valid indictment, as where the court passed sentence of transportation in a case punishable only with death, and the defendants bring error, the court can neither pass a proper sentence nor send back the record to the court below in order that they may do so, but the judgment must be reversed and the defendants discharged.

E. W.

NORTH CAROLINA SUPREME COURT.

Anna CASHION, Appt.,
v.

WESTERN UNION TELEGRAPH COM-
PANY.

(124 N. C. 459.)

Damages for mental anguish caused by negligent failure to deliver promptly a telegram stating that a person has been killed may be recovered, although the message is sent by an agent without disclosing who sent it or the relations of the sender with the addressee.

(April 11, 1899.)

A PPEAL by plaintiff from a judgment of the Superior Court for Iredell County allowing her the price of the message and costs only in an action brought to recover damages for failure to promptly transmit and deliver a telegram. *Reversed.*

Plaintiff's husband was killed while at work in Morganton. Plaintiff sent the following telegram to her brother-in-law in Davidson, North Carolina.

J. W. Mock, Davidson.

Come at once; Mr. Cashion is dead. Killed at work. John Payne.

John Payne, the signer of the message, was the agent of plaintiff for the purpose of sending it. This telegram was received at the office of defendant at Davidson at five o'clock the same evening, but was not delivered until the following morning. Mock testifies that if the telegram had been promptly delivered he would have ridden through the country to Statesville in time to take the train to Morganton that night. Plaintiff left Morganton the following morning with the body of her husband, and arrived at Statesville about seven o'clock A. M., where she remained awaiting a train until seven that evening. Mock arrived in Statesville about ten o'clock the same morning, and returned to Davidson that evening with the plaintiff.

Further facts appear in the opinion.

Messrs. L. C. Caldwell and J. F. Gamble, for appellant:

The plaintiff is entitled to recover, in addition to nominal damages, compensation for the actual damage done her, and "mental anguish is actual damage."

Young v. Western U. Teleg. Co. 107 N. C. 385, 9 L. R. A. 669.

An undisclosed principal may sue in his own name on contract made by an agent, and is entitled to all its advantages and benefits, for the reason that he is the "ultimate party in interest," even against third parties.

Story, Agency, § 418; *Harkness v. Western U. Teleg. Co.* 73 Iowa, 190; *Foster v. Smith*, 2 Coldw. 474, 88 Am. Dec. 604; *Na-*

tional L. Ins. Co. v. Allen, 116 Mass. 393; *Ruis v. Norton*, 4 Cal. 355, 80 Am. Dec. 618; *St. Louis, K. C. & N. R. Co. v. Thacher*, 13 Kan. 567; *Thompson, Electricity*, § 433.

The fact that a telegraph company only contracted with the agent in sending the message, and had no notice or knowledge that the plaintiff was in fact principal, is immaterial.

Chandler v. Coe, 54 N. H. 571; *Crosby v. Watkins*, 12 Cal. 88.

Where the despatch is sent for an undisclosed principal, the principal may maintain the action in his own name, and the fact that the company had no knowledge that plaintiff was, in fact, the principal, and the party tendering the message his agent, is immaterial.

Thompson, Electricity, § 432; *Western U. Teleg. Co. v. Broesche*, 72 Tex. 654; *Croswell, Electricity*, § 454, p. 401.

If the sender is merely acting as agent or servant of another, the right of action is in the principal or master.

Thompson, Electricity, § 431; *De Rutte v. New York A. & B. Electro Magnetic Teleg. Co.* 30 How. Pr. 403; *Milliken v. Western U. Teleg. Co.* 110 N. Y. 409, 1 L. R. A. 281; *De Rutte v. New York, A. & B. Electric Magnetic Teleg. Co.* 1 Daly, 547; *Western U. Teleg. Co. v. Moore*, 76 Tex. 66; *Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844; *Harkness v. Western U. Teleg. Co.* 73 Iowa, 190; *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527.

A telegraph company having knowledge of the urgency of a message,—and one of this character shows its urgency on its face—is liable in damages for negligence in its transmission and delivery, although it was prepaid and delivered by another acting for the one for whose benefit it was sent, at his special request, and not by the former in person.

Loper v. Western U. Teleg. Co. 70 Tex. 689.

The addressee may recover for negligence of the company in delivering a message, and this though the message does not disclose the relation of the parties.

Lyne v. Western U. Teleg. Co. 123 N. C. 129.

Messrs. Jones & Tillett, for appellee:

Every court among English-speaking people, and especially every supreme court in the United States, including the supreme court of North Carolina, has over and over again approved *Hadley v. Baxendale*, 9 Exch. 341, and held that the rule there laid down was the correct one.

Huyett & S. Mfg. Co. v. Gray, 111 N. C. 93; *Coley v. Statesville*, 121 N. C. 301; *Asho v. De Rossett*, 50 N. C. (5 Jones, L.) 299, 72 Am. Dec. 552; *Alpha Mills v. Watertown Steam Engine Co.* 116 N. C. 797; *Spencer v. Hamilton*, 115 N. C. 49.

The plaintiff can recover only such damages as were naturally within the contemplation of the parties. How can the damages for mental anguish of the plaintiff here be

NOTE.—On the disputed question of damages for mental anguish in telegraph cases, see *Peay v. Western U. Teleg. Co.* (Ark.) 39 L. R. A. 463, and cases cited in footnote thereto. 45 L. R. A.

supposed to have been within the contemplation of the parties when the defendant company did not even know of the plaintiff's existence.

Damages ought not to be enhanced by evidence of any circumstances which could not reasonably have been anticipated as probable from the language of the written message.

Young v. Western U. Teleg. Co. 107 N. C. 373, 9 L. R. A. 669; *Cannon v. Western U. Teleg. Co.* 100 N. C. 300.

It has never been held that an undisclosed principal could recover any other class of damages except that which the agent could recover if suing on behalf of the principal.

Western U. Teleg. Co. v. Kerr, 4 Tex. Civ. App. 280; *Western U. Teleg. Co. v. Fore* (Tex. Civ. App.) 26 S. W. 783.

A party who is not mentioned in a message, and whose interest therein is not communicated to the company, cannot recover damages for mental anguish.

Western U. Teleg. Co. v. Proctor, 6 Tex. Civ. App. 300; *Weatherford, M. W. & N. W. R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841; *Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 217; *Elliott v. Western U. Teleg. Co.* 75 Tex. 18; *Western U. Teleg. Co. v. Brown*, 71 Tex. 723, 2 L. R. A. 766.

Even though the plaintiff's interest in the telegram had been communicated to the company, yet, inasmuch as Mock was only her brother-in-law, in order for her to recover it must not only be sworn that there was some special degree of affection existing between her and Mock, but notice of this special affection must have been communicated to the telegraph company.

Western U. Teleg. Co. v. Coffin, 88 Tex. 94; *Western U. Teleg. Co. v. Gibson* (Tex. Civ. App.) 39 S. W. 198; *Western U. Teleg. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. 298; *Western U. Teleg. Co. v. Garrett* (Tex. Civ. App.) 34 S. W. 649.

The plain inference from the face of a message like the one mentioned in this case is that it was sent for the benefit of the party to whom it was addressed, and the company not having any notice that it was sent for the benefit of the sender, there can be no recovery for mental anguish suffered by the sender.

Western U. Teleg. Co. v. Nations, 82 Tex. 539; *Western U. Teleg. Co. v. Luck*, 91 Tex. 178.

It does not appear from the evidence in this case that the plaintiff suffered any damage whatever for mental anguish, except that she did not have the presence of J. W. Mock with her, and damages for alleged mental anguish arising out of the failure to have the presence of some friend or relative cannot be recovered unless it appears that the friend or relative could have done something substantial for the comfort of the plaintiff.

Chappell v. Ellis, 123 N. C. 259, *Western U. Teleg. Co. v. Birchfield*, 14 Tex. Civ. App. 664; *Rowell v. Western U. Teleg. Co.* 75 Tex. 26.
45 L. R. A.

Douglas, J., delivered the opinion of the court:

This case was here before, and is reported in 123 N. C. 269. It is now before us on an exception to the charge of the court below, which is stated in the record as follows: "The following is the charge of the court pertinent to the determination of the contention of the parties: 'The plaintiff contends that, by reason of the delay in the delivery of this telegram, her brother-in-law was prevented from being present with her, and that by reason of the absence of her brother-in-law upon this occasion she suffered mental anguish; that she suffered more than she would have suffered, under the circumstances, on account of the death of her husband. Now, to determine this question, the court charges you that there is no presumption of law that plaintiff suffered mental anguish on account of the absence of J. W. Mock; that the fact that she stood in relation to him as a sister-in-law, and the further fact of his being prevented from being with her, would not have raised the presumption that she suffered mental anguish on account of his not being there, but the burden is on the plaintiff to show by the preponderance of the evidence that there was existing between plaintiff and J. W. Mock such tender ties of love and affection as that his presence, advice, and sympathy with her in Morganton, and on the journey to Statesville, would have given her comfort and consolation in her distress, and would have prevented her from suffering to the extent she says that she actually suffered. But if you should find that such a relation existed between plaintiff and J. W. Mock, yet, as the plaintiff admits that she did not sign the telegram, and that her name is not mentioned in the telegram, and that Payne signed and sent the same as the agent of the plaintiff, before she can recover damages for mental anguish occasioned by the failure of J. W. Mock to be present with her upon this occasion the burden is upon the plaintiff to show, by a preponderance of the evidence, that at the time the message was delivered to the defendant company the said company was notified of the fact that the telegram was sent for the benefit of the plaintiff, and also of the relations existing between her and J. W. Mock. And the court charges you that there is no evidence that the defendant telegraph company had any notice that the telegram was sent for the benefit of the plaintiff, or that it had any notice of the relationship existing between the plaintiff and the said J. W. Mock; and your answer to the second issue cannot be more than twenty-five cents,—the cost of the telegram. The plaintiff does not contend that there was any physical injury to herself resulting from the alleged negligence, but the allegation in the complaint is for mental anguish suffered by her; and as the plaintiff has failed to show that the defendant company had notice that the telegram was sent for her benefit, or had notice of the relationship existing between her and J. W. Mock, she cannot recover in this action except the twenty-five cents paid for the telegram. If you should answer the first

issue "Yes,"—that the defendant company was guilty of negligence,—your answer as to the second issue can, under no circumstances, be more than twenty-five cents." There was a verdict, and the following is the judgment of the court: "This cause coming on to be heard at this term of the court before Shaw, Judge, and a jury, and being heard upon the whole record, and the following issues submitted: (1) 'Was the defendant guilty of negligence as alleged in the complaint?' to which the jury answered, 'Yes.' And (2) 'What damage has plaintiff sustained by reason of the negligence of the defendant?' to which issue the court ordered the jury to respond, 'twenty-five cents,' the amount paid for the transmission of the message,—it is therefore adjudged that the plaintiff recover of the defendant the sum of twenty-five cents, and the costs of the action." The plaintiff appealed.

This directly presents the question whether the plaintiff can recover damages for mental anguish caused by the negligence of the defendant in failing to promptly deliver a telegram sent through an agent, when the name of the plaintiff was not signed to the telegram, and when the fact that it was sent for her was not disclosed to the defendant at the time the message was sent, nor were her relations with the addressee then communicated to the company. We intended to decide this question at the first hearing, and thought we had done so, at least by direct inference, but, it seems, not explicitly enough to be understood. To prevent any further misconstruction, we say, plainly, she can recover, if otherwise entitled. In other words, the failure to give such information was no bar to the action, or to the recovery of substantial damages. In *Lyne v. Western U. Teleg. Co.* 123 N. C. 129, it was held that, where a telegram relates to sickness or death, it is not necessary to disclose to the company the relation of the parties, as there is a common-sense suggestion that it is important. The same rule applies here. The telegram in question stated that Mr. Cashion had been killed while at work, and on its face suggested that it was of unusual importance to somebody. The defendant knew that somewhere there was a vacant chair; that someone the lonely deathwatch was keeping. Who or where, it mattered not to the defendant, as it had no more right to wrong one person than another.

The able counsel for the defendant relies upon *Hadley v. Baxendale*, 9 Exch. 341, quoting as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered, either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and 45 L. R. A.

thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, from such a breach of contract." This rule is almost universally followed as to all ordinary business transactions, but can it have any possible application to the case at bar? We think not. What probable damages could Mrs. Cashion possibly have had in contemplation, when, in the first hour of her bereavement, she sent a telegram announcing the sudden and violent death of her husband? Surely she could not be expected to dictate such a telegram with the cool deliberation with which a man would contract for the shipment of a mill shaft; nor can her mental anguish be measured by the rule laid down in determining the lost profits of Hadley's mill. We must admit that damages for mental anguish are somewhat anomalous, and the extreme difficulty of their admeasurement by any ordinary rule of law has led many jurisdictions to reject the doctrine. We have found it established in this state, and feel compelled to uphold it, on the highest principles of public policy and of private right, and must give it such a reasonable construction as will enforce its legitimate results.

One other principle must be kept in view. A telegraph company is in the nature of a common carrier. Claiming and exercising the right of condemnation, which can be done only for a public purpose, it is thereby affected with a public use. It owes certain duties to the public, which are not dependent upon a personal contract, but which are imposed by operation of law. A simple contract is an agreement between two parties,—a drawing together of two minds to a common intent,—and must be voluntary as well as mutual. Whenever a man, at a proper time and place, presents a telegram to the company for transmittal, and at the same time tenders the proper fee, the company is bound to receive, transmit, and deliver it with reasonable care and diligence; it cannot refuse to receive it; and, while it may protect itself by reasonable regulations, it cannot insist upon a personal contract contrary to its usual custom or to public policy. As was said in *Reese v. Western U. Teleg. Co.* 123 Ind. 294, 7 L. R. A. 583, the failure of the telegraph company to promptly deliver a telegram "is not a mere breach of contract, but a failure to perform a duty which rests upon it as the servant of the people." While reaffirming the doctrine, we must again earnestly caution juries against its abuse. The defendant is in no way responsible for the anguish suffered by the plaintiff for the loss of her husband. All

that can possibly be charged to it is the injury resulting from a negligent failure to deliver the telegram; and the jury, in considering this matter, should carefully guard against the sympathy they would naturally feel for the widow and orphan child. However creditable to them as men, it must be ignored by them as jurors. If the defendant has been negligent, it is their duty to give to the plaintiff a fair recompense for the anguish she has suffered from such negligence, but from that alone; and, in determining the amount, they should render to each party exact and equal justice, without the shadow of generosity, which is not a virtue when dealing with the property of others.

The counsel for defendant argued before us other questions, not presented by the record, which we cannot properly consider.

For error in the charge of the court, a new trial must be ordered.

M. F. PHILLIPS

v.

SOUTHERN RAILWAY COMPANY, Appt.

(124 N. C. 123.)

1. A person coming to a railroad station with the intention of taking the next train is, in contemplation of law, a passenger, provided his coming is within a reasonable time before the departure of the train.
2. A rule for closing a railroad waiting room after the departure of a train until thirty minutes before the departure of the next train is a reasonable one as applied to a person who has come to the station at 8 p. m. to wait for a train at 1:30 a. m., and is driven out of the room, although the night is cold, to wait several hours until the regular time of reopening the room; but the rule might not be reasonable in case of through passengers or delayed trains.

(March 7, 1899.)

A PPEAL by defendant from a judgment of the Superior Court for Henderson County in favor of plaintiff in an action brought to recover damages for injuries alleged to have occurred by defendant's refusal to keep its passenger station open for the accommodation of plaintiff while waiting for a train. *Reversed.*

The facts are stated in the opinion.

Messrs. F. H. Busbee, G. F. Bason, and A. B. Andrews, Jr., for appellant:

The right of a railroad company to make reasonable rules for its protection and for the safety and convenience of passengers has never been denied.

1 Fetter, Carr. of Pass. § 247; 1 Redf. Railways, 98; Thomp. Carr. 306; Dietrich v. Pennsylvania R. Co. 71 Pa. 432, 10 Am. Rep. 711.

The reasonableness of the rules as to open-

ing and closing the doors of its waiting room was one of law for the court.

1 Fetter, Carr. of Pass. § 248.

When one purchases a ticket he should inform himself as to the usual mode of travel on the road; and so far as the customary mode of carrying passengers is reasonable, he should conform to it.

Chicago & A. R. Co. v. Randolph, 52 Ill. 515, 5 Am. Rep. 60; *McRae v. Wilmington & W. R. Co.* 88 N. C. 526, 43 Am. Rep. 745.

The duty of properly lighting a station as a means of ingress and egress to the trains is very similar to the duty of having the waiting rooms and ticket office open, i. e., it must be done a reasonable time before the departure and arrival of trains.

Montgomery & E. R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72, 1 Thomp. Neg. 314; *Batton v. South & North Ala. R. Co.* 77 Ala. 591, 54 Am. Rep. 80; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159; *Hodges v. New Hanover Transit Co.* 107 N. C. 576; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337.

In 4 Elliott, Railroads, at § 1579, the author says: "It is broadly stated in one of the cases that the fact that a person had purchased a ticket 'created the relation of carrier and passenger, and the law imposed duties arising out of that relation both on the carrier and the passenger,' but this, we venture to say, carries the rule too far."

Webster v. Fitchburg R. Co. 161 Mass. 298, 24 L. R. A. 521; *McDonald v. Chicago & N. W. R. Co.* 29 Iowa, 170, 96 Am. Dec. 114, 124 Iowa, 142.

At common law a carrier of passengers and freight was under no obligation to provide depots for passengers awaiting transportation or warehouses for freight.

People v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; 1 Thomp. Neg. 314; *Batton v. South & North Ala. R. Co.* 77 Ala. 591, 54 Am. Rep. 80; *Alabama G. S. R. Co. v. Arnold*, 84 Ala. 159.

Mr. T. J. Rickman, for appellee:

A contract between carrier and passenger arises when passenger goes upon the premises of railway with bona fide intention of taking passage upon defendant's train.

Boothby v. Grand Trunk R. Co. 66 N. H. 342; *Daniel v. Petersburg R. Co.* 117 N. C. 592; *Tillett v. Lynchburg & D. R. Co.* 115 N. C. 662; *Tillett v. Norfolk & W. R. Co.* 118 N. C. 1046.

Where there was insolence or undue force, punitive damages may be recovered.

Allen v. Wilmington & W. R. Co. 119 N. C. 713.

Rudeness will entitle the plaintiff to recover punitive damages.

Holmes v. Carolina C. R. Co. 94 N. C. 322.

Furches, J., delivered the opinion of the court:

On the 15th of December, 1896, the plaintiff intending to take the next train on de-

NOTE.—On the question when a person becomes a passenger, see also *Webster v. Fitchburg R. Co.* (Mass.) 24 L. R. A. 521, and *note*; also *Wood v. Pennsylvania R. Co.* (Pa.) 35 L. R. A. 199; *Western & A. R. Co. v. Volis* (Ga.) 45 L. R. A.

35 L. R. A. 635; *Southern R. Co. v. Smith* (C. C. App. 5th C.) 40 L. R. A. 746; and *Young v. New York, N. H. & H. R. Co.* (Mass.) 41 L. R. A. 193.

fendant's road to Hot Springs, in Madison county, entered the defendant's waiting room at Asheville about 8 o'clock at night, with the intention of remaining there until the departure of the next train on defendant's road for Hot Springs, which would leave 1:20 o'clock of the next morning. He was informed by defendant's agent, in charge of the waiting room, that, according to the rules of the company, she must close the room, and that he would have to get out. The plaintiff protested against this, and refused to leave. But when the clerk of defendant's baggage department (Graham) came, and told him that he could not stay, and made demonstrations as if he would put him out, he left. He had no place to go where he could be comfortable. The night was cold. He was thinly clad, and suffered very much from this exposure, and took violent cold therefrom, which ran into a spell of sickness, from which his health has been permanently injured. It was in evidence, and not disputed, that the rules of defendant company required the waiting room to be closed after the departure of defendant's train, and to remain closed until thirty minutes before the departure of its next train; that, under this rule of the defendant, it was time to close the waiting room when the plaintiff was ordered to leave the room, and he was informed that it would not be opened again until thirty minutes before the departure of defendant's next train, at 1:20 of the next morning. The plaintiff contended that he had purchased a ticket from Asheville to Hot Springs before he entered the waiting room; which he showed to the keeper of the room at the time he was ordered out. This was denied by defendant.

The defendant asked, in writing, a great number of instructions, which were not given. Among these was the following: "If the jury believe the evidence, the answer to the first issue should be, 'No.'" The first issue was as follows: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" The court, among other things, charged the jury that, if the plaintiff bought a ticket to take passage on the next train, he had a right to remain in the waiting room until that train left, and that if the jury found from the evidence that plaintiff had bought a ticket, and exhibited it, as he alleges he did, he is entitled to recover actual damages, but not punitive damages. To that part of the charge referring to the purchase of the ticket, and plaintiff's right to remain in the waiting room, the defendant excepted. We are of the opinion that both these exceptions are well taken, but it is not necessary that we should discuss them both. If either one of them is sustained, it is substantially an end to the plaintiff's case. In fact, the discussion of the one involves the other. A party coming to a railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such passenger, it is not necessary that he should have purchased his ticket, as 45 L. R. A.

seems to have been considered by his honor. 1 Fetter, Carr. of Pass. § 228. But the purchase of the ticket would probably be considered the highest evidence of his intention. But, still, it is his coming to the station within a reasonable time before, with the intention to take, the next train, that creates the relation of passenger and carrier. There is no dispute but what the plaintiff intended to take the defendant's next train to Hot Springs, and we must infer from the charge of the court and the verdict of the jury that they found that plaintiff had purchased his ticket.

So, the only question that remains is as to whether the defendant had the right to establish the rule for closing the waiting room, and was the rule a reasonable one? And we are of the opinion that the defendant had the right to establish the rule, and that it was a reasonable one. *Webster v. Fitchburg R. Co.* 161 Mass. 298; 24 L. R. A. 521; *Boothby v. Grand Trunk R. Co.* 66 N. H. 342; 1 Elliott, Railroads, §§ 199, 200; 4 Elliott, Railroads, § 1579. The rule would probably be different in the case of through passengers, and in the case of delayed trains; but, if so, these would be exceptions, and not the rule. Waiting rooms are not a part of the ordinary duties pertaining to the rights of passengers and common carriers; but they are established by carriers as ancillaries to the business of carriers, and for the accommodation of passengers, and not as a place of lodging and accommodation for those who are not passengers. This being so, it must be that the carrier should have a reasonable control over the same, or it could not protect its passengers in said rooms. There is error.

New trial.

Maggie MEANS, Admr., etc., of Taylor Means, Deceased, Appt.,

v.
CAROLINA CENTRAL RAILROAD COMPANY.

(124 N. C. 574.)

1. It is negligence in a railroad company not to furnish a conductor on a local train with one passenger car, which runs on a schedule so arranged as to enable people on the route to visit a city for several hours, and return at a reasonable hour on the night of the same day, when the train ordinarily carries a good many passengers.
2. The question of a railroad company's negligence in failing to furnish a conductor is a question of law, where the train ordinarily carries a good many passengers and runs on a schedule so arranged as to encourage travel upon it.
3. The declaration or statement of a train hand on a mixed train, while hurriedly going from a coach at the rear end of the train to the engine in front, that he wanted to get to the engineer and give him the tickets which he had collected before the

NOTE.—As to the obligation of a street-railway company to furnish a conductor on a car, see *South Covington & C. Street R. Co. v. Berry* (Ky.) 15 L. R. A. 604, and note.

train got too fast, is competent as part of the *res gesta*, where he was killed in attempting to return to the rear of the train, and death is alleged to have been caused by the negligence of the carrier in failing to furnish a conductor.

(May 5, 1899.)

APPEAL by plaintiff from a judgment of the Superior Court for Mecklenburg County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Taylor Means had been employed for some time by defendant as a brakeman. Defendant had a train which ran between Charlotte and Shelby. On the day upon which the injury occurred, this train consisted of engine, flat car, box car, flat car, six box cars, a coach, and shanty car. Defendant was accustomed to carry passengers upon this train. Some days before the accident deceased was delegated to attend to the shanty car and coach and collect tickets under the direction of the engineer. Defendant claimed that just before the accident deceased went from the rear of the train toward the engine, after the train had started, got upon the engine, and reported to the engineer that there were passengers on the coach. He then started back over the train. The train was going 5 or 6 miles an hour at the time, and defendant claimed that he might have stepped to the ground, waited for the coach, and then got upon it as it passed. Also that the engineer would have stopped the train to give deceased an opportunity to get back to the coach, if he had been asked to do so. It did not appear how the accident occurred. But the body of deceased was found lying on the right side of the track, and was cut half in two. There was broken glass of his lantern on the flat car.

Further facts appear in the opinion.

Messrs. Osborne, Maxwell, & Keerans for appellant.

Messrs. Burwell, Walker, & Cansler, for appellee:

The intestate had been employed by the defendant company three years, and had been actually engaged in the particular business of collecting tickets for two weeks at least; and he well knew the risks and dangers of the service, if there were any, and yet continued in the service.

In such a case the law denies a recovery of damages to the plaintiff.

Pleasants v. Raleigh & A. R. Co. 95 N. C. 195; *Crutchfield v. Richmond & D. R. Co.* 78 N. C. 300, 76 N. C. 320; *Porter v. Western N. C. R. Co.* 97 N. C. 66; *Kirk v. Atlanta & C. Air Line R. Co.* 94 N. C. 625, 55 Am. Rep. 621; *Patton v. Western N. C. R. Co.* 96 N. C. 455; *Heathcock v. Pennington*, 33 N. C. (11 Ired. L.) 640; *Turner v. Goldsboro Lumber Co.* 119 N. C. 387.

When the servant has knowledge of defects in machinery, or of the danger of the work he is put to do, and continues in the service, he thereby assumes the increased risk as one of the hazards of the service.

Becker v. Baumgartner, 5 Ind. App. 576; 45 L. R. A.

Lake Shore & M. S. R. Co. v. Stupak, 108 Ind. 1; *Mexican C. R. Co. v. Shean* (Tex.) 18 S. W. 151; *Wood, Mast. & S.* § 326; *Ladd v. New Bedford R. Co.* 119 Mass. 412, 20 Am. Rep. 331.

Means was merely told to collect tickets and deliver them to Mr. Hall, and the performance of this duty did not require him to go to the engine while the train was in motion, and come back over the cars. What he did, therefore, was a voluntary act.

If Mr. Hall had ordered him to collect the tickets and bring them to him as a part of his duty, and it was dangerous, or even very hazardous to do so, the company was still not guilty of negligence.

This is one of the assumed risks of the employment, "the rule being that the servant assumes the hazards of dangerous methods as well as the use of defective tools or machinery, when, after employment, he learns of the defects, but voluntarily continues in the employment without objection."

Bailey, Master's Liability for Injuries to Servant, 1894, pp. 159-170; *Kean v. Detroit Copper & Brass Rolling Mills*, 66 Mich. 277; *Russell v. Tillotson*, 140 Mass. 201; *Paule v. Florence Min. Co.* 80 Wis. 350.

Montgomery, J., delivered the opinion of the court:

When this case was here at February term, 1898 (122 N. C. 990), a new trial was ordered because of an error committed by his honor on the trial below in instructing the jury that "it is the duty of a railroad company to have a conductor when there are passengers, and it is negligence not to have one." In reference to that instruction we said: "The rule would apply where the trains are passenger trains, or where a considerable part of the train was for the accommodation of passengers, and the passenger fare would be a considerable part of the inducement to run the train. But where the train is a freight train, with a passenger car attached, it is a fair presumption that the passenger coach is purely for the accommodation of the public, and we cannot say, as a matter of law, that it would be negligence (nothing else appearing) in a railroad company not to furnish a conductor on such trains." In the case as it was made up for this court at the first hearing, nothing appeared as to the nature or destination of the train, except that it was one which consisted of an engine and eleven cars, including one passenger coach and a shanty car, and that it left Charlotte at 4 P. M. Nothing was said of the extent of the passenger traffic. We thought the charge of his honor too broad to fit the facts of that case.

The case as presented now has some new features, and important ones. The train, a local one, was operated between Charlotte, by Lincolnton and Shelby. Its schedule time for departure from Shelby was 6 A. M., and for arrival at Charlotte 10 A. M. It left Charlotte at 4 P. M. The engineer testified that "at ordinary times we carried a good many passengers." It is apparent, from the facts above stated, that in the running of that train the passenger traffic was

a matter of business consideration to the company; that the inducement to attach the passenger coach was not simply to oblige a passenger now and then who might wish to make an emergency trip or to visit some obscure station, but to establish a passenger business by a schedule so arranged as to enable and encourage the people along the route, and especially those in Shelby and Lincolnton, to visit the city of Charlotte for several hours, and return to their homes at a reasonable hour on the night of the same day; and that the result was what was anticipated,—a considerable passenger business. His honor, after the conclusion of the testimony, was of the opinion that the plaintiff could not recover, and, upon intimating so much to the plaintiff's counsel, the plaintiff submitted to a nonsuit, and appealed. His honor thought the case as developed did not differ materially from the case as brought out on the first trial. We think, however, that there was a substantial difference between the two cases in the respects pointed out by us. It was the duty of defendant company to have had a conductor for such a train as that of the defendant's was shown to have been by the undisputed evidence, and the defendant was negligent in not having provided one. What might be a sufficient crew to manage a train would ordinarily be a question for the jury; but whether or not it is negligence in a railroad company not to furnish a conductor in a case like the one before the court, the evidence being undisputed, must be a question of law. The conductor need not have been purely and entirely a passenger conductor. A freight conductor might have been sufficient, under the circumstances, to have dis-

charged the duties of a passenger conductor and his own at the same time. Whether or not the intestate's death was caused, without his fault, by the failure of the defendant company to furnish a conductor, is a question for the jury, under proper instructions as to the law from the court.

There were only two exceptions on points of evidence. The plaintiff was permitted, over the objection of the defendant, to introduce a declaration or statement made by the intestate while he was hurriedly going from the coach at the rear end of the train to the engine in front. The declaration was, "Get out of my way; I want to get to Mr. Hall [the engineer], to give him these tickets, before the train gets too fast." The evidence was competent as a part of the *res gestæ*. It was contemporaneous with the main subject,—the alleged killing of the intestate through the negligence of the defendant. It was made without forethought or design, and it helped to explain the main fact in the case. *Carter v. Buchannon*, 3 Ga. 513; 21 Am. & Eng. Enc. Law, p. 99; Best, Ev. 446. The declaration of the intestate was the natural and inartificial concomitant of a probable act which itself was a part of the *res gestæ*. *Hunter v. State*, 40 N. J. L. 540.

The defendant offered to show by the engineer that he would have stopped the train in order that the intestate might have returned to the coach, if he had been so requested to do. We do not see how the evidence was material as the case was then constituted, and it should not have been admitted, for it threw no light upon the matter.

There was error in the ruling of his honor, and there must be a new trial.

NORTH DAKOTA SUPREME COURT.

Re C. N. HOGAN.

(..... N. D.)

- *1. A violation of the provisions of § 3124, Rev. Codes, forbidding any agent to act for any insurance company in transacting the business of insurance without procuring a certificate of authority as therein specified, is a crime under the laws of this state.
2. A corporation which undertakes to guarantee a fixed revenue per acre from farming lands, and which, in order to do so, contracts, for a specified consideration, to pay such fixed amount per acre for the crop grown upon said land, irrespective of its value, is an insurance company within the provisions of §§ 4441, 4445, Rev. Codes.

(May 5, 1899.)

APPPLICATION for a writ of habeas corpus to obtain petitioner's release from the custody of a sheriff to which he had been

*Headnotes by BARTHOLOMEW, Ch. J.

committed for alleged violation of the law requiring one acting as agent for an insurance company to be licensed.

Petitioner remanded.

The facts are stated in the opinion.

Messrs. W. E. Purcell, P. J. McCumber, Charles E. Wolfe, and Stevens & Allen for petitioner.

Messrs. John F. Cowan, Attorney General, and George W. Soliday, for the State:

The penalty imposed for a violation of § 3124, Rev. Codes, as a punishment is a fine.

The punishment prescribed by § 3131, Rev. Codes, for this offense not being death or imprisonment in the penitentiary, it is not a felony, but it imposes a fine, hence it must be a crime; and not being a felony, it must be a misdemeanor, and may be punished under §§ 7737, 8295, Rev. Codes.

The Realty Revenue Guaranty Company is by article 2 of its articles of incorporation expressly authorized to "guarantee certain

NOTE.—For some of the modern forms of insurance, see also *People, Kasson, v. Rose* (Ill.) 44 L. R. A. 124, and cases cited in footnote 45 L. R. A.

thereto; also *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* (N. J.) 44 L. R. A. 215.

rentals, and produce income from lands and tenements." And the contract issued by it is a contract of insurance.

By a reservation in the contract the Realty Guaranty Company is not liable under the contract should any damage or loss accrue to said crops after September 15 of this year, or after crops are harvested. By implication it must be liable for losses or damage to said crops prior to such times: that is, the loss or damage to such crops reducing the value below \$5 per acre is the contingency insured against.

Rev. Codes, § 4441; *Olaflin v. United States Credit System Co.* 165 Mass. 501; *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L. R. A. 383.

The term "insurance company" includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance.

Rev. Codes, § 3085.

Bartholomew, Ch. J., delivered the opinion of the court:

One C. N. Hogan presented to this court his petition for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by the sheriff of Foster county, in this state. His petition sets forth that he was arrested upon a warrant issued by a justice of the peace of said county, which said warrant was based upon a complaint duly laid before said justice by one Ferguson, wherein said petitioner was accused of having acted as agent for an insurance company without having procured the certificate required by § 3124, Rev. Codes of this state, that a preliminary hearing was duly had before said justice, and that upon such hearing said justice adjudged that the petitioner be held to answer to said charge before the district court of said county, and fixed his appearance bond at the sum of \$500, which the petitioner failed to give, whereupon he was duly committed to the custody of said sheriff, and was by him restrained. Copies of the complaint, the warrant, of all the testimony introduced at the hearing, of the entries in the docket of the justice and of the mittimus were attached to, and made a part of, the petition. The writ was duly issued by this court, directed to said sheriff, who in due time made return thereto setting forth the grounds upon which he restrained the petitioner, which were substantially in all respects as shown in the petition. To this return the petitioner demurred, and upon the issues of law thus raised the case was argued to this court.

The petitioner contends (1) that a violation of the provisions of said § 3124 does not constitute a crime, under the laws of this state, and, (2) granting that such violation does constitute a crime, there is no reasonable or probable cause to believe that petitioner has committed such crime. We notice the points in this order.

Section 3124, Rev. Codes, declares: "No agent shall act for any insurance company directly or indirectly in taking risks or transacting the business of insurance without procuring from the commissioner of in-

surance a certificate of authority, stating that such corporation or company has complied with all the requisites of this chapter." Section 3131, being a part of the same chapter, declares: "For violation of any provision of this chapter when no penalty is specifically provided for herein the offender shall be punished by a fine of not less than \$100 nor more than \$500." We notice here that the fine imposed is declared to be by way of punishment, and a large discretion is vested in the court in fixing the amount. No part of the amount inures to the benefit of any private person. No person is authorized to sue for or recover it. It is not a case where the law arbitrarily fixes a penalty as the liquidated damages for failure to perform an ascertained legal duty owing to another, and which penalty the party to whom the duty was owing may recover in a personal action upon proof of the dereliction. But petitioner urges that this penalty should be recovered by the state under the provisions of chapter 27, Code Civ. Proc., which relates to actions to recover penalties and forfeitures. But the 1st section of that chapter (§ 5785) provides that, if the act for which the forfeiture was imposed is a misdemeanor, then such forfeiture cannot be recovered in a civil action. We look then to the Penal Code to determine whether or not this act is a misdemeanor. Section 6802 reads: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: . . ." And the third punishment named is "fine." We have, then, in this case, a statute (§ 3124) forbidding the doing of a certain act, we have that forbidden act done, and the punishment which the law (§ 3131) prescribes for doing this forbidden act is a fine; hence it must be a crime. Section 6803 declares that crimes are divided into felonies and misdemeanors. Section 6804 reads: "A felony is a crime which is or may be punishable with death or imprisonment in the penitentiary; every other crime is a misdemeanor." We have here, then, a crime. It cannot be punished by death or imprisonment; hence it must be a misdemeanor. It seems clear to us that petitioner's first contention cannot prevail. In saying that this offense cannot be punished by imprisonment, we mean only that primarily the judgment must be a fine, and the judgment may be satisfied by the payment of the fine; but we do not hold that the judgment may not also direct that, in case of nonpayment, the defendant be imprisoned as provided in § 8295, Rev. Codes.

Petitioner's second proposition presents more difficulties, and, as preparatory to its discussion, we remark that no point is made by petitioner as to the regularity of any of the proceedings that led up to his incarceration. They are concededly regular. It is admitted, also, that petitioner was soliciting business as agent for a corporation known as the Realty Revenue Guaranty Company, of Minneapolis, Minnesota. It is admitted that petitioner never procured the certificate of authority specified in said § 3124, and that he

took an application from the complaining witness in form as set forth in the evidence, and procured for said witness the contract of said company as set out in the evidence, and took the promissory note of the witness, secured by chattel mortgage, for the consideration mentioned in said contract. These admissions leave but one question for our determination: Is or is not the Realty Revenue Guaranty Company, in fact or in effect, an insurance company? If it be, then clearly the petitioner was properly held; otherwise, he should be discharged. While the attorneys representing the state claim that the oral evidence in the record strengthens their claim that said corporation is in fact an insurance company, yet we shall rest our conclusions on this point upon the documentary evidence. Our statute (§ 4441, Rev. Codes) defines insurance as follows: "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event." Necessarily, in defining insurance in a single sentence, only the most general terms can be used, and any general definition must be extended to cover the ever-changing phases in which the subject is presented to the public. Fifty years ago it was thought that a single chapter in any work on contracts could exhaust the law of insurance. Now Mr. Joyce presents the subject in four elaborate volumes, showing the immense development of that branch of the law. Mr. Joyce expressly defines one line of insurance as guaranty insurance. See 1 Joyce, Ins. §§ 12, 13. True, guaranty insurance, as there defined, relates more particularly to guaranty against loss by reason of breaches of contract, such as "fidelity guaranty" and "credit guaranty." But we have real-estate title guaranty insurance; and, while perhaps this is the first instance where an attempt has been made to guarantee a realty revenue, yet as the revenue arising from that class of realty here involved, i. e., farming lands, is affected by so many contingencies, such as winds, hail, frost, drought, ravages of insects, etc.,—contingencies which, while not likely to happen, yet such as may occur,—it would seem that inherently it would be a proper subject for insurance, perhaps even an inviting field. In this record we find a copy of the articles of incorporation of the Realty Revenue Guaranty Company. The second article sets forth the general business of the corporation, naming a number of things that it is organized for the purpose of doing, and, among others, "to guarantee certain rental and produce income from lands and tenements." The petitioner, as agent for said company, took from Peter Ferguson an application for a contract. The application was upon a printed form, headed, in bold type, "Realty Revenue Guaranty Company, of Minneapolis, Minn. Capital stock, \$100,000." Then follows the printed portion, which reads: "I, —, of — P. O., county of —, state of —, do hereby apply to the Realty Revenue Guaranty Company for an option-sale contract of \$— per acre, which

is hereby referred to and made a part hereof, subject to all conditions therein contained upon all crops raised on the following described lands." Then follows a description of the land, and various questions to be answered by the applicant as to whether he is owner or tenant of the land, and what interest he has in the crop, what the land yielded per acre the year before, nature of the soil, etc.,—all to be signed by the applicant. Upon this application, Ferguson received a contract, which we copy in full:

This agreement, made by and between the Realty Revenue Guaranty Company, of Minneapolis, Minnesota, and Peter Ferguson, of Carrington P. O., county of Foster, and state of North Dakota, party of the second part, witnesseth that, in consideration of an application for this contract, which is hereby referred to and made a part hereof, and the payment of the sum of \$55, according to the conditions of a certain promissory note for said amount, by said party of the second part, the above-named Realty Revenue Guaranty Company agrees to purchase the entire crop of small grain, consisting of wheat, oats, flax, barley, corn, or rye, from said party of the second part, at the rate of \$5.00 per acre, grown during the season of 1899; all of said crops being on the following described lands, to wit, 160 acres southeast quarter Sec. 20, T. 146, R. 65; 60 acres northwest quarter Sec. 26, T. 146, R. 65. It is further agreed that said party of the second part is in no manner bound to sell said crops to the said Realty Revenue Guaranty Company, except at his own option. It is further agreed that said party of the second part shall cultivate said crops in a husbandlike manner, sow, plant, garner, gather, harvest, thresh, and otherwise care for said crops in due season and in an economical manner. Said party of the second part agrees to notify said Realty Revenue Guaranty Company in case of any damage to said crops within five days thereafter, and of his intention to avail himself of his option to sell before said crops are harvested, and shall, within five days after threshing the same, give notice to the company of his election to sell under this contract. After said election to sell, said party of the second part agrees to deliver said crops at the nearest market, if directed so to do by said Realty Revenue Guaranty Company. Should the party of the second part fail to perform any of the conditions herein by him to be performed, time being the essence hereof, or if any of the warranties or statements made by him are untrue, the said option shall terminate. Nor shall said guaranty company be liable under this contract should any damage or loss accrue to said crops after September 15 of this year, or after said crops are harvested, nor in any manner, except as herein stipulated. This contract shall terminate December 1st following date hereof. In witness whereof, the said Realty Revenue Guaranty Company has caused these presents to be executed and signed by its president and secretary, and caused its corporate seal

to be hereto attached, this seventh day of April, 1899.

Realty Revenue Guaranty Co.

By L. E. Utley, President.

A. L. Brice, Secretary. [Corporate Seal.]

What was the object of this contract and what was its legal effect? The petitioner says it was an option contract of sale of a crop. We cannot conceive that the farmer's primary object was to sell his crop. Ordinarily a man does not pay a premium for the privilege of selling his produce. Nor was it the primary purpose of the company to purchase the crop. From the very terms of the contract, it is certain that it must lose money upon all the grain it buys under the contract. Moreover, grain is bought and sold by the bushel, and not by the acre. We think the contract was the identical contract which the articles of incorporation authorize the company to enter into. It was a contract by which the guarantor undertook to guarantee or assure to the farmer a certain revenue from his land. How did the parties proceed to execute such a contract? It was well known to both parties that an acre of land in this state, farmed as the farmer contracts to farm it in this case, will produce a crop of a value far in excess of \$5, and the value can be reduced to or below that figure only by the happening of one or more of the contingencies hereinbefore mentioned. But such contingencies may happen, and to be absolutely assured that his land will yield him at least \$5 per acre the farmer is willing to pay something; and the corporation, expecting to do business over a wide scope of country, believes that it can with profit to itself assure the farmer a crop worth \$5 per acre for the compensation which the farmer is willing to pay therefor. But what is this in substance except a contract to indemnify the farmer against loss arising from the happening of a contingent event, and that is our statutory definition of insurance. The farmer was seeking and paying for protection, and the corporation was seeking to make a profit by extending this protection for the consideration paid by the farmer. True, it is not all loss that is insured against. The

contingencies named may reduce the value of a crop from \$20 per acre until, in the judgment of the owner, it barely exceeds \$5 per acre, and there is no liability under the contract. It is the loss below \$5 per acre that is insured against. The effect of the contract is very like that of a valued policy of insurance. When the contingency happens that creates a liability under the policy, then the full amount of the policy must be paid, but the insured is entitled to all the salvage.

In *Clafin v. United States Credit System Co.* 165 Mass. 501, the defendant was held to be an insurance company. The contract is thus stated by the court: "It was made on April 6, 1891, and purports to bind the defendant, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied." A contract to purchase bad accounts and judgments at a fixed price, irrespective of value, cannot be distinguished in principle from a contract to purchase damaged crops at a fixed price, irrespective of value. That same company was held to be an insurance company in *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L. R. A. 383, and the reasoning of the court is very pertinent to this case.

It is doubtless true that there has been a studied effort to keep this corporation outside the operation of our insurance laws; but the purpose and effects of its contracts are too clear to admit of doubt. They exactly meet the requirements of an insurance contract, and the corporation for which petitioner acted as agent is an insurance company. The act charged in the complaint is a crime under our statutes, and there is reasonable and probable cause to believe the petitioner guilty of committing the act. He is therefore properly held.

The writ issued in this case is discharged, and petitioner remanded to the custody of the sheriff of Foster county.

All concur.

WASHINGTON SUPREME COURT.

George H. SMITH, *Respt.*,

v.

UNION TRUNK LINE, *Appt.*

(18 Wash. 351.)

1. Negligence on the part of a cable-car company is shown by the fact that the gripman on a moving car did not, because engaged in conversation, see a person on the

track in front of the car until his attention was called by a passenger, when it was too late to avoid a collision.

2. A cable-car company is guilty of gross negligence in running two cars past each other at a largely used street crossing in a populous city, without giving some signal or warning as they approach.

3. Negligence cannot be imputed to a pedestrian for not anticipating culpable

NOTE.—As to negligence in running street cars past other cars which are discharging passengers, see also *Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 126; and *Consolidated Traction Co. v. Scott* (N. J.) 33 L. R. A. 122.

As to negligence in running street cars over street crossings, see also *Wallace v. City & S.* 45 L. R. A.

R. Co. (Or.) 25 L. R. A. 663, and *note*; also *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 276; *State, Cape May, D. B. & S. P. R. Co., v. Cape May* (N. J.) 36 L. R. A. 657; and *Evansville Street R. Co. v. Gentry* (Ind.) 37 L. R. A. 378.

and gross negligence on the part of a street-car company in running its cars past a largely used street crossing.

4. A pedestrian has a right to rely upon a street-car company's giving the signals in common use when approaching a street crossing.
5. A passenger on a crowded street car, whose view in front of the car is obstructed by standing passengers, is not guilty of negligence, as matter of law, in stepping from the moving car upon the track used by cars going in the opposite direction at a largely used street crossing in a populous city, when no signal of the approach of a car on that track has been given.
6. An instruction that plaintiff in an action to recover for negligent injuries may recover if guilty of only slight negligence if defendant was guilty of gross negligence will not require reversal if the jury find plaintiff was not negligent at all.

(Anders, J., dissents.)

(December 21, 1897.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. John E. Humphries, William E. Humphrey, and E. P. Edson, for appellant:

From plaintiff's own testimony it is shown that he was guilty of negligence, and his negligence was the proximate cause of his injury.

Weber v. Kansas City Cable R. Co. 100 Mo. 194, 7 L. R. A. 819; *MacLeod v. Graven*, 43 U. S. App. 129, 73 Fed. Rep. 627, 19 C. C. A. 616; *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490; *Saiko v. St. Paul City R. Co.* 67 Minn. 8; *Jagger v. People's Street R. Co.* 180 Pa. 436, 38 L. R. A. 786; *Bailey v. Market Street Cable R. Co.* 110 Cal. 320; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215; *Connolly v. New York & N. E. R. Co.* 158 Mass. 8; *Smith v. City & S. R. Co.* 29 Or. 539; *South Covington & C. Street R. Co. v. Enslen*, 18 Ky. L. Rep. 921.

The doctrine of contributory negligence was set at naught.

Blanchard v. Lake Shore & M. S. R. Co. 126 Ill. 416; *Illinois C. R. Co. v. Hammer*, 72 Ill. 347; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 521; *Calumet Iron & S. Co. v. Martin*, 115 Ill. 358.

In all cases of comparative negligence, before the plaintiff has any basis whatever for a recovery the court or jury must find that he exercised ordinary care and prudence; and if he exercised ordinary care and prudence, and the defendant failed to exercise slight care and prudence, the plaintiff would be entitled to recover for the damages sustained by the gross negligence of the defendant. Unless the plaintiff first was in the exercise of ordinary care and prudence, there would be no ground for recovery whatever.

45 L. R. A.

Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512; *Calumet Iron & S. Co. v. Martin*, 115 Ill. 358; *Garfield Mfg. Co. v. McLean*, 18 Ill. App. 447; *Louisville, N. A. & C. R. Co. v. Shanks*, 94 Ind. 598; *Chicago, B. & Q. R. Co. v. Rogers*, 17 Ill. App. 638; *Chicago & N. W. R. Co. v. Sweeney*, 52 Ill. 327; *Willard v. Swansen*, 126 Ill. 381; *Fenneman v. Holden*, 75 Md. 1; *Dreher v. Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Prescott & A. C. R. Co. v. Rees* (Ariz.) 28 Pac. 1134.

The want of ordinary care and prudence on the part of the person injured is deemed contributory negligence.

Graham v. Pennsylvania Co. 139 Pa. 149, 12 L. R. A. 293; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

The plaintiff cannot recover for an injury the result of mere negligence upon the part of the defendant, when his own failure to exercise ordinary care under the circumstances contributes thereto.

Toledo & W. R. Co. v. Goddard, 25 Ind. 197; 3 Am. & Eng. Enc. Law, p. 371, notes; *Abend v. Terre Haute & I. R. Co.* (Ill.) 19 Cent. L. J. 350, note; *O'Keefe v. Chicago, R. I. & P. R. Co.* 32 Iowa, 467.

As the court inadvertently misstated the law in the instruction, the only way to correct the evil is by granting a new trial.

Culbertson v. Holliday, 50 Neb. 229.

If the negligence, however slight, of the plaintiff, contributed any, then the degree cannot be the measure, and he cannot recover.

Baltimore & P. R. Co. v. Jones, 95 U. S. 442, 24 L. ed. 507; *Thompson v. Carmichael*, 122 Pa. 478; *Monongahela City v. Fischer*, 111 Pa. 9, 56 Am. Rep. 241; *Mattimore v. Erie*, 144 Pa. 14; *Potter v. Chicago & N. W. R. Co.* 21 Wis. 373, 94 Am. Dec. 548; *Culbertson v. Holliday*, 50 Neb. 229; *Banning v. Chicago, R. I. & P. R. Co.* 89 Iowa, 74.

All the testimony showed that the plaintiff had left the east-bound car before attempting to pass across the north track. That being the case he was not a passenger at the time of the injury, and his being a passenger prior to that time did not make defendant liable.

23 Am. & Eng. Enc. Law, p. 1004, note 4; *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490; *Smith v. City & S. R. Co.* 29 Or. 539; *Buzby v. Philadelphia Traction Co.* 126 Pa. 559; *Bailey v. Market Street Cable R. Co.* 110 Cal. 320.

Plaintiff is guilty of contributory negligence because he jumped off of the car when it was going 8 miles per hour, and landed within 6 to 10 feet of the west-bound car running at full speed. The first jump off of the east-bound car was the proximate cause of his injury.

Weber v. Kansas City Cable R. Co. 100 Mo. 194, 7 L. R. A. 819; *White v. West End Street R. Co.* 185 Mass. 522; *Saiko v. St. Paul City R. Co.* 67 Minn. 8; *Murdock v. Boston & A. R. Co.* 133 Mass. 15, 43 Am. Rep. 480; *Denver Tramway Co. v. Owens*, 20 Colo. 107; *Jagger v. People's Street R. Co.* 180 Pa. 436, 38 L. R. A. 786; *Bailey v. Market Street Cable R. Co.* 110 Cal. 320;

Little Rock & Ft. S. R. Co. v. Tankersley, 54 Ark. 25; *Scully v. New York, L. E. & W. R. Co.* 80 Hun, 197; *Butler v. St. Paul & D. R. Co.* 59 Minn. 135; *Hill v. Birmingham Union R. Co.* 100 Ala. 447; *Connolly v. New York & N. E. R. Co.* 158 Mass. 8; *MacLeod v. Graven*, 43 U. S. App. 129, 73 Fed. Rep. 627, 19 C. C. A. 616; *Nichols v. Middlesex R. Co.* 106 Mass. 463; *Creamer v. West End Street R. Co.* 158 Mass. 320, 16 L. R. A. 490; *Watson v. Mound City Street R. Co.* 133 Mo. 246; *McLarin v. Atlanta & W. P. R. Co.* 85 Ga. 504.

An injury resulting from an attempt to alight from a rapidly moving railway train will generally afford no cause of action.

Jagger v. People's Street R. Co. 180 Pa. 436, 38 L. R. A. 786; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215; *Coleman v. Georgia R. & Bkg. Co.* 84 Ga. 1; 2 Rorer, Railroads, 1091, 1116.

The plaintiff was guilty of negligence in jumping off of defendant's car when it was going at the rate of 8 miles per hour.

Jagger v. People's Street R. Co. 180 Pa. 436, 38 L. R. A. 786; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323; *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819.

The plaintiff has violated the rule of law in regard to ordinary care.

Giberson v. Bangor & A. R. Co. 89 Me. 337; *Robertson v. Pennsylvania R. Co.* 180 Pa. 43; *Baltimore & O. R. Co. v. Few*, 94 Va. 82; *Pennsylvania Co. v. Myers*, 136 Ind. 242; *Herlich v. Louisville, N. O. & T. R. Co.* 44 La. Ann. 280; *Morris v. Lake Shore & M. S. R. Co.* 148 N. Y. 182; *Omaha & R. Valley R. Co. v. Talbot*, 48 Neb. 627; *Bosko v. Delaware, L. & W. R. Co.* 91 Hun, 320; *Dubois v. New York C. & H. R. R. Co.* 88 Hun, 10; *Beynon v. Pennsylvania R. Co.* 168 Pa. 642; *Purdy v. New York C. & H. R. R. Co.* 87 Hun, 97; *Atchison, T. & S. F. R. Co. v. Booth*, 53 Ill. App. 303; *Lortz v. New York C. & H. R. R. Co.* 83 Hun, 271; *Kelley v. Missouri P. R. Co.* 129 Mo. 362; *Bates v. New York C. & H. R. R. Co.* 84 Hun, 287; *Sprow v. Boston & A. R. Co.* 163 Mass. 330; *Sheehan v. Philadelphia & R. R. Co.* 166 Pa. 354; *Dowdy v. Georgia R. & Bkg. Co.* 88 Ga. 726; *Sala v. Chicago, R. I. & P. R. Co.* 85 Iowa, 678; *Thomas v. Chicago & G. T. R. Co.* 86 Mich. 496; *Heaney v. Long Island R. Co.* 112 N. Y. 122; *Carson v. Federal Street & P. Valley R. Co.* 147 Pa. 219, 15 L. R. A. 257; *Ward v. Rochester Electric R. Co.* 43 N. Y. S. R. 84; *Ehrisman v. East Harrisburg City Pass. R. Co.* 150 Pa. 180, 17 L. R. A. 448; *Schulte v. New Orleans City & L. R. Co.* 44 La. Ann. 509; *Watson v. Mound City Street R. Co.* 133 Mo. 246; *Boyd v. Wabash Western R. Co.* 105 Mo. 371; *McLaughlin v. New Orleans & O. R. Co.* 48 La. Ann. 23; *Curry v. Rochester R. Co.* 90 Hun, 230; *Thompson v. Buffalo R. Co.* 145 N. Y. 196; *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819; *Pitcher v. People's Street R. Co.* 174 Pa. 402; *Ashworth v. East Tennessee, V. & G. R. Co.* 97 Ga. 306; *Doller v. Union R. Co.* 7 App. Div. 283; *Culbertson v. Metropolitan Street R. Co.* 140 Mo. 35; *McQuade v. Metropolitan Street R. Co.* 1745 L. R. A.

Misc. 154; *Bailey v. Market Street Cable R. Co.* 110 Cal. 320; *Connaughton v. Bernard*, 84 Md. 577; *Johnson v. Chicago & N. W. R. Co.* 94 Iowa, 745; *Atlanta & W. P. R. Co. v. Dickerson*, 89 Ga. 455; *Buzby v. Philadelphia Traction Co.* 126 Pa. 559; *Allerton v. Boston & M. R. Co.* 146 Mass. 241; *Hamilton v. Delaware, L. & W. R. Co.* 50 N. J. L. 263; *Woodard v. New York, L. E. & W. R. Co.* 106 N. Y. 369; *Houston City Street R. Co. v. Farrell* (Tex. Civ. App.) 27 S. W. 942; *McGee v. Consolidated Street R. Co.* 102 Mich. 107, 26 L. R. A. 300; *Blakeslee v. Consolidated Street R. Co.* 105 Mich. 462; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374; *Creamer v. West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490; *Deselms v. Baltimore & O. R. Co.* 149 Pa. 432.

It is presumptively negligence on the part of a pedestrian to attempt to cross the track without looking or listening, when, if he had looked and listened, he could have discovered the approach of the car in ample time to avoid the injury.

Young v. Citizens' Street R. Co. 148 Ind. 54; *Smith v. City & S. R. Co.* 29 Or. 539; *Phillips v. Detroit, G. H. & M. R. Co.* 111 Mich. 274; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215.

The plaintiff must use ordinary care to see and hear a car before attempting to cross the track; and a failure to do so is such negligence as will preclude a recovery.

Christensen v. Union Trunk Line, 6 Wash. 81; *Lewis v. Puget Sound Shore R. Co.* 4 Wash. 188; *Young v. Citizens' Street R. Co.* 148 Ind. 54; *Bailey v. Market Street Cable R. Co.* 110 Cal. 320; *McGee v. Consolidated Street R. Co.* 102 Mich. 107, 26 L. R. A. 300; *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819; *Korraday v. Lake Shore & M. S. R. Co.* 131 Ind. 261; *Heaney v. Long Island R. Co.* 112 N. Y. 123; *Ohio & M. R. Co. v. Hill*, 117 Ind. 56.

It was as much the duty of the plaintiff to keep from getting injured as it was that of the defendant to keep from injuring him.

Baltimore & O. R. Co. v. Jones, 95 U. S. 442, 24 L. ed. 507; *Culbertson v. Holliday*, 50 Neb. 229; *Monongahela City v. Fischer*, 111 Pa. 9, 56 Am. Rep. 241; *Oil City Fuel Supply Co. v. Boundy*, 122 Pa. 449; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 197.

If the respondent got off of the east-bound car, and attempted to cross in front of the west-bound car, without looking or listening for the west-bound car, and was injured through his own negligence or through no fault or negligence of the defendant, he cannot recover.

Creamer v. West End Street R. Co. 156 Mass. 320, 16 L. R. A. 490; *Smith v. City & S. R. Co.* 29 Or. 539; *Buzby v. Philadelphia Traction Co.* 126 Pa. 559; 23 Am. & Eng. Enc. Law, p. 1004, note 4; *Denver Tramway Co. v. Owens*, 20 Colo. 107.

Messrs. Lindsay, King, & Turner, for respondent:

The court did not err in overruling appellant's motion for a nonsuit.

Lowe v. Salt Lake City, 13 Utah, 91.

The proximate cause of the injury in ques-

tion was the gross negligence of respondent and its servant as found by the jury.

The immediate, the proximate, cause of the accident was the gross carelessness and negligence of the gripman, Sullivan.

Hall v. Ogden City Street R. Co. 13 Utah, 243; *Shearm. & Redf. Neg.* 4th ed. § 99; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141; *Roth v. Union Depot Co.* 13 Wash. 537, 31 L. R. A. 855.

Even conceding that respondent failed to "look and listen," it is a question for the jury to determine whether under the circumstances the respondent was guilty of such contributory negligence as should defeat his recovery.

Patterson, Railway Accident Law, 168, 169, notes; *Crowley v. Strouse* (Cal.) 33 Pac. 456; *Hall v. Ogden City Street R. Co.* 13 Utah, 243; *Solen v. Virginia & T. R. Co.* 13 Nev. 106; *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362; *Cincinnati Street R. Co. v. Snell*, 54 Ohio St. 197, 32 L. R. A. 276; *Swain v. Fourteenth Street R. Co.* 93 Cal. 179; *Driscoll v. Market Street Cable R. Co.* 97 Cal. 555.

The jury find that if appellant's gripman had used such care and diligence as is generally used under similar circumstances by careful servants of street-car companies he could have prevented the accident. Notwithstanding any claimed want of ordinary care on the part of the respondent in the premises, appellant would still be held liable under such circumstances.

Hall v. Ogden City Street R. Co. 13 Utah, 243; *Louisville & N. R. Co. v. Schuster* (Ky.) 7 S. W. 874; *Patterson, Railway Accident Law*, 174, § 181, cases cited in note 1; *Union P. R. Co. v. Mertes*, 35 Neb. 204; *Louisville & N. R. Co. v. Webb*, 97 Ala. 308.

It cannot be imputed to respondent as negligence that he did not anticipate culpable or gross negligence on the part of appellant.

Robinson v. Western P. R. Co. 48 Cal. 421; *Strong v. Sacramento & P. R. Co.* 61 Cal. 327; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Louisville & N. R. Co. v. Schuster* (Ky.) 7 S. W. 874; *Tucker v. Duncan*, 9 Fed. Rep. 867; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 27 Fed. Rep. 159; *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 150; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141; *Hall v. Ogden City Street R. Co.* 13 Utah, 243.

The respondent must have acted in the premises as a person of "ordinary prudence" generally acts under entirely similar circumstances.

Bridge v. Grand Junction R. Co. 3 Mees. & W. 244; *Cremer v. Portland*, 36 Wis. 92; *Hammond v. Mukwa*, 40 Wis. 35; *Houston & T. C. R. Co. v. Corbett*, 49 Tex. 573; *Kerwacker v. Cleveland, C. & O. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Manly v. Wilmington & W. R. Co.* 74 N. C. 655.

When plaintiff alighted he was justified in assuming that appellant would not be so grossly careless as to be "in conversation with a lady passenger," instead of being on

the sharp lookout for footmen on the street crossing.

Hall v. Ogden City Street R. Co. 13 Utah, 243; 4 Am. & Eng. Enc. Law, 1st ed. p. 75, note 2.

Dunbar, J., delivered the opinion of the court:

This is an action against the appellant, a street-railway company, for personal injuries inflicted upon the respondent. The complaint alleges that the appellant negligently and carelessly struck, knocked down, and dragged respondent a distance of 25 feet; negligently caused the car in which the respondent was riding to be overcrowded, thereby preventing the respondent from seeing the car coming west (the car which struck respondent); that the car which struck respondent was not furnished with any fenders or safeguards; that the injuries were inflicted on one of the street corners in one of the crowded streets in Seattle; that no warning or signal was given by the gripman on the approaching car, and that the speed of the respective cars was not slackened as they approached; that the gripman of the car coming west had ample time to prevent said injuries, which he failed to do.

In this case the appellant was the owner and operator of a couple of street railroads with parallel lines on James street. The south track was used for cars going east, and the north track for cars going west. The tracks were about 7 feet apart, and when the cars were opposite each other there was a space of about 2½ feet between them. It is conceded that the street was open, and free from obstruction. The plaintiff boarded the car at Second street, and at Fourth street he stepped off of the car at the crossing, and undertook to walk across the track on the north, and was run down and injured by the west-bound car, and sustained the injuries complained of. At the conclusion of the respondent's testimony, appellant moved for a nonsuit, which motion was denied. Appellant then introduced its testimony in defense, the case was submitted to the jury, who found a verdict for the respondent.

If this case could be reversed at all, it would be upon the theory that the appellant was entitled to its motion for a nonsuit for the reason that the testimony of the respondent himself showed contributory negligence. The testimony contradicting the statements made by respondent and his witness was a matter for the consideration of the jury. The respondent testified that the car was crowded when he got on at Second street; that more passengers got on the car at Third street, and that he was crowded over to the north side and the back end thereof; that he signaled to the conductor to let him off, and, his signal not being answered, he stepped off of the north side, and started to walk across the street,—that is, he stepped upon the track, saw the east-bound train within a few feet of him, and undertook to throw himself off of the track, but was not given time enough to do so, and his leg was caught, and he was dragged under the car. The tes-

timony of the respondent's witness is to the effect that the gripman on the east-bound train was not tending to his business, but was engaged at the time in conversation with a lady passenger. Some of the witnesses testified that they saw the danger the respondent was in, and hallooed to the gripman to stop the car. Witness Wood testified to this effect, and that in notifying the gripman he used very strong language, because he felt hot, seeing that the gripman had plenty of time to stop the car in the way it was running down. Another witness testified that the gripman, after he became aware of the danger, did not act with promptitude, but very deliberately took hold of the lever for the purpose of stopping the car, and the witnesses to the accident who were introduced by the respondent testified that no bell was rung, nor signal of any kind given by either car, as they passed each other. It is also in evidence that the cars did not have cowcatcher attachments, or the latest improvements, which the ordinance in relation to street cars in Seattle provides for. The cars were running at about the rate of 8 miles an hour. The testimony is that the car, at the place the accident occurred, at the rate of speed at which the east-bound car was running, could be stopped by a competent man, in from 5 to 12 feet.

It is insisted by the appellant that the respondent could have seen, and ought to have seen, the east-bound train coming towards him when he alighted, for the reason that it was an open street; but the testimony of the respondent is that he was unable to see the train by reason of the car which he was on being crowded; that many passengers were standing up, standing on the outside of the car, and hanging onto the straps; that they were thus in front of him, and that it was impossible for him to see anything in that direction.

It is earnestly contended by the appellant that the respondent was guilty of contributory negligence in not looking and listening to see whether a car was coming from the east, before he ventured onto the track. The testimony of the respondent is that he did look and listen, but his testimony is somewhat confused in this respect. It may be said that without any doubt the testimony of the respondent at least shows negligence, and gross negligence, on the part of the defendant. If a passenger, having no duty towards other passengers, can see the danger of the footman, and warn the gripman of that danger before he sees it, by reason of his being engaged in conversation with a lady passenger, or for any other reason, certainly there was negligence on the part of the gripman, whose special duty it is to keep a lookout, in not seeing the danger in time to avoid the accident. Then the case resolves itself into the single proposition, viz., whether or not the respondent was guilty of contributory negligence. We do not think that we can say from the testimony in this case that, as a matter of law, he was. But there were circumstances connected with his alighting from the east-bound train, and attempting to cross the

track of the west-bound train, which should be submitted to a jury for their determination on the question of contributory negligence. This accident occurred at a street crossing, a popular street in a populous city, where people were passing backwards and forwards across the street in large numbers, almost all hours of the day, and where they had a right to so pass. Under such circumstances, and at such a place, it was gross and culpable negligence on the part of the appellant to run its cars past each other without giving some signal or warning, or to approach this crossing, whether passing each other or not without giving a signal or warning; and we think that negligence cannot be imputed to the pedestrian for not anticipating culpable and gross negligence on the part of the street-car company.

Street cars have not, by any means, an exclusive right to the streets. The occupancy of the streets by street cars, other vehicles, and pedestrians is a joint occupancy, and the rules of care which are required of pedestrians in crossing street-car tracks are laws which are made to govern, not the brightest or the most alert minds, but the ordinary mind; and the ordinary mind is often apt to be distracted with other thoughts than that of danger in crossing car tracks on the streets. As was very pertinently remarked by the respondent in his testimony in this case, "One's mind cannot always be kept on the street cars." Of course, the pedestrian must exercise ordinary care to avoid consequences which might ensue from collision, and the care must be in proportion to the danger to be avoided. But the law must look at human minds just as they exist, with all their frailties, their inclination to abstract thought and absent-mindedness. Human life is of more importance yet than rapid transit, and, if street cars cannot reasonably protect life and limb while running at the rate of speed at which they do run, they have a remedy left; and that is to lessen their rate of speed, and increase their watchfulness for the safety of those who must necessarily be the sufferers when a collision occurs. Bells, whistles, and signals of different kinds are used for the purpose of challenging the attention of people who are using the street, that they may protect themselves from these unfortunate collisions and accidents; and the citizen has a right to rely upon these signals which are in common use, and negligence should not be imputed to him by reason of such reliance. As was pertinently remarked by the court in *Cincinnati Street R. Co. v. Snell*, 54 Ohio St. 197, 32 L. R. A. 276, which was a case much in principle like the one under discussion: "Ancient rights have not changed because new vehicles of travel have been introduced upon the streets, nor because a portion of the people who ride, being in haste to reach their destination, demand rapid transit. The streets remain for all the people, and he who goes afoot has the right, especially at a crossing, to walk to his destination; he should not be compelled to run, or to dodge and scramble, to avoid collision with vehi-

cles." In that case it was also held that it was the duty of the drivers of vehicles, whether wagons, wheels, or cars, to so regulate their speed, and give some warning of approach, at whatever cost of pains and trouble on their part, as that the footman using ordinary care himself, and barring inevitable accident, may cross in safety. Applying this rule, coupled with the other rule mentioned, that ordinary care does not require the pedestrian to anticipate negligence on the part of the approaching car, we think in this case it cannot be said, accepting the truthfulness of the respondent's testimony, that the respondent was guilty of contributory negligence. The conflict in the testimony, as we before said, is a matter exclusively for the discretion of the jury.

It is contended by the appellant that the court erred in its instructions to the jury, and also in not giving the instructions asked for by the appellant. The principal objection is raised to instruction No. 3, which is as follows: "If you do not believe from a preponderance of the evidence that plaintiff acted as persons of ordinary prudence generally act in circumstances entirely similar to all those which surrounded plaintiff, at and immediately preceding said accident, or if you believe from the evidence that said injury was not occasioned directly by any negligent act of defendant's servants, or any of them, then your verdict must be for defendant; provided, however, that, should you find that plaintiff was guilty of only slight negligence in the premises, and that said accident occurred by reason of gross negligence of defendant's servant or servants, you will then find for plaintiff, notwithstanding such slight negligence on his part." The proviso is the portion of the instruction which it is insisted is wrong, and it is asserted by the appellant that the instruction was given in supposed obedience to a rule laid down by this court in the case of *Roth v. Union Depot Co.* 13 Wash. 525, 31 L. R. A. 855, that the law was misunderstood by the lower court, and that such is not the law in any

state. The latter proposition is not necessary for us to determine, for a reference to the case of *Roth v. Union Depot Co.* 13 Wash. 525, 31 L. R. A. 855, shows that it was not the intention of this court to lay down in that case the doctrine of comparative negligence, but the review of that doctrine was simply incidental in that case. This instruction, however, considering the special findings in the case, was harmless, for the jury found as a question of fact that the respondent was not guilty of any negligence, slight or otherwise, but that he acted properly to the extent that persons of ordinary minds generally do under circumstances in all respects similar to those which surrounded him. They also found as a special verdict that the appellant was negligent in the running of the cars, and that the gripman, had he exercised such care and prudence as is generally used under such circumstances by careful servants of street-car companies, could have seen respondent in time to have prevented the injury; that it was the gross carelessness of the defendant that led to this injury; and that no warning was given him by defendant, or its employees, of the approach of the car which struck the plaintiff. Objections were made to other instructions which were given, but we think, with the exception of those we have mentioned, the instructions were correct; and that the instructions offered by the defendants, which had not already been given by the court in different forms, should not have been given. We find no merit in any of the objections of the plaintiff, the only question, as we have before stated, being the bald question as to whether or not the respondent was guilty of contributory negligence; and, finding that that question was properly submitted to the jury, and they having determined it in respondent's interest, *the judgment will be affirmed.*

Scott, Ch. J., and Reavis, J., concur.

Anders, J., dissents.

WISCONSIN SUPREME COURT.

NORTH MILWAUKEE TOWN-SITE COMPANY, No. 2, *Appt.*,
v.

Frank BISHOP, Jr., *Respnt.*

(.....Wis.....)

1. A call on stockholders, stating that they may pay in cash or "by a promise to pay in the form of a land contract or contracts," without showing whom they may exercise the option, or prescribing any conditions or terms to govern in settlement of the balance due the corporation, is void for indefiniteness.

NOTE.—As to power to make by-laws, see also *Engelhardt v. Fifth Ward Permanent Dime Sav. & Loan Assn.* (N. Y.) 35 L. R. A. 289; and *Peck v. Elliott* (C. C. App. 6th C.) 38 L. R. A. 616.
45 L. R. A.

2. The power to enact suitable by-laws rests in the stockholders of a corporation, and is not included in the general power of the directors to control the stock and business of the company.

(June 22, 1899.)

APPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County in favor of defendant in a suit brought to compel payment of a call upon stock which defendant held in the plaintiff corporation. *Affirmed.*

Statement by Bardeen, J.:

The plaintiff is a corporation. The defendant is the owner of 58 shares of its capital stock, of the par value of \$100, upon

which assessments to the amount of \$54 have been paid. On April 20, 1896, the plaintiff's board of directors adopted the following resolution: "Resolved, that a call be, and hereby is, made upon the unpaid portion of subscription for stock in this company, amounting to \$46 per share, the same to be paid thirty days from date, either in cash or by a promise to pay in the form of a land contract or contracts; and when the same shall be paid that the stock shall be shown as full-paid on the books of the company; and the secretary is hereby directed to proceed and use all legal means necessary for the collection of any unpaid portion of said call, and, if any party refuse or neglect to make such payment, proper steps be taken to advertise and foreclose the stock upon which such payment shall not have been made." At the same time the board passed the following resolution: "Resolved, that the secretary be, and hereby is, instructed to notify the stockholders of this company of said call by mailing to each stockholder a copy of said resolution." The defendant failed to pay the call so made, and this action was commenced to enforce payment. After hearing the plaintiff's evidence, the court granted a nonsuit. From a judgment for defendant, the plaintiff appeals.

Messrs. Quarles, Spence, & Quarles, for appellant:

The proofs show a valid call.

Defendant's status as a stockholder and his liability to assessment are indisputable.

That liability rests primarily upon the contract of subscription. And it extended to the amount remaining unpaid upon said shares at the time of his purchase.

Cook, Corporations, § 256.

A subscription to the capital stock of a corporation creates a debt, the time of payment of which remains indefinite until fixed by a call made by the board of directors pursuant to the statute.

Cook, Corporations, § 105; *Germania Iron Min. Co. v. King*, 94 Wis. 442, 36 L. R. A. 51.

A call is an official declaration by the directors that the sum subscribed or any specified instalment thereof is required to be paid and is made effective by the giving of notice as prescribed in the by-laws.

Cook, Corporations, § 104; *Germania Iron Min. Co. v. King*, 94 Wis. 441, 36 L. R. A. 51.

Section 1753, Rev. Stat., expressly provides that stock may be issued by a corporation "in consideration of money or labor or property."

Property includes "money, goods, chattels, things in action, and evidences of debts."

Rev. Stat. § 4972, subdvs. 3, 4.

Payment for stock may be made in the obligation of the stockholder, as a note and mortgage.

Cook, Corporations, § 20, note 1; *Clark v. Farrington*, 11 Wis. 321; *Blunt v. Walker*, 11 Wis. 349, 78 Am. Dec. 709; *Lyon v. Ewings*, 17 Wis. 63; *Andrews v. Hart*, 17 45 L. R. A.

Wis. 306; *Western Bank v. Tallman*, 17 Wis. 637; *Rouse v. Detroit Cycle Co.* 111 Mich. 251, 38 L. R. A. 794; *Vermont Central R. Co. v. Claves*, 21 Vt. 30; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Pacific Trust Co. v. Dorsey*, 72 Cal. 55; *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461.

Such payments are binding upon the corporation, and it may be compelled to issue stock, or pay dividends upon stock thus paid for.

Stoddard v. Shetucket Foundry Co. 34 Conn. 542.

In the absence of fraud payment so made cannot be questioned by creditors.

Rouse v. Detroit Cycle Co. 111 Mich. 251, 38 L. R. A. 794; *Whitehill v. Jacobs*, 75 Wis. 474; *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212.

Land contracts are property of the kind which the plaintiff corporation by its articles of organization is authorized to deal in, and therefore may be accepted in payment of subscriptions to its capital stock.

Whitehill v. Jacobs, 75 Wis. 474.

Where a subscription is payable in property, and, *a fortiori*, where it is optional with the subscriber to pay in money or in property, if the subscription is not paid according to its terms, or the option is not exercised, money may be demanded and a suit maintained.

2 Thomp. Corp. § 1633; *Cook, Corporations*, § 89; *Haywood & P. Pl. Road Co. v. Bryan*, 51 N. C. (6 Jones, L.) 82; *Sperry v. Johnson*, 11 Ohio, 453.

The test of the validity of the resolution must be whether injustice will necessarily result from an impartial enforcement of it, and not whether it is possible that by acting in bad faith, in violation of the spirit, if not the letter, of the resolution, the directors may make unjust discrimination between stockholders.

Hambleton v. Glenn, 72 Md. 331.

The corporate authorities—generally the directors—have power to compromise any corporate debt, and if in the collection of subscriptions there is reasonable doubt as to the liability of the subscriber, or if the subscriber is insolvent, the corporation may compromise the liability and release a part for the purpose of securing the residue. All that is required is good faith.

Cook, Stock & Stockholders, § 171; *Whitaker v. Grummond*, 68 Mich. 249; *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. 318; *Hambleton v. Glenn*, 72 Md. 331.

It has been held no defense to an action upon a call, nor ground for restraining its collection, that the directors, who are enforcing the call against other stockholders, are not themselves paying their assessments.

2 Thomp. Corp. § 1719; *Grant v. Attrill*, 11 Fed. Rep. 469.

The fact that the corporation had forfeited the stock of some subscribers and has compromised with others is no defense to a subscriber sued for calls.

Cook, Corporations, § 191; *Dorman v. Jacksonville & A. Pl. Road Co.* 7 Fla. 265;

Bennett v. Glenn, 8 U. S. App. 419, 55 Fed. Rep. 956, 5 C. C. A. 353; *Howard v. Glenn*, 85 Ga. 238.

No particular formality is required in the making and notification of calls.

Cook, Corporations, §§ 115, 116; 2 *Thomp. Corp.* § 1746; *Germania Iron Min. Co. v. King*, 94 Wis. 441, 36 L. R. A. 51.

The resolution passed by the board of directors is a valid by-law, if the board possessed the power of making by-laws.

A by-law is a rule or law adopted by a corporation or association for the regulation of its own action and concerns, and of the rights and duties of its members among themselves.

Com. v. Turner, 1 Cush. 493; 5 Am. & Eng. Enc. Law, p. 87.

Mr. W. J. Turner for respondent.

Bardeen, J., delivered the opinion of the court:

The judgment of nonsuit was justified upon either of two grounds:

1. The proof fails to show a valid call. The resolution of the board of directors provides that the stockholder may pay either in cash or "by a promise to pay in the form of a land contract or contracts." Just what was intended by the statement quoted is not apparent. Its indefiniteness is sufficient to condemn it. The resolution fails to show at whose option the shareholder may pay in cash or land contract. It prescribes no conditions, and fixes no terms by which either the board of directors or stockholders are to be governed in settlement of the balance due the corporation. Calls of this kind should be uniform in their operation, and not of such a character as to permit the directors to practise favoritism, or act oppressively. *Germania Iron Min. Co. v. King*, 94 Wis. 439, 36 L. R. A. 51. It is not to be understood that a call may not be so made that the shareholder may pay in money or money's worth. The chief requisites are that it should be impartial and uniform, and sufficiently definite to enable the stockholder to comply with its requirements.

2. No proof was made of giving notice of such call according to the by-laws of the corporation. Section 1754, Rev. Stat. 1898, provides that, "unless otherwise expressly provided by law or the articles of organization, the directors of any corporation may call in the subscriptions to the capital stock by instalments, in such proportion and at such times as they shall think proper, by giving such notice thereof as the by-laws shall prescribe." It was admitted on the trial that no by-law of the corporation in this regard had ever been adopted. The action of the board was attempted to be justified, however, by showing that the board, after adopting the resolution for the call, adopted another resolution instructing the secretary to notify each stockholder thereof by mailing to him a copy of said resolution. This latter action of the board is claimed 45 L. R. A.

to be equivalent to a regular by-law, and answers all the purposes of the statute. The difficulty with this contention is that the board of directors have no power to enact by-laws unless so authorized by law, by the articles of organization, or by proper action of the stockholders. A by-law is a permanent and continuing rule for the government of the corporation and its officers. The power to enact them resides primarily with the stockholders. They have few functions to perform, and this right to make by-laws is an essential and an important one. It is a power that the directors have no inherent right to exercise. This is the rule laid down by the textwriters, and finds ample support in the authorities cited in the following works: 2 *Cook, Stock & Stockholders & Corp. Law*, § 700a; 1 *Thomp. Corp.* § 956; *Ang. Corp.* § 327. In the *Germania Case* cited it is said: "We hold, therefore, that it was intended that the statutory method of making calls should supersede previous common-law methods, and to prescribe a uniform and reasonable rule easily complied with"; and it was accordingly held that a complaint which did not allege that a call was made by giving such notice as the by-laws prescribed fails to state a cause of action. For the same reason such an action cannot be sustained until proof is made in conformity to these requirements. It is argued, however, that because § 1776, Rev. Stat., provides that "the stock, property, affairs, and business" of every corporation shall be under the care of and be managed by a board of directors, the power to enact proper by-laws may be implied therefrom. As before intimated, the power to make by-laws is incident to the corporation itself, and results from the necessity of such a power to enable the body politic to answer to the purposes for which it was created. It being a valuable and important right, it ought not to be taken away by inference or implication. The power given to the directors to control the stock and business of the corporation may exist, and be entirely consistent with the power of the stockholders to say upon what terms and conditions the stock of the corporation shall be paid for and issued. We therefore hold that, unless taken away by the charter, or some law of the state, the power to enact suitable by-laws rests in the stockholders of the corporation, and not in the board of directors. Our attention has been called to some expressions used in the opinion in *Re Klaus*, 67 Wis. 401, to the effect that the directors, and not the stockholders, may make the by-laws. As we have seen, this statement of the law is contrary to all of the adjudicated cases, and cannot be sustained on principle, and was in fact not necessary to the question decided. In that regard it must be deemed to be overruled.

The judgment of the Superior Court of Milwaukee County is affirmed.

WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.* Wellington STROHL, Receiver, etc., of Skookum Box & Lumber Company,
v.

SUPERIOR COURT FOR KING COUNTY
et al.

(.....Wash.....)

The enactment of the Federal bankruptcy law of July 1, 1898, did not suspend the right of a state court to appoint a receiver for an insolvent corporation under state laws, when it had not been adjudged a bankrupt under the law of Congress.

(February 9, 1899.)

APPPLICATION for a writ of mandamus requiring respondent to assume jurisdiction of and try a certain case instituted by

relator against the Seattle National Bank *et al.* Writ awarded.

The facts are stated in the opinion.

Messrs. Donworth & Howe and Ira Bronson, for relator:

If the superior court erred in holding that it had no jurisdiction to try the case, mandamus is the proper remedy to require said court to assume jurisdiction of the case and to try the same.

State, Smith, v. McClinton, 17 Wash. 45; *State, Smith, v. Parker*, 12 Wash. 685; *State, Puget Sound Nat. Bank, v. King County Super. Ct.* 14 Wash. 686; *State, Shannon, v. Hunter*, 3 Wash. 92.

The superior court had undoubted jurisdiction of the case brought by relator and of the case in which relator was appointed receiver of the Skookum Box & Lumber Company.

NOTE.—*Relation of bankrupt law to assignments and insolvent proceedings under state laws.*

I. Provisions of the various bankrupt laws.
II. An assignment for creditors as an act of bankruptcy.

III. Effect of bankrupt law on assignments for creditors.

a. Cases under the bankrupt act of 1841.

b. Cases under the bankrupt act of 1867.

1. Where no bankrupt proceedings were instituted.

2. Where bankrupt proceedings were instituted, but the assignment was not attacked.

3. Where the assignment was not attacked in time by bankrupt's assignee.

4. Where the assignment was attacked in time by bankrupt's assignee.

5. Effect on intervening judgments and executions.

6. Allowances to assignee for creditors where the assignment was avoided.

c. Cases under bankrupt act of 1898.

IV. Effect of bankrupt law on insolvent proceedings under state laws.

a. On subsequent proceedings.

b. On pending proceedings.

c. On proceedings after the repeal of the bankrupt law.

d. On proceedings for arrest.

V. Proceedings for a receiver as affected by bankrupt law.

VI. Effect of creditor's bill or supplementary proceedings as against bankrupt proceedings.

VII. Effect of an assignment for creditors on the right to a discharge in bankruptcy.

I. Provisions of the various bankrupt laws.

The bankrupt act of August 19, 1841, took effect February 1, 1842, and was repealed March 3, 1843, and provided that preferential transfers in contemplation of insolvency, and transfers in contemplation of bankruptcy, except to a bona fide purchaser or creditor, should be void.

The bankrupt act of 1867, which took effect June 1, 1867, and was repealed September 1, 1878, prohibited preferences within four months, and transfers in fraud of the act within six

months in contemplation of becoming a bankrupt or to prevent the property being distributed under the act, or to delay or hinder the operation of the act. The four months' clause was amended June 22, 1874, providing that if the transferee knew that the conveyance was made in fraud of the act it would be void.

The bankrupt act July 1, 1898, chap. 3, § 3a, provides that an assignment for creditors is an act of bankruptcy. Chapter 7, § 67a, provides that transfers by the bankrupt within four months of bankrupt proceedings, with intent to hinder and delay creditors, except to bona fide purchasers, shall be void, and that all transfers made within that time void under state laws shall be void under this act. Section 70e provides that the trustee may avoid any transfer which any creditor of such bankrupt might have avoided.

II. An assignment for creditors as an act of bankruptcy.

Under the act of 1842 an assignment for creditors is held to be an act of bankruptcy. *Ex parte Tower* (1842) 1 N. Y. Legal Obs. 8; *Ex parte Breneman* (1842) *Crabbe*, 456; *Gassett v. Morse* (1843) 21 Vt. 627; *Re Holmes* (1842) 1 N. Y. Legal Obs. 211.

In *Jones v. Sleeper* (1843) 2 N. Y. Legal Obs. 131, it was said that an assignment for creditors is an act of bankruptcy under the Federal act of 1841.

And the same was held under the act of 1867. *Barnes v. Rettew* (1871) 8 Phila. 133; *Boese v. King* (1883) 108 U. S. 379, 27 L. ed. 760, Affirming (1879) 78 N. Y. 471, Reversing *Boese v. Locke* (1879) 17 Hun. 270 (1877) 53 How. Pr. 148; *Re Burt* (1870) 1 Dill. 439; *Crain v. Thompson* (1873) 2 Dill. 513; *Re Croft Bros.* (1878) 8 Biss. 188; *Re Damon* (1879) 70 Me. 153; *Re Frisbee* (1877) 14 Blatchf. 165; *Grow v. Ballard* (1868) 2 Nat. Bankr. Reg. 194; *Re Goldschmidt* (1869) 3 Ben. 379, 3 Nat. Bankr. Reg. 164; *Re Lains* (1877) 16 Nat. Bankr. Reg. 168; *Re Smith* (1869) 4 Ben. 1, 3 Nat. Bankr. Reg. 377; *Re Randall* (1869) *Deady*, 557 (as it will be presumed to have been made with intent to defeat the operation of the bankrupt act); *Spicer v. Ward* (1870) 3 Nat. Bankr. Reg. 512 (as the act of 1867 makes them fraudulent). (Denied in *Haas v. O'Brien* (1876) 66 N. Y. 602.)

So, in *Globe Ins. Co. v. Cleveland Ins. Co.* (1876) 14 Nat. Bankr. Reg. 311, a corporation

The enactment of a bankruptcy law by Congress cannot operate to deprive a state court of the right to appoint a receiver for an insolvent corporation.

There is nothing in the case at bar to show that the corporation is insolvent within the definition given by the bankruptcy law.

A person may be insolvent without being bankrupt.

Black, Bankruptcy, 270, 271.

If the relator has no standing in the state court, it is only because the bankruptcy law operates by its mere passage to deprive the state court of all jurisdiction over parties not adjudicated, and against whom no proceedings have been filed to have adjudicated bankrupts, but who are subject to bankruptcy proceedings if creditors should see fit to institute them.

Collier, Bankruptcy, pp. 19, 20; *Watson*

making an assignment for creditors was held to have committed an act of bankruptcy. A writ of error was dismissed in *Cleveland Ins. Co. v. Globe Ins. Co.* 98 U. S. 366, 25 L. ed. 201, on the ground of want of jurisdiction.

A defective assignment which was preferential was an act of bankruptcy. *Re Mendelsohn* (1875) 8 Sawy. 842, 12 Nat. Bankr. Reg. 533.

And a defective assignment made by three of five partners was an act of bankruptcy. *Re Lawrence* (1878) 10 Ben. 4.

In *Ebersole v. Adams* (1873) 10 Bush, 83, 13 Nat. Bankr. Reg. 141, it was said that an assignment, if made in contemplation of insolvency or to prefer creditors, is an act of bankruptcy.

But in *Langley v. Perry* (1869) 2 Nat. Bankr. Reg. 596, overruling *Re Langley* (1868) 1 Nat. Bankr. Reg. 559, it was held that an assignment for creditors is not an act of bankruptcy unless made with the intent to hinder and delay creditors, or with the intent to defeat the operation of the bankrupt law.

So, in *Re Kintzing* (1869) 3 Nat. Bankr. Reg. 217.

And under the act of 1867 an assignment was not an act of bankruptcy if made before June 1, 1867. *Re Wells* (1867) 1 Nat. Bankr. Reg. 171.

Under the bankrupt act of 1898, an assignment for creditors is of itself an act of bankruptcy. *Re Abraham* (1899) 93 Fed. Rep. 767; *Re Curtis* (1899) 91 Fed. Rep. 737, Affirmed, 94 Fed. Rep. 630; *Davis v. Bohle* (1899) 92 Fed. Rep. 325; *Re Gutwillig* (1899) 92 Fed. Rep. 337, Affirmed (1898) 90 Fed. Rep. 475 (Approved *West Co. v. Lea* (1899) 174 U. S. 590, *George M. West Co. v. Lea Bros.* 43 L. ed. 1098, Affirming *Lea v. George M. West Co.* 91 Fed. Rep. 237); *Re Hanks* (1899) 1 Nat. Bankr. News, 181; *Re Slevers* (1899) 91 Fed. Rep. 366; *Re Simonson* (1899) 92 Fed. Rep. 904; *Re Wilcox* (1899) 1 Am. Bankr. Rep. 544; *Re Lewis* (1899) 91 Fed. Rep. 632.

And this was held in *West Co. v. Lea* (1899) 174 U. S. 590, *George M. West Co. v. Lea Bros.* 43 L. ed. 1098, to be the case even if the debtor was not insolvent.

And the same was said to be the rule in *Re Romanow* (1899) 92 Fed. Rep. 510.

An assignment by a partnership is an act of bankruptcy. *Chemical Nat. Bank v. Meyer* (1899) 92 Fed. Rep. 896.

A corporation making an assignment for creditors July 13, 1898, may be adjudged a bankrupt in involuntary proceedings, and the assignee for creditors may be made a party in the bankrupt court, and may be required to 45 L. R. A.

v. Citizens' Sav. Bank, 2 Hughes, 200; *Re National L. Ins. Co.* 6 Biss. 35; *Smith v. Buchanan*, 8 Blatchf. 153; *Watson v. Citizens' Sav. Bank*, 5 S. C. N. S. 159; *Boese v. King*, 108 U. S. 379, 27 L. ed. 760; *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; *Buchanan v. Smith*, 16 Wall. 277, 21 L. ed. 280.

Messrs. Bausman, Kelleher, & Emory and Strudwick & Peters for defendants.

Beavis, J., delivered the opinion of the court:

The facts set forth in the application are substantially that about the 19th of December, 1898, the relator was appointed receiver of the Skookum Box & Lumber Company, a corporation created and existing under the laws of this state; that the appointment was made in a case wherein the Seattle Hardware Company, a corporation, was plaintiff, and

hold the assets subject to the order of the district court in bankruptcy. *Leldigh Carriage Co. v. Stengel* (1899) 1 Nat. Bankr. News, 387.

But a corporation not engaged principally in mercantile pursuits cannot be adjudged a voluntary bankrupt on account of making an assignment for creditors. *Re Cameron Town Mut. Fire, Lightning, & Wind-Storm Ins. Co.* (1899) 1 Nat. Bankr. News, 383.

And a preferential assignment was not void except as against an assignee in bankruptcy. *Seaman v. Stoughton* (1848) 3 Barb. Ch. 344; *Dodge v. Sheldon* (1843) 6 Hill, 9; *Proctor v. Wadsworth* (1843) 3 B. Mon. 401.

And an assignment for creditors was not void by reason of the passage of the bankrupt act. *Re Holmes* (1842) 1 N. Y. Legal Obs. 211.

An assignment made prior to February 1, 1842, was valid notwithstanding the passage of the bankrupt act. *Weiner v. Farnum* (1845) 2 Pa. 146, Overruling *Cornwell's Appeal* (1844) 7 Watts & S. 305; *Hutchins v. Taylor* (1842) 5 Law Rep. 289.

Proceedings under an assignment and state insolvent law long prior to the bankrupt act of 1842, were not affected thereby. *Sullivan v. Hieskill* (1843) *Crabbe*, 525.

In *Ex parte Potts* (1842) *Crabbe*, 469, it was said that an assignment for creditors, made to prevent a preference, was not void under the bankrupt law of 1842.

Whether assignments made on May 26 and June 14, 1842, were valid, was not decided. *Re Ely* (1842) 1 N. Y. Legal Obs. 343.

And in *Anonymous* (1842) 1 Clark (Pa.) 121, an assignment was held to be not void though made after filing petition, and before a decree in bankruptcy.

III. Effect of bankrupt law on assignments for creditors.

a. Cases under the bankrupt act of 1841.

Under the bankrupt act of 1841 an assignment for creditors was generally held void as against an assignee in bankruptcy. *Ex parte Tower* (1842) 1 N. Y. Legal Obs. 8; *Ex parte Eames* (1842) 2 Story, 322; *Ex parte Brene-man* (1842) *Crabbe*, 456; *Cornwell's Appeal* (1844) 7 Watts & S. 305 (said to be overruled in *Weiner v. Farnum* (1845) 2 Pa. 146).

An assignment for creditors made within ten months prior to voluntary proceedings was void as a fraud on the bankrupt act of 1842. *McLean v. Johnson* (1843) 3 McLean, 202; *McLean v. Meline* (1843) 3 McLean, 199.

In the latter case the court further held that an intervening execution obtained a priority.

the Skookum Box & Lumber Company was defendant; that as the duly qualified and acting receiver of the Skookum Box & Lumber Company, on the 27th day of December, 1898, the relator instituted an action in the superior court of King county against the Seattle National Bank, a corporation, and the sheriff of King county and certain other defendants. The object of the action was to vacate a certain judgment of foreclosure rendered by the superior court of King county, in favor of the Seattle National Bank, and against the Skookum Box & Lumber Company, which judgment foreclosed a chattel mortgage executed by the Skookum Box & Lumber Company to the Seattle National Bank, and to have the mortgage adjudged void. The allegations of the complaint show that the mortgage was given by the Skookum Box & Lumber Company to secure a pre-

existing debt, and, at the time it was executed, the Skookum Box & Lumber Company was insolvent, in the sense that it was wholly unable to meet its obligations as they matured in the ordinary course of business, and that the intent of the mortgage was to constitute the Seattle National Bank a preferred creditor of the Skookum Box & Lumber Company. It was further alleged that the property covered by the mortgage, if sold at forced sale, would be insufficient to pay the indebtedness, and there would be no property remaining of the Skookum Box & Lumber Company out of which the general creditors of the corporation could receive payment; and the further allegation was made that another defendant had obtained a judgment against the Skookum Box & Lumber Company, and had caused its property to be levied upon. The complaint

The decision on this point was not followed by the weight of authority under the act of 1867. (See *b. infra.*)

And an assignment was void if fraudulent. *Ashley v. Robinson* (1856) 29 Ala. 112.

An assignee in bankruptcy was entitled to the assets as against an assignee under a preferential assignment. *Freeman v. Deming* (1846) 3 Sandf. Ch. 327.

An assignment for creditors, made after Massachusetts statute of 1836 (in regard to assignments in trust for creditors) was repealed, was invalid as against the assignee in bankruptcy. *Winsor v. Whiting* (1843) Fed. Cas. No. 17,868.

But an assignment for creditors was valid where no bankrupt proceedings were taken. *Strong v. Carrier* (1845) 17 Conn. 310.

b. Cases under the bankrupt act of 1867.

1. Where no bankrupt proceedings were instituted.

The bankrupt act of 1867 did not render general deeds of assignment for the benefit of creditors void. So, where bankrupt proceedings were not instituted such deeds were, with but a few exceptions, held valid. Such was the ruling in the following cases. *Cook v. Rogers* (1875) 31 Mich. 391, 13 Nat. Bankr. Reg. 97; *Re Hawkins* (1868) 2 Nat. Bankr. Reg. 378; *Reed v. Taylor* (1871) 32 Iowa, 209, 7 Am. Rep. 180, 4 Nat. Bankr. Reg. 710; *Sadler v. Immel* (1880) 15 Nev. 265; *Beck v. Parker* (1870) 65 Pa. 262, 3 Am. Rep. 625; *Bostwick v. Burnett* (1878) 74 N. Y. 317, *Reversing* (1877) 11 Hun, 301; *Hawkin's Appeal* (1868) 34 Conn. 548.

In *Boese v. King* (1883) 108 U. S. 379, 27 L. ed. 760, *Affirming* (1879) 78 N. Y. 471, *Reversing* *Boese v. Locke* (1877) 53 How. Pr. 148, it was held that in the absence of bankrupt proceedings an assignment in New Jersey of all the debtor's property for the benefit of all the creditors was sufficient to pass the title to the assignee, although the New Jersey statute of bankruptcy was suspended by the bankrupt act of Congress 1867. This was because the assignment would be valid at common law without regard to the New Jersey statute. But the dissenting opinion says that the assignment was made under the statute and directly referred to it.

In *Ehlersole v. Adams* (1873) 10 Bush, 83, 13 Nat. Bankr. Reg. 141, where an action was brought under Ky. act March 10, 1856, providing that a preference of one creditor in contemplation of insolvency shall operate as an assignment for the benefit of all his creditors, it was held that, although this was an act of bankruptcy, yet the bankrupt law did not prevent winding up the estate in a state court. 45 L. R. A.

In *Wald v. Wehl* (1881) 6 Fed. Rep. 163, 18 Blatchf. 495; *Re Walker* (1878) 18 Nat. Bankr. Reg. 56; *Re Kurth* (1878) 17 Nat. Bankr. Reg. 573; *Geery's Appeal* (1876) 43 Conn. 289, 21 Am. Rep. 653; *Cragin v. Thompson* (1873) 2 Dill. 513; and *Shryock v. Bashore* (1875) 11 Phila. 565,—it was said that notwithstanding the existence of the bankrupt act a general deed of assignment would be valid where no proceedings in bankruptcy were instituted.

In *Platt v. Preston* (1879) 19 Nat. Bankr. Reg. 241, it was said that it was an open question whether an assignment for creditors was *per se* not fraudulent but only void, if made with actual intent to defraud or to defeat the bankrupt law.

In *Linder v. Lewis* (1879) 4 Fed. Rep. 318, it was said that an assignment for creditors was not of itself void, although it was made in violation of the bankrupt act.

In *Thrasher v. Bentley* (1873) 2 Thomp. & C. 309 (1874) 59 N. Y. 649 (1875) 1 Abb. N. C. 39, it was said that an assignment might be good under the common law notwithstanding the bankrupt law.

In *Von Helm v. Elkus* (1876) 8 Hun, 516, it was said that it was decided in *Thrasher v. Bentley* that the common-law right to make an assignment existed, even though by the operation of the bankrupt law the New York statute of 1860 was suspended; but that the error of this view arose from the fact that the statute regulated the exercise of the right and that both must fall or stand together, and that the court of appeals had held that this was the effect of the statute because the failure to acknowledge the assignment and have the proof certified before delivery under the statute rendered it void.

But in *Shryock v. Bashore* (1875) 11 Phila. 565, in an action by an assignee of a state bank against the maker of a note, it was held that a deed of assignment made under Pa. act 1850, for winding up insolvent banks, was void, as that act was suspended by the bankrupt act.

2. Where bankrupt proceedings were instituted, but the assignment was not attacked.

Where an assignment for creditors was made, and subsequently proceedings in bankruptcy instituted, but no direct attack by proper proceedings was made against the deed of assignment, it was held valid in almost every case. The case of *Dolson v. Kerr* (1877) 52 How. Pr. 481, holding the contrary, does not appear to be sustained by the authorities. The following cases held that the assignment was valid until attacked by the assignee in bankruptcy.

prayed for an injunction against the defendants, restraining them from selling the property of the Skookum Box & Lumber Company, and that the mortgage of the Seattle National Bank be declared void, and the possession of the property of the lumber company be delivered to the receiver, and for general equitable relief. The defendant Seattle National Bank appeared and answered that the Skookum Box & Lumber Company was a corporation organized under the laws of this state engaged in manufacturing, trading, and mercantile pursuits, and, at all times in the complaint mentioned, owed debts to the amount of \$1,000, and that the purpose and scope of the receivership proceedings in which the relator was appointed receiver was to declare the Skookum Box & Lumber Company an insolvent corporation, and to wind up and distribute all its prop-

erty to its creditors. It appears from the return of the judge of the superior court to the alternative writ that the action came on for hearing on the 17th of January, 1899, and that the answer of the Seattle National Bank in said cause was deemed a plea to the jurisdiction of the court, and that the court held such plea sufficient, and dismissed the cause for want of jurisdiction. No proceedings in bankruptcy under the law of the United States which took effect on the 1st day of July, 1898, have ever been instituted, and all the proceedings in the action dismissed took place since the 1st of July, 1898.

1. Relator appears to have no plain, speedy, and adequate remedy by appeal, and, if the superior court had jurisdiction, mandamus is the proper remedy here to require that court to proceed and try the cause. The single question presented is: Did the enact-

An assignee in insolvency may recover by a suit money paid by the debtor in fraud of creditors, notwithstanding bankrupt proceedings are pending under the laws of the United States. Bull v. Houghton (1884) 65 Cal. 422.

In *Reed v. McIntyre* (1878) 98 U. S. 507, 25 L. ed. 171, it was said that even if it were conceded that the assignment to C was an act of bankruptcy upon the ground that it was made with the intent to prevent the property from coming to the assignee in bankruptcy and from being distributed under the bankrupt act, it was not invalid except in reference to proceedings under the bankrupt statute to be instituted by the bankrupt or by some creditor for the purpose of bringing the bankrupt's effects into the bankrupt court.

In *Re Marter* (1875) 12 Nat. Bankr. Reg. 185, in contempt proceedings in the Federal court for the violation by an assignee for creditors of an injunction restraining him from selling the property, it was held that in order for the assignee in bankruptcy to divest the assignee for creditors of possession and control of funds it must be by a suit at law or in equity.

In this case it was said that if an assignment was valid the sale by an assignee passed a good title, although the bankrupt court had enjoined the assignee from selling, and the assignment would not be held void in the absence of a direct action by the assignee in bankruptcy.

Where an assignment was made and the assignee failed to give bond, and the assignor was then adjudicated bankrupt and made a composition with his creditors, he could not then insist that his assignment was void and recover possession of property held as security by a creditor, as it was a valid assignment and did not fall under the condemnation of the bankrupt law. The court said that an assignee in bankruptcy could not have recovered this property from a general assignee, and as there was no proceeding under the bankrupt law to take charge of the property the title remained in the assignee for creditors. *Bigler v. National Bank*, (1882) 26 Hun, 520.

Where an assignee for creditors was also an assignee in bankruptcy in subsequent proceedings, and brought suit to have an intervening judgment removed as a cloud upon his title, it was held that until the assignment was set aside as void the title remained in the assignee under the general assignment, and whether the assignee in bankruptcy could sue himself as assignee under a voluntary assignment was not decided; but in the present condition judgment was said to be no cloud. *Belden v. Smith* (1878) 16 Nat. Bankr. Reg. 802. 45 L. R. A.

In *Smith v. Tighe* (1880) 14 Jones & S. 270, it was held that an assignee for creditors having received assets could not defend an action for an accounting on the ground that since the assignment the assignor had been discharged in bankruptcy.

In *Re Troth* (1880) 1 Fed. Rep. 405, it was said that as voluntary proceedings in bankruptcy were begun within six months after the date of an assignment for creditors, it was not then indefeasible, but might have been declared invalid at the instance of the assignee in bankruptcy, under U. S. Rev. Stat. § 5129, avoiding conveyances made in violation of its provisions within six months of bankrupt proceedings.

In *Re Pierce* (1869) 3 Nat. Bankr. Reg. 258, the court said: Even where the assignment has been the sole foundation of the proceeding in bankruptcy, I have considered it not a void act, but an act voidable by the assignee in bankruptcy by a bill in equity filed for the purpose of avoiding it.

In *Adams v. Hams* (1881) 19 Blatchf. 487, it was said that an assignment for creditors was valid until it was attacked by an assignee in bankruptcy.

In a proceeding for involuntary bankruptcy it was said that an assignment ordered by the court of chancery to be made by the trustee, who misapplied the trust fund, was not void under the bankrupt act. U. S. Rev. Stat. 534, § 35; *Re Meyers* (1877) 2 Hughes, 230.

But in *Dolson v. Kerr* (1877) 52 How. Pr. 481 (*infra*, III., b. 5), the court said that a general assignment without giving priority is superseded by proceedings in bankruptcy, and for the reason that it places the property beyond the power of the bankrupt court, if it stands, and this is contrary to the policy of the bankrupt act, and a fraud in law.

3. Where the assignment was not attacked in time by bankrupt's assignee.

Where bankrupt proceedings were not taken in time, an assignee in bankruptcy could not avoid a prior assignment for creditors.

In *Mayer v. Hellman* (1875) 91 U. S. 496, 23 L. ed. 377, 13 Nat. Bankr. Reg. 440, the Supreme Court of the United States held that an assignment by an insolvent debtor of all his property for the benefit of creditors was not fraudulent, and that when executed six months before proceedings in bankruptcy were taken against the debtor it could not be assailed by an assignee in bankruptcy subsequently appointed. The court said that such an assignment, even though executed within six months of the filing of the petition, was not void, but

ment of the Federal bankruptcy law July 1, 1898, suspend the right of the state court to appoint a receiver for an insolvent corporation under the laws of this state? It is conceded that the enactment of the general bankruptcy law by Congress superseded and suspended all state insolvency laws. While the industry of the learned counsel upon each side in this controversy in the citation of authorities is commendable, yet we are unable to find one precisely in line with the facts here, and there is apparently some conflict in the expressions of different courts.

First noticing authorities presented by counsel for the respondent: In *Re Merchants Ins. Co.* 3 Biss. 162, an insurance company was declared insolvent, and a receiver appointed by the state court. Thereafter a petition was filed in the Federal court to de-

clare the corporation bankrupt, and take possession of its assets, and the petition was allowed, and the court observed: "It also seems clear to us that in so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of the debtor from further liability on its debts." It was also held in this case, and in *Re Washington Marine Ins. Co.* 2 Ben. 292, that the acquiescence of the defendant in the appointment of the receiver was an act of bankruptcy. The case *Re Independent Ins. Co.* Holmes, 103, arose under the bankruptcy act of 1867. It was there observed, citing from *Griswold v. Pratt*, 9 Met. 23: "When the power is exercised by Congress and a bankruptcy law is in force, it does suspend all state insolvent

declined to express an opinion as to whether or not it was voidable.

In this case the court said that the bankrupt act does not suspend the operation of the Ohio act regulating the mode of administering assignments for the benefit of creditors, as the statute of Ohio is not an insolvent law and the assignment will be regarded as though the statute of Ohio in relation to assignments for creditors had not existed.

An assignee in bankruptcy could not avoid an assignment for creditors made more than twelve months prior to bankrupt proceedings, under bankrupt act 1867, § 35, providing that an assignment for creditors made within four months, where the assignee has reasonable cause to believe him insolvent, and within six months if made to prevent the property coming to the hands of the assignee or to defeat the act, are void. *Re Arledge* (1873) 1 Nat. Bankr. Reg. 644.

And an assignment made more than three months prior to involuntary bankrupt proceedings could not be set aside by the assignee in bankruptcy under bankrupt act 1867, amended by act of Congress June 22, 1874, prohibiting transfers within three months of bankrupt proceedings. *Re Kimball* (1877) 16 Nat. Bankr. Reg. 188.

In this case it was said that as to the six months' clause as it existed prior to June 22, 1874, the supreme court in *Mayer v. Hellman*, (1875) 13 Nat. Bankr. Reg. 440, 91 U. S. 496, 23 L. ed. 377, held that a voluntary assignment by an insolvent debtor more than six months prior to filing a petition was valid against the claims of an assignee in bankruptcy. The same rule applied to the time of three months.

Where an assignee for creditors took possession of the assets before bankrupt proceedings, and sold and distributed the same to the creditors before the assignee in bankruptcy brought suit against him, he was not liable to the assignee in bankruptcy for the value of the property. *Cragin v. Thompson* (1873) 2 Dill. 513.

And a Federal marshal seizing property under a warrant in bankruptcy was not protected by the fact that an assignment for creditors was made more than two months prior to bankrupt proceedings, under bankrupt act 1867, amended June 22, 1874, rendering void assignments made in contemplation of bankruptcy within two months of filing proceedings. *Mathews v. Stewart* (1880) 44 Mich. 209.

In *Re Cohn* (1870) 6 Nat. Bankr. Reg. 379, and *Re Damon* (1879) 70 Me. 153, it was said 45 L. R. A.

that if an assignment for creditors was not attacked within six months thereafter through bankrupt proceedings it would be valid.

4. Where the assignment was attacked in time by bankrupt's assignee.

Under the bankrupt act of 1867, and the amendment of 1874, where bankrupt proceedings were instituted after a general assignment for creditors was made, and the assignment was attacked in time, most of the cases held that the assignment was void as against the assignee in bankruptcy. There is some conflict of authority on this question. The exceptional cases were on the ground that the assignment was made in good faith and with no intent to defeat the operation of the bankrupt law. The following cases held that an assignment was void as against an assignee in bankruptcy, and that he was entitled to the assets. *Burkholder v. Stump* (1871) 8 Phila. 172, 4 Nat. Bankr. Reg. 597; *Adams v. Hyams* (1881) 19 Blatchf. 487; *Alexander v. Galt* (1881) 9 Fed. Rep. 149; *Hobson v. Markson* (1871) 1 Dill. 421; *Re Moses* (1880) 1 Fed. Rep. 845; *Ostrander v. Meunch* (1881) 12 Fed. Rep. 562.

And a deed of assignment made March 2, 1869, was held void at the suit of the assignee in bankruptcy where proceedings for involuntary bankruptcy were filed April 7, 1869, and the title of the assignee vested as of the day of filing the petition in bankruptcy, under bankrupt act, § 14, providing that the assignment to the assignee and the conveyance to him of the title to the property and estate of the bankrupt relate back to the commencement of proceedings in bankruptcy. *Clark v. Marx* (1872) 6 Ben. 275.

And an assignment for creditors was held void as against an assignee in bankruptcy. *Globe Ins. Co. v. Cleveland Ins. Co.* (1876) 14 Nat. Bankr. Reg. 311.

This was on the ground that the assignment was contrary to the policy of the bankrupt law. This is a leading case on this question. The opinion reviewed the authorities approving the English rule, and claimed that we should adopt the same, as the bankrupt act followed the wording of English decisions. The ground was also taken that as insolvent laws were suspended it would be absurd to allow an insolvent to defeat the operation of the bankrupt act by selecting his own assignee and choosing his own local court to administer his property to the prejudice of foreign creditors.

And assignments for creditors were held void as against an assignee in bankruptcy, where the

laws applicable to like cases, and that this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result." But the Massachusetts case goes further than any of the other authorities. In *Re Reynolds*, 9 Nat. Bankr. Reg. 50, by Bradley, Ch. J., the exclusive supremacy of the bankruptcy courts is announced, whether the state statute is in the nature of an insolvency or a bankruptcy act. Black on Bankruptcy, p. 128, observes: "Several cases are found in the reports of the inferior Federal courts wherein it is held that, although an insolvent corporation is in the hands of a receiver appointed by a state court, this will not deprive the national courts of jurisdiction in proceedings against the corporation under the bankruptcy law; for it is said any other construction

would entirely defeat the operation of that law." Some of the cases heretofore noticed are cited, and the court continues: "But this view is contradicted by a considerable body of authorities."

Of relator's citations: The case of *Boese v. King*, 108 U. S. 379, 27 L. ed. 760, was where an assignment was made under the state insolvency law of New Jersey, entitled "An Act to Secure to Creditors an Equal and Just Division of the Estates of Debtors Who Convey to Assignees for the Benefit of Creditors." The act provided, among other things, that every conveyance or assignment by a debtor of his estate, real or personal or both, in trust, to an assignee for the benefit of creditors, shall be made for their equal benefit, in proportion to their several demands to the net amount that shall come to the hands of the assignee for distribution;

assignment was made with the intent to prevent the property from being distributed under the bankrupt act. *Re Temple* (1876) 17 Nat. Bankr. Reg. 345, 4 Savvy. 92.

And so where it was held that as the result was to prevent the property from being distributed under the bankrupt act, the assignment was held to have been made with that view, and was void as against the assignee in bankruptcy. *Macdonald v. Moore* (1876) 15 Nat. Bankr. Reg. 26, 1 Abb. N. C. 53; *Harding v. Crosby* (1879) 17 Blatchf. 348; *Re Cohn* (1870) 6 Nat. Bankr. Reg. 379.

And an assignment for creditors was held void as against the assignee in bankruptcy on the ground that the assignment deprived the creditors of the selection of the assignee, and of the aid of the Federal court. *Re Walker* (1877) 18 Nat. Bankr. Reg. 56.

And where an assignment was held to have been made with intent to defeat the bankrupt law, it was void as against the assignee in bankruptcy. *Linder v. Lewis* (1879) 4 Fed. Rep. 818; *Jackson v. McCulloch* (1871) 1 Woods, 433, 13 Nat. Bankr. Reg. 283; *Re Belsenthal* (1878) 10 Ben. 42, 18 Nat. Bankr. Reg. 120, (1877) 14 Blatchf. 146, 15 Nat. Bankr. Reg. 228.

Some cases avoided the assignment as against the assignee for creditors on the ground that such conveyances were attempts to defeat the bankrupt act, and were also a fraud upon the bankrupt law. *Re Stubbs* (1870) 4 Nat. Bankr. Reg. 376.

So, an assignment by a creditor, made within six months of bankrupt proceedings, was void as against an assignee in bankruptcy, as the bankrupt must have contemplated the results of his acts, which were a fraud upon the law. *Re Cohn* (1870) 6 Nat. Bankr. Reg. 379.

And where an assignment for creditors, made within six months of bankrupt proceedings, was attacked by an assignee in bankruptcy in time, it was held void, as contemplating a distribution of his property otherwise than as provided by the bankrupt law, and as an attempt to defeat its operation and evade its provisions, and was a fraud upon the bankrupt law. *Barnewall v. Jones* (1876) 14 Nat. Bankr. Reg. 278.

A deed of assignment to pay certain debts preferentially, made within four months prior to voluntary proceedings in bankruptcy, the amount assigned being insufficient to pay all debts in full, was prima facie void as against an assignee in bankruptcy as an apparent attempt to defeat the bankrupt law, and was held to have been made in fraud of the bankrupt 45 L. R. A.

act. *Stobaugh v. Mills* (1873) 8 Nat. Bankr. Reg. 361.

An assignment for creditors was held void as against an assignee for creditors as a fraud upon the bankrupt act. *Re Meyer* (1869) 2 Nat. Bankr. Reg. 422.

In this case the bankrupt was insolvent when he made the assignment, and the assignee then had reasonable cause to believe him to be insolvent, and that he was contemplating going into bankruptcy, and that a fraud on the bankrupt act was intended. It was also held that an assignment not made in the usual and ordinary course of business was prima facie fraudulent under the bankrupt act, § 35.

An assignment for creditors was held void as against an assignee in bankruptcy on the ground that it was a fraud on the bankrupt law, defeating its operation, because providing for a different administration. *Platt v. Preston* (1879) 19 Nat. Bankr. Reg. 241.

In *Re Randall* (1869) Deady, 557, it was said that an assignment for creditors would be presumed to have been made with the intention of defeating the bankrupt act of 1867.

An assignment for creditors was held void in a suit by an assignee in bankruptcy against the assignee for creditors. *Waring v. Buchanan* (1879) 19 Nat. Bankr. Reg. 502.

In this case the court said that "the general assignment was clearly void as against the assignee in bankruptcy under the well-settled rule of construction of the bankrupt law as applied in this court."

And an assignment was held void at the suit of the assignee in bankruptcy on the ground that the assignee for creditors knew the assignor to be insolvent at the time the assignment was made. *Wald v. Wehl* (1890) 6 Fed. Rep. 163, 18 Blatchf. 405.

In this case it was said that the assignment was not avoided for fraud, but because contrary to the statute.

In *Re Kurth* (1878) 17 Nat. Bankr. Reg. 573, an assignee for creditors was compelled to pay to the assignee in bankruptcy the proceeds of property in his hands.

In *Re Frisbee* (1877) 14 Blatchf. 185, it was said that a general assignment without preference could be avoided by the assignee in bankruptcy within the time limited by statute.

In *Re Skoll* (1877) 16 Nat. Bankr. Reg. 175, it was said that an assignment for creditors was voidable, and that creditors could by bankruptcy proceedings set it aside.

While the weight of authority was that an assignee in bankruptcy might avoid a deed of assignment if attacked in time, there were some

and all preferences of one creditor over another, or whereby one shall be first paid or have a greater proportion in respect to his claim than another, shall be deemed fraudulent and void. The assignees under such assignment converted the assets of the assignor into money and deposited it for convenience of distribution in a bank in New York city. No proceedings in bankruptcy were ever taken against the assignor. Creditors in New York of the assignor procured judgment in the supreme court of that state, and endeavored to secure satisfaction thereof from the fund deposited by the assignees in the bank. The supreme court of New York held that the assignment in New Jersey was void because of the operation of the general bankruptcy law, but on writ of error to the Supreme Court of the United States from the court of appeals it was said: "The supreme

court of New York ruled that the statute of New Jersey was, in its nature and effect, a bankrupt law; and the power conferred upon Congress to establish a uniform system of bankruptcy, having been exercised by the passage of the act of 1867, the latter act wholly suspended the operation of the local statute as to all cases within its purview. Consequently, it was held the assignment was not valid for any purpose. The court of appeals, recognizing the paramount nature of the bankrupt act of Congress, and assuming that the 14th section of the New Jersey statute, relating to the effect upon the claims of creditors who exhibit their demands for a dividend, was inconsistent with that act, and therefore inoperative, adjudged that other portions of the local statute providing for the equal distribution of the debtor's property among his creditors, and regulat-

cases, one of them a Federal case, which refused to adopt this doctrine unless the assignment was shown to be either fraudulent or preferential, or made to defeat the purpose of the bankrupt law.

So, in *Sedgwick v. Place* (1868) 1 Nat. Bankr. Reg. 673 (1869) 3 Ben. 360, 3 Nat. Bankr. Reg. 139. It was held that a general assignment by insolvent debtors under the New York state law, not fraudulent as to creditors or as to the bankrupt act, was valid, and the property would not be turned over to the assignee in bankruptcy. In this case there was no proof of any intention to defraud creditors, or to prevent the property of the debtor from coming to the assignee in bankruptcy.

This case was approved and followed in *Haas v. O'Brien* (1876) 66 N. Y. 597, holding that a general assignment for creditors, made by an insolvent debtor in good faith without intent to evade the bankrupt act, was not void although proceedings were brought by the assignee in bankruptcy to set it aside, and the assignment was made within six months prior to the commencement of bankrupt proceedings. The court said that the bankrupt act was aimed at fraud and to prevent preferences, and that when neither existed it could not be claimed that an equitable distribution of the insolvent's estate was in violation of law.

In this case it was said: "Although some of these cases appear to sanction the doctrine that the bankrupt act absorbs and swallows up all other proceedings in the state courts, there are the strongest reasons for holding that the act was not intended to interfere with the debtor, where, with an honest purpose and entire good faith, he sought to apply his property for the benefit of his creditors, precisely in the same manner as was intended, and as would have been done by proceedings under the bankrupt act, and probably at less expense and far more to the advantage of the creditors. The act was aimed at fraud and to prevent preferences, and where neither of these are apparent, there is no ground for claiming that an equitable distribution of the insolvent's estate is in violation of the law."

In this case the cases of *Foster v. Hackley* (1869) 2 Nat. Bankr. Reg. 406; *Re Smith* (1869) 3 Nat. Bankr. Reg. 377; *Re Goldschmidt* (1869) 3 Ben. 379, 3 Nat. Bankr. Reg. 164; *Spicer v. Ward* (1869) 3 Nat. Bankr. Reg. 512; *Re Randall* (1869) 3 Nat. Bankr. Reg. 18; *Re Pierce* (1869) 3 Nat. Bankr. Reg. 258; *Re Wells* (1867) 1 Nat. Bankr. Reg. 171; *Re Burt* (1870) 1 Dill. 439; and *Hardy v. Blininger* (1870) 4 45 L. R. A.

Nat. Bankr. Reg. 262,—were distinguished, on the ground that it did not appear in any of these cases that the assignments were made in good faith and with no design to evade the bankrupt act.

An assignee in bankruptcy was refused leave by the state court to sue a receiver under a voluntary assignment appointed by such court. *Re Platt* (1877) 9 Jones & S. 513, 52 How. Pr. 468.

In this case the court said that assignments like this had been held by the highest court of the state to be valid under the bankrupt act, while the Federal courts had reached a different conclusion. The court further said that leave would not be granted to have an officer of that court sued in a tribunal which administered law differently, and whose jurisdiction was invoked to nullify its conclusions until the conflict was determined by the Supreme Court of the United States.

5. Effect on intervening judgments and executions.

Where an assignment was availed by an assignee in bankruptcy an intervening execution did not thereby obtain priority. *Linder v. Lewis* (1879) 4 Fed. Rep. 318; *Re Walker* (1877) 18 Nat. Bankr. Reg. 56; *Waring v. Buchanan* (1879) 19 Nat. Bankr. Reg. 502.

In *Reed v. McIntyre* (1878) 98 U. S. 507, 25 L. ed. 171, where an assignee for creditors surrendered the property to an assignee in bankruptcy, it was held that an intervening execution creditor could not claim priority although the adjudication in bankruptcy was on the ground that the assignment was made to hinder, delay, or defraud creditors, as the assignment was not invalid except as against bankrupt proceedings.

A judgment rendered after a deed of assignment for creditors was made did not affect the title to the property, although the debtor was afterwards adjudged a bankrupt, where no proceedings were taken to set aside the assignment. *Beiden v. Smith* (1878) 16 Nat. Bankr. Reg. 302.

The court said that if the assignment was set aside by the Federal court the judgment would not become a lien.

In *Re Belsenthal* (1877) 14 Blatchf. 140, 15 Nat. Bankr. Reg. 228, where the United States circuit court held that an assignment was void as against the assignee in bankruptcy as contrary to the bankrupt law, it also held that an intervening execution was not entitled to priority. Following *Johnson v. Rogers* (1876) 15 Nat. Bankr. Reg. 1, which said that "if the assignment had been void, only because contrary

ing the general conduct of the assignee, were not inconsistent with, nor were they necessarily suspended by, the act of 1867; further, that the New Jersey statute did not create the right to make voluntary assignments for the equal benefit of creditors, but was only restrictive of a previously existing right, and imposed, for the benefit of creditors, salutary safeguards around its exercise. Consequently, had the whole of the New Jersey statute been superseded, the right of a debtor to make a voluntary assignment would still have existed. The assignment, as a transfer of the debtor's property, was therefore upheld as in harmony with the general object and purposes of the bankrupt act, unassailable by reason merely of the fact that some of the provisions of the local statute may have been suspended by the act of 1867." "We are of opinion that, except as against proceedings instituted under the

bankrupt act for the purpose of securing the administration of the property in the bankruptcy court, the assignment, having been made without intent to hinder, delay, or defraud creditors, was valid, for at least the purpose of securing an equal distribution of the estate among all the creditors of Locke, in proportion to their several demands." The following authorities also seem to be analogous: *Watson v. Citizens' Sav. Bank*, 2 Hughes, 200; *Re National L. Ins. Co.* 6 Biss. 35; *Smith v. Buchanan*, 8 Blatchf. 153; *Watson v. Citizens' Sav. Bank*, 5 S. C. N. S. 159; *Eyster v. Gaff*, 91 U. S. 521, 23 L. ed. 403; *Buchanan v. Smith*, 16 Wall. 277, 21 L. ed. 280; Collier, Bankruptcy, pp. 19, 20; *Reed v. Taylor*, 32 Iowa, 209, 7 Am. Rep. 180.

2. The test of insolvency under the Federal bankruptcy law of 1898 is thus stated: "A person shall be deemed insolvent, within the provisions of this act, whenever the ag-

to the provisions of the bankrupt act, and the assignee in bankruptcy had obtained a decree setting it aside upon this ground, the judgments of the several creditors would not have been liens upon the real estate;" and following *Everett v. Stone* (1844) 3 Story, 446, which was a case under the bankrupt act of 1842.

The *Belsenthal* Case refused to follow *Macdonald v. Moore* (1876) 15 Nat. Bankr. Reg. 26, 1 Abb. N. C. 53, and *McLean v. Meline* (1843) 3 McLean, 190. The latter case was a decision under the bankrupt act of 1842.

In *Re Belsenthal* (1878) 10 Ben. 42, 18 Nat. Bankr. Reg. 120, where the sheriff had subsequently obtained a judgment in the state court that this assignment was fraudulent, the Federal court then held that the sheriff was entitled to the proceeds as against the assignee in bankruptcy, as the judgment operated as an estoppel and the assignee in bankruptcy was a privy in title.

In *Hunker v. Bing* (1881) 9 Fed. Rep. 277, it was said that if the assignment "had been a valid assignment under the state law, these executions would not have attached, and upon the decree in this action setting aside the voluntary assignment, the benefits of the decree, it is settled, would have inured only to the assignee in bankruptcy, and the execution creditors would have remained without lien or preference as before."

In *Re Croughwell* (1878) 9 Ben. 360, where a voluntary assignment was made December 20, 1877, and an execution levied January 5, 1878, and a petition in bankruptcy filed against the debtor January 9, and the assignee in bankruptcy obtained possession of the property, the court refused the application of the sheriff to subject the property to the execution, who claimed that the assignment was void for failure to file an inventory in time, and the court held that the assignee would be allowed an opportunity to avoid the assignment and recover the property on any ground which might exist.

But in *Dolson v. Kerr* (1877) 52 How. Pr. 481, it was held that an assignee for creditors could not recover property sold under an intervening execution where the debtor was subsequently adjudged a bankrupt. In this case the assignee for creditors had by an instrument in writing surrendered his rights to the assignee in bankruptcy, and the court held that he could not recover for himself or for the benefit of the assignee in bankruptcy, saying: "You can't recover for the benefit of the assignee in bankruptcy, simply and only because the general assignee in bankruptcy does not take priority 45 L. R. A.

over the judgment and execution creditor." This statement is contrary to the weight of authority on this question.

In *Macdonald v. Moore* (1876) 15 Nat. Bankr. Reg. 26, 1 Abb. N. C. 53, it was held that an intervening execution was a lien superior to the claim of an assignee in bankruptcy where the assignment was avoided at the suit of an assignee in bankruptcy. But a note to this case in the Federal Cases, No. 8763, says that on this point the case was reversed by the circuit court July 1, 1878.

The authority of this case was denied in *Re Steele* (1877) 7 Biss. 504, 16 Nat. Bankr. Reg. 105.

6. Allowances to assignees for creditors where the assignment was avoided.

In regard to the expenses and allowances due an assignee for creditors where the assignment was set aside at the instance of an assignee in bankruptcy, the courts differed as to whether any allowance should be made to the assignee for creditors, and if so what should be allowed. It seems that the weight of authority was that compensation for the assignee's services in acts contrary to the bankrupt act, and compensation for his attorney's fees, should not be allowed, but that he was entitled to compensation for such acts as were for the interest of the creditors in preservation of the property.

Where a Federal court set aside a deed of assignment for creditors made within six months before proceedings in bankruptcy, it was held that an allowance of the expenses and charges of the assignee for creditors should not be made where it could not be guarded so as to prevent duplicate charges, and no allowance should be made to include any reservation for the expense of a future settlement in the state court. *Burkholder v. Stump* (1871) 8 Phila. 172, 4 Nat. Bankr. Reg. 597.

This case was approved in *Platt v. Archer* (1876) 13 Blatchf. 351, where the question was as to a receiver's fees as against an assignee in bankruptcy.

And compensation for services of an assignee for creditors was refused where an assignment was avoided. *Re Stubbs* (1870) 4 Nat. Bankr. Reg. 376; *Re Kurth* (1878) 17 Nat. Bankr. Reg. 573.

And an allowance for attorney's fees was refused. *Re Col'n* (1872) 6 Nat. Bankr. Reg. 379.

An assignee for creditors should be allowed for disbursements made legitimately for collections, as this was beneficial to the estate. But

gregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." It will thus be seen that the allegations of the complaint in the suit for the receiver in the case at bar would not conclusively make a case under the Federal bankruptcy law. It is true that the fact of a fraudulent preference would be a single act of bankruptcy under that law. The statutes of this state (Code Proc. § 326, subd. 5; 2 Ballinger's Anno. Codes & Stat. § 5456; 2 Hill's Code, § 326) expressly authorize the court to appoint receivers of corporations which are insolvent or are in imminent danger of insolvency; and this court has uniformly affirmed the doctrine that the assets of such a corporation are always a trust fund to be administered in equity for the

benefit of the creditors ratably and equally. *Thompson v. Huron Lumber Co.* 4 Wash. 600; *Conover v. Hull*, 10 Wash. 673; *Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co.* 16 Wash. 681. It would seem that a corporation created under the laws of this state should be subject to the chancery jurisdiction of the courts, and that creditors of such corporation should have their ordinary remedies under existing state laws until such corporation is adjudged a bankrupt under the law of Congress and by the proper tribunal. Unquestionably, upon such adjudication the power of the state court to further proceed ceases.

The writ will issue directing the Superior Court to proceed with the cause in consonance with this opinion.

Gordon, Ch. J., and Anders, Dunbar, and Fullerton, JJ., concur.

the claims for personal services and for attorney's fees should be disallowed in his settlement with the assignee in bankruptcy. *Re Lains* (1877) 16 Nat. Bankr. Reg. 168.

The court held that these claims could only be allowed as other claims against the bankrupt's estate, and be proved against it.

In *Clark v. Marx* (1872) 6 Ben. 275, where an assignment was set aside, it was said that the assignee should not be allowed for any disbursements or expenses which he made or incurred by virtue of such transfer or to maintain his title or possession thereunder; but that, so far as he acted with the permission of the court given in its orders in making sales of the property, he ought to be allowed such expenses as were necessary.

In *Hunker v. Bing* (1881) 9 Fed. Rep. 277, where the assignment for creditors was avoided by the assignee in bankruptcy as void under the state law for failure of the assignee to file an inventory within thirty days, it was held that the assignee was not entitled to any compensation as "assignee." But for acts performed in the way of services and disbursements, which, considered independent of the assignment itself, were lawfully rendered and were beneficial to the general body of creditors or necessary to the care of the property, or its conversion into money, allowance should be made, and the sum of \$500 for attorney's fees was allowed covering charges for collection suits, for advice concerning disputed claims, and for negotiations concerning litigations beneficial to the creditors.

This case cites *Havemeyer v. Loeb*, MS. Dec. 11, 1877.

In *Jones v. Kinney* (1871) 5 Ben. 259, where an assignment was set aside, the assignee was allowed for disbursements to lawful creditors before bankrupt proceedings. But as to disbursements and other expenses the question was reserved until the master should make a report, and that evidence could be given by either side.

In *Wald v. Wehl* (1881) 6 Fed. Rep. 163, where the assignment was avoided only under the bankrupt statute, the assignee was allowed on accounting for all proper services and expenses under the assignment prior to the bringing of this suit to avoid the same.

But in the following cases, where the assignment was set aside at the instance of an assignee in bankruptcy, the assignee for creditors was allowed his expenses for making a sale. *Re Cohn* (1872) 6 Nat. Bankr. Reg. 379; *Stobaugh v. Mills* (1873) 8 Nat. Bankr. Reg. 361.

And he was allowed his expense of administration of the estate while in his hands. *Re Kurth* (1878) 17 Nat. Bankr. Reg. 573.

And he was allowed compensation for his services in such a case. *Catlin v. Foster* (1879) 3 Nat. Bankr. Reg. 540.

And in such a case was allowed for his services and counsel fees. *Macdonald v. Moore* (1876) 8 Ben. 579, 15 Nat. Bankr. Reg. 26.

In *Re Cohn* (1872) 6 Nat. Bankr. Reg. 379, the court referred to *Catlin v. Foster*, 3 Nat. Bankr. Reg. 540, *Re Stubbs* (1870) 4 Nat. Bankr. Reg. 376, and *Burkholder v. Stump* (1871) 4 Nat. Bankr. Reg. 597, and said that the decisions on this point were variant; and further said: "In some of the judicial districts of the United States the allowance is refused wholly, and occasional precedents of contrary directions here will not be followed, if to follow them would result in any injustice to creditors."

c. Cases under bankrupt act of 1898.

In cases arising under the bankrupt act of 1898 it is uniformly held that an assignment for creditors will be avoided by bankrupt proceedings where it is attacked in time, and the Federal court will take care of the assets and administer them in that court. The Federal act of 1898, providing that an assignment for creditors is an act of bankruptcy, is held to denounce such assignments as contrary to the Federal act.

Such an assignment constitutes an act of bankruptcy under this statute, even if the debtor is not in fact insolvent. His insolvency cannot be denied for the purpose of preventing bankruptcy proceedings, but is for that purpose conclusively established by making the assignment. *West Co. v. Lea* (1899) 174 U. S. 590, *George M. West Co. v. Lea Bros.* 43 L. ed. 1098.

An assignment for creditors is void as against bankrupt proceedings if attacked in time, and the assignee is accountable to the trustee in bankruptcy. *Davis v. Bohle* (1899) 92 Fed. Rep. 325, *Affirming Re Sievers* (1899) 91 Fed. Rep. 366; *Caruthers v. Curtis* (1899) 1 Nat. Bankr. News, 41.

Under bankrupt act of 1898 the bankrupt court may, on summary petition, compel an assignee for creditors to surrender the property to a receiver appointed by the bankrupt court. *Re Smith* (1899) 92 Fed. Rep. 135.

And the Federal court will enjoin an assignee for creditors from using the assets, where the assignment is within four months prior to the petition in bankruptcy. *Re Gutwillig* (1899) 92 Fed. Rep. 337. In this case it is held to be

in fraud of creditors and in fraud of the bankrupt act.

An injunction will be granted in involuntary bankrupt proceedings, requiring an assignee for creditors of a corporation, under a deed of July 13, 1898, to hold the assets subject to the order of the Federal court. *Leldigh Carriage Co. v. Stengel* (1899) 1 Nat. Bankr. News, 387.

Where an assignment for creditors was made December 1, 1898, and on December 8 a petition in involuntary bankruptcy was filed, the Federal court appointed a receiver to take possession of the assets. *Rautman v. Hopkins* (1899) 1 Nat. Bankr. News, 41.

And a receiver to take charge of the assets will be appointed by the Federal court, where a corporation made an assignment and its creditors filed a petition in bankruptcy. *Re John A. Etheridge Furniture Co.* (1899) 92 Fed. Rep. 329.

Where an assignment was made December 12, 1898, by a corporation, and a receiver appointed, and the same day involuntary proceedings in bankruptcy begun, the Federal court enjoined further proceedings in the state court. *Lea v. George M. West Co.* (1899) 91 Fed. Rep. 237. *Affirmed West Co. v. Lea*, 174 U. S. 590, *George M. West Co. v. Lea Bros.* 43 L. ed. 1098.

In *Re Ogles* (1899) 93 Fed. Rep. 426, it was said that it is proper to compel a transfer of assets to the assignee in bankruptcy, where an assignment has been made under the insolvent laws of the state.

In *Re Buntrock Clothing Co.* (1899) 92 Fed. Rep. 886, it was said that an assignment for creditors is void when attacked by bankrupt proceedings.

The bankrupt act of 1898 superseded the state insolvent laws, and the priorities for labor claims are to be adjusted by the bankrupt law, and not by Ill. Rev. Stat. 1898, p. 172, chap. 10, § 6, providing priority for wages earned within three months next preceding an assignment for creditors. *Re Rouse, H. & Co.* (1899) 91 Fed. Rep. 96, 33 C. C. A. 356. But see *Re Wright* (1899) 1 Nat. Bankr. News, 428.

But in *Re Romanow* (1899) 92 Fed. Rep. 510, it was held that, although an assignment for creditors is an act of bankruptcy, and is avoided by the adjudication, yet it is not a void instrument, but a voidable one, and until the adjudication it is valid; and the creditors who assent to the assignment are bound by their assent, and cannot file a petition in involuntary bankruptcy against the debtor.

And an assignment made within thirty days of the approval of the bankrupt act of 1898 is not void, as no bankrupt proceedings can be taken within one month. *Devlin v. Hellwell* (1899) 1 Nat. Bankr. News, 41. In this case it was said that the bankrupt act of 1898 did not go into force so as to render insolvency proceedings under the state law void, within or during the time that no proceedings could be taken thereunder, and the act provides that no petition for voluntary bankruptcy should be filed within one month, or for involuntary bankruptcy within four months, and within that time an assignment under the state law would be valid.

In *Re Slevers* (1899) 91 Fed. Rep. 366, it was said that an assignment is not void unless proceedings in bankruptcy are instituted.

An inquiry into the circumstances of making a deed of assignment in May, 1897, will not be allowed unless it is probable that property is still withheld. *Re Hayden* (1899) 1 Nat. Bankr. News, 265.

A creditor receiving a *pro rata* under an assignment held void by the state court is not precluded from claiming the balance in bankrupt 45 L. R. A.

proceedings. *Re Folb* (1898) 1 Am. Bankr. Rep. 22.

As to whether an assignment for creditors is void or voidable under the bankrupt act of 1896 is not decided. *Re Curtis* (1899) 94 Fed. Rep. 630.

IV. Effect of bankrupt law on insolvent proceedings under state laws.

a. On subsequent proceedings.

It is generally held that the operation of a state insolvent law is suspended by the passage of a Federal bankrupt act, and that after the passage of the same proceedings cannot be instituted under state insolvent laws. *Seattle Coal & Transp. Co. v. Thomas* (1881) 57 Cal. 197; *Re Curtis* (1899) 94 Fed. Rep. 630; *Re Smith* (1899) 92 Fed. Rep. 135; *Re McKee* (1899) 1 Nat. Bankr. News, 139; *Beach v. Miller* (1860) 15 La. Ann. 601; *Fisk v. Montgomery* (1869) 21 La. Ann. 446; *Cassard v. Kroner* (1869) 4 Nat. Bankr. Reg. 569; *Van Nostrand v. Carr* (1869) 30 Md. 128; *Van Nostrand v. Barr*, 2 Nat. Bankr. Reg. 485; *Fisher v. Currier* (1844) 7 Met. 424; *Ex parte Eames* (1842) 2 Story, 322; *Griswold v. Pratt* (1845) 9 Met. 16; *Parmenter Mfg. Co. v. Hamilton* (1898) 172 Mass. 178; *Foley Bean Lumber Co. v. Sawyer* (1890) (Minn.) 78 N. W. 1038; *Shears v. Solinger* (1870) 10 Abb. Pr. N. S. 287; *Re John A. Etheridge Furniture Co.* (1899) 92 Fed. Rep. 329; *French v. O'Brien* (1876) 52 How. Pr. 394; *Leldigh Carriage Co. v. Stengel* (1899) 1 Nat. Bankr. News, 387; *Com. v. O'Hara* (1867) 6 Phila. 402, 1 Nat. Bankr. Reg. 86; *Shryock v. Bashore* (1875) 11 Phila. 565; *Barber v. Rodgers* (1872) 71 Pa. 362; *Re Reynolds* (1867) 8 R. I. 485, 5 Am. Rep. 615; *Re Bruse-Ritter Co.* (1898) 1 Am. Bankr. Rep. 58.

Of the foregoing cases some hold that proceedings under state laws concerning voluntary assignments like state insolvent laws are suspended. *Re Smith* (1899) 92 Fed. Rep. 135; *Re McKee* (1899) 1 Nat. Bankr. News, 139; *Re John A. Etheridge Furniture Co.* (1899) 92 Fed. Rep. 329; *Leldigh Carriage Co. v. Stengel* (1899) 1 Nat. Bankr. News, 387.

And in the following cases it was said that the insolvent laws of the state are suspended by a Federal bankrupt act, and that after the passage of the bankrupt act proceedings cannot be instituted under the state law. *Clarke v. Rosenda* (1843) 5 Rob. (La.) 27; *Lyman v. Bond* (1881) 130 Mass. 201; *Boese v. King* (1882) 103 U. S. 379, 27 L. ed. 760, *Affirming* (1879) 78 N. Y. 471, *Reversing Boese v. Locke* (1879) 17 Hun, 270; *Chamberlain v. Perkins* (1871) 51 N. H. 336; *Re Slevers* (1899) 91 Fed. Rep. 366; *Atkinson v. Purdy* (1844) *Crabbe*, 551; *STATE, STROHL, v. KING COUNTY SUPER. CT.* (1899); *Re Miller* (1874) 6 Biss. 30; *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 4 L. ed. 529.

So, in the following cases it was held that proceedings to wind up a corporation and distribute the property under the state insolvent law cannot be had after the passage of the bankrupt law: *Parmenter Mfg. Co. v. Hamilton* (1898) 172 Mass. 178; *Re John A. Etheridge Furniture Co.* (1899) 92 Fed. Rep. 329; *French v. O'Brien* (1876) 52 How. Pr. 394; *Leldigh Carriage Co. v. Stengel* (1899) 1 Nat. Bankr. News, 387; *Re Bruse-Ritter Co.* (1898) 1 Am. Bankr. Rep. 58.

In *Re Safe Deposit & Sav. Inst.* (1872) 7 Nat. Bankr. Reg. 302, the court refused to decide whether the bankrupt law *ipso facto* suspended the state insolvent law.

In *Beck v. Parker* (1870) 65 Pa. 262, 3 Am. Rep. 625, it was said that whether the bankrupt

act suspended the state insolvent law is not necessary to be decided.

A discharge in bankruptcy in December, 1898, applies to debts for which a discharge was refused in state insolvent proceedings June 15, 1898. *Dean v. Justices of Municipal Ct.* (1899) 1 Nat. Bankr. News, 336.

The refusal of a discharge in bankruptcy will prevent a discharge from the same debts, under Cal. insolvent laws 1880. *Re Smith* (1885) 68 Cal. 203.

In *Re Meyers* (1899) 1 Nat. Bankr. News, 293, it was said that the words "state insolvent laws," in the bankrupt act of 1898, referred to local bankrupt law, as Massachusetts insolvent laws, and New York Code of Civil Procedure, §§ 2149-2157.

Massachusetts insolvent laws, Pub. Stat. chap. 157, § 104, providing that in the distribution of an insolvent's estate the debts entitled to priority are those due to the United States and to the state, and to a county, city, or a town therein, is not suspended by the bankrupt act of 1898, and a debt due to a county is entitled to priority in the bankrupt court. *Re Wright* (1899) 1 Nat. Bankr. News, 428.

In this case it was said that in *Re Rouse, H. & Co.* (1899) 91 Fed. Rep. 96, 33 C. C. A. 356, it was held that a claim for labor performed more than three months prior to the bankrupt proceedings and entitled to priority under the insolvent laws of a state, was not entitled to priority under the bankrupt laws; but that decision was rested solely upon the ground that the specific provision of the bankrupt act concerning labor claims was intended to override the provisions relating to wages made by the state statutes, and it was conceded that the state statute would have been valid in the absence of express provisions of the bankrupt act concerning wages. In this case the bankrupt act makes no specific provision for debts due to counties.

b. On pending proceedings.

Proceedings under state insolvent laws pending at the time of the passage of a bankrupt act are not affected by the latter act. *Larrabee v. Talbott* (1847) 5 Gill, 426, 46 Am. Dec. 637; *Sullivan v. Hieskill* (1843) *Crabbe*, 525; *Meerkins v. Their Creditors* (1867) 19 La. Ann. 497; *West v. His Creditors* (1844) 8 Rob. (La.) 123; *Dwight v. Simon* (1849) 4 La. Ann. 490.

So, proceedings filed May 1, 1867, under California insolvent laws, are not affected by the bankrupt act which took effect June 1, 1867. *Martin v. Berry* (1869) 37 Cal. 208, 2 Nat. Bankr. Reg. 629.

And proceedings commenced under N. H. insolvent laws March 15, 1867, were not affected by the United States bankrupt act, which did not go into operation so as to suspend state insolvent laws until June 1, 1867. *Chamberlain v. Perkins* (1871) 51 N. H. 336.

Proceedings under Massachusetts insolvent laws commenced prior to June 1, 1867, were not affected by the mere passage of the bankrupt act March 2, 1867. *Day v. Bardwell* (1867) 97 Mass. 246.

An insolvent discharge under a state law May 25, 1867, was not invalidated by the bankrupt act which took effect June 1, 1867. *Augsbury v. Crossman* (1877) 10 Hun, 389.

Under bankrupt act, § 39, Amended June 22, 1874, providing that a person committing an act of bankruptcy shall be adjudged a bankrupt on the petition of one or more of his creditors who shall constitute one fourth thereof at least in number, the aggregate of whose debts provable under the act amounts to at least one third of the debts so provable, providing that such petition is brought within six months after such 45 L. R. A.

act of bankruptcy has been committed, creditors may institute insolvent proceedings under the state law where proceedings in bankruptcy are not instituted within six months thereafter. *Geery's Appeal* (1876) 43 Conn. 289, 21 Am. Rep. 653. In this case it was said that where a state insolvent law and a Federal bankrupt law conflict the United States law will prevail.

In *Bates v. Rowley* (1876) 33 Phila. Leg. Int. 202, it was held that Pa. act July 12, 1842, abolishing imprisonment for debt and to punish fraudulent debtors, was not superseded by the bankrupt act of Congress, in cases where, by reason of fraud, embezzlement, etc., the proceedings in bankruptcy would not discharge the debtor. The court said that the state insolvent laws were not entirely abrogated, but existed until the bankrupt law attached upon the person and property of the debtor.

In *Beach v. Miller* (1860) 15 La. Ann. 601, it was said that rights vested by a *cessio bonorum* cannot be impaired by the subsequent passage of a bankrupt act.

An assignee in bankruptcy cannot maintain a suit in equity to recover from the bankrupt's assignee in insolvency, appointed several years before, under the insolvent laws of Massachusetts, real estate purchased in good faith by the defendant for a nominal consideration, it then having no market value, within one month before the proceedings in bankruptcy, although the property has since increased considerably in value. *Goldsmith v. Hapgood* (1875) *Holmes*, 454. In this case it was said that no fraud was proved on the part of the purchaser, and nothing passed to the assignee under the bankrupt act, and they cannot maintain this suit.

Proceedings under Ky. act March 10, 1856, providing that a preference in contemplation of insolvency shall operate as an assignment for all creditors, were not affected by the mere existence of the bankrupt law of 1867. *Ebersole v. Adams* (1873) 10 Bush, 83, 13 Nat. Bankr. Reg. 141; *Linticum v. Fenley* (1874) 11 Bush, 131.

Where the record in insolvency proceedings did not show that the insolvent owes more than \$300, they were not affected by the existence of the bankrupt act of 1867. *Shepardson's Appeal* (1869) 36 Conn. 23.

The Ohio statute regulating the mode of administering assignments for creditors, was not an insolvent law, and was not suspended by the bankrupt act of 1867. *Mayer v. Hellman* (1875) 91 U. S. 496, 23 L. ed. 377, 13 Nat. Bankr. Reg. 440.

New Hampshire Gen. Stat. chap. 167, § 10, providing that when upon the representation of the guardian of an infant or spendthrift the estate is not sufficient to discharge the just debts due therefrom, the estate may be settled as insolvent, was not suspended by the bankrupt law of 1867, as this statute is not regarded as a general assignment law. *Hawkins v. Learned* (1874) 54 N. H. 333.

c. On proceedings after the repeal of the bankrupt law.

A state insolvent law suspended by the passage of the bankrupt law is revived on the repeal of the bankrupt law, and applies to acts occurring during such suspension. *Atkins v. Spear* (1844) 8 Met. 490; *Austin v. Caverly* (1845) 10 Met. 332; *Smith v. His Creditors* (1881) 59 Cal. 267; *Lewis v. Santa Clara County Clerk* (1880) 55 Cal. 604; *Boedefeld v. Reed* (1880) 55 Cal. 299; *Palmer v. Hixon* (1883) 74 Me. 447.

So, proceedings may be had under a state insolvent law after the bankrupt law is re-

pealed, although the state law was passed during the existence of the Federal statute. *Re Damon* (1879) 70 Me. 153.

And on the repeal of the bankrupt law the state insolvent law revives and goes into active operation. *Austin v. Caverly* (1845) 10 Met. 332; *Tua v. Carriere* (1886) 117 U. S. 201, 20 L. ed. 855, Affirming 24 Fed. Rep. 346; *Orr v. Lisso* (1861) 33 La. Ann. 476; *Butler v. Goreley* (1892) 146 U. S. 308, 36 L. ed. 981.

Massachusetts insolvent law, Stat. 1838, chap. 163, providing that all attachments shall be dissolved by an assignment for creditors, suspended by the bankrupt act of 1841, was revived on the repeal of the bankrupt act March 3, 1843, and an attachment made during the existence of the bankrupt law was dissolved after its repeal by proceedings under the state insolvent law. *Ward v. Proctor* (1843) 7 Met. 318, 39 Am. Dec. 782.

Where an insolvent discharge was granted January, 1841, and a bankrupt discharged August, 1842, under the bankrupt act of 1842, the repeal of the bankrupt act March 3, 1843, revived the state insolvent law, and the insolvent trustee was entitled to property acquired by descent December, 1843, under Md. act 1834, chap. 293, providing that the property which accrues to the insolvent after his discharge by inheritance shall vest in the trustee for the benefit of creditors who were such at the time of his application. *Lavender v. Gosnell* (1873) 12 Nat. Bankr. Reg. 283.

It was also held that the bankrupt act superseded the state insolvent law, and that on the repeal of the former the latter revived.

In this case it was said that the exercise by Congress of the power to establish a uniform system of bankruptcy is paramount and exclusive, and suspends the insolvent law of the state.

Since the adoption of the Constitution of the United States, a state has authority to pass a bankrupt law provided such law does not impair the obligation of contracts, within the meaning of Const. art. 1, § 10, and provided that there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law. *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 4 L. ed. 529.

d. On proceedings for arrest.

A bond to avoid an arrest and to surrender all the debtor's property under a state law is not avoided by the existence of a bankrupt act. Proceedings under the state law may be had if a discharge in bankruptcy is refused, or if bankrupt proceedings are not taken in time. Some cases hold that proceedings under insolvent laws to obtain a discharge from arrest may be had notwithstanding bankrupt proceedings; but on this there is some question. A discharge in bankruptcy will avoid a bond given under an insolvent act.

An arrest bond is not avoided by the existence of a bankrupt act.

A bond given to avoid an arrest is not void, although the general bankrupt law of the United States has suspended for the time being the insolvent law of the state. *Gottschalk v. Meyer* (1876) 28 La. Ann. 885.

In this case the court said that, although the state may be precluded for the time being from enforcing her own bankrupt law, she is not on that account prevented from affording her citizens the means of invoking the bankrupt law of the United States, and whether the creditor's remedy be under the state or national law, he may enforce the presence of the debtor in order that a surrender of his property may be effected.

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In an action on a bond given under N. J. Nixon, Dig. 386, p. 9, April 15, 1846, providing for abolishing imprisonment on civil process in certain cases, it was held that the state law was not affected by the national bankrupt law, as the former furnished relief not afforded by the Federal law. *Steelman v. Mattix* (1873) 36 N. J. L. 344. In this case it was said that the New Jersey act has neither the scope, nor does it subserve the end, of the bankrupt law, and the person who invokes its aid need not be bankrupt or insolvent, although his property is distributed among his creditors.

And the bankrupt act does not affect the right to a discharge from imprisonment for debt.

So, R. I. Rev. Stat. title 8, chap. 198, poor debtor's act, is not suspended or superseded by the bankrupt act of 1867, chap. 91, as the bankrupt act contains no provision specifically adapted to the cases of a poor debtor imprisoned for debt. *Jordan v. Hall* (1869) 9 R. I. 218. In this case it was said that the bankrupt act supercedes the insolvent law of a state. The Rhode Island statute for relief of poor debtors appears to be similar to the insolvent law of Rhode Island, in that it required the same kind of assignments; but the assignee under the insolvent law is required to be sworn and to give bond, and the assignee under the poor law is the keeper of the jail and he is not sworn as assignee.

And in *Re Reynolds* (1867) 8 R. I. 485, 5 Am. Rep. 615, 9 Nat. Bankr. Reg. 50, it was said that the insolvent law of Rhode Island merely discharging a debtor from imprisonment was not in conflict with the bankrupt act of 1867.

In *Shears v. Solhinger* (1870) 10 Abb. Pr. N. S. 287, it was said that the bankrupt act of 1867 did not suspend the New York statute authorizing the discharge of a person from imprisonment for debt.

In *Berthelon v. Betts* (1843) 4 Hill, 577, it was said: "Clearly, therefore, our insolvent laws are no farther suspended than they seek, upon notorious grounds, to seize and distribute the effects of the debtor among his creditors generally. Such is not the effect of that branch of the nonimprisonment law now in question."

So, where the bankrupt law does not discharge from the kind of debt for which the person is imprisoned.

An imprisoned debtor was permitted to file his bond to appear in the Pennsylvania court of common pleas and present his petition for the benefit of the insolvent law and obtain relief from a judgment founded upon fraud, although pending the proceedings he was adjudged a bankrupt, as bankrupt act 1867, § 26, exempted a bankrupt from arrest, except in a civil action founded upon a debt from which his discharge would not release him. *Re Winternitz* (1870) 7 Phila. 380. In this case the court said that to give any other construction would have the effect of leaving the petitioner without redress and be perpetual imprisonment.

Proceedings for an arrest may be taken under an insolvent law if a discharge in bankruptcy is refused.

Under bankrupt act of 1867, providing that no discharge should be granted, or, if granted, be valid, if the bankrupt had removed or caused to be removed any part of his property from the district with intent to defraud his creditors, a bankrupt was privileged from arrest on civil process while bankrupt proceedings were actually pending; but his privilege was ended by the refusal of the discharge on the ground of fraud. The creditor might reach his person and after-acquired property by any remedy given by the state law. *Gregg v. Hilsen* (1877) 12 Phila.

348. In this case it was said that there was no case of the supreme court deciding that the existence of a bankrupt act ousted the jurisdiction under the insolvent act; but, that a bond given under the Pennsylvania insolvent law was substantially complied with if the obligor was declared a bankrupt, for an assignee appointed by a superior jurisdiction takes title to the insolvent's property and administers it.

And Federal courts refused to interfere with proceedings for an arrest under the state insolvent law in the following cases:

In *United States, Scott, v. McAleese* (1892) 1 Am. Bankr. Rep. 650, where a debtor made an assignment for creditors October 12, 1898, and the same month proceedings for his arrest were had under Pa. stat. July 12, 1842, P. L. 339, and June 16, 1836, providing for an arrest for fraudulent concealment of property by an insolvent, and in November bankruptcy proceedings were had, and he was adjudged a bankrupt December 3, the Federal court refused to release him on habeas corpus. The court said that as the bankrupt act is not as wide in its scope as the Pennsylvania statutes of 1842, it is obvious that offenses condemned by the state law will escape punishment, if the relator's contention be sound that the state insolvent laws are suspended by the bankrupt act. The court held that the remedy in the state court should first be pursued, and that if any Federal law was not respected there, the Federal court would then interfere.

The Federal court refused to enjoin proceedings in a state court where the debtor had previously given a bond to obtain a release from arrest, and to appear in the state court and take the benefit of the state insolvent law. *Ex parte Rank* (1842) Crabbe, 493. In this case it was said: "It is also urged that after the bankrupt law went into operation all proceedings under the state insolvent laws were suspended, and therefore the arrest was illegal. How this may be in states where the discharge under the state insolvent laws operates as a discharge of the debt, it is unnecessary for me to say, but I can see no incompatibility between the bankrupt law and the insolvent laws of Pennsylvania, a discharge under which does not affect the debt, but leaves all future acquisitions of the debtor liable to execution for previous contracts. If, however, the construction contended for by the petitioner be correct, and the arrest was illegal, it will be a good defense to an action at law on the bonds, and that is a sufficient reason why this court should not interfere."

And proceedings under insolvent laws for an arrest have been sustained notwithstanding bankrupt proceedings. (But see *Clarke v. Ray* (1802) 1 Harr. & J. 318, *infra*.)

In *Minon v. Van Nostrand* (1870) 1 Low. Dec. 458 (1869) 4 Nat. Bankr. Reg. 108, it was held that a bankrupt is not entitled to a discharge from arrest where he gave bond to appear for examination under Massachusetts insolvent laws for the relief of poor debtors, and pending such proceedings filed his petition in bankruptcy. In this case it was said that if the debtor can show a compliance with the state law that court will discharge him.

In *Ex parte Ziegenfuss* (1842) 24 N. C. (2 Fred. L.) 463, Appx., where a debtor had applied for the benefit of the bankrupt act of 1842 and thereafter was arrested on a writ of *capias ad satisfaciendum*, it was held that so far as the state insolvent laws may impede the operation of the bankrupt law they must yield to it. But while the state laws thus yield they are not entirely abrogated. The court said: "They exist and operate with full vigor until the bank-

rupt law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefits of the bankrupt law, by being declared a bankrupt by a decree of the court. Before that time, I think, upon a sound construction of the bankrupt act, it does not necessarily come in conflict with the insolvent laws of the state." And it was held that before a decree in bankruptcy a debtor applying voluntarily for the benefit of the bankrupt law cannot be protected from arrest on a writ issuing from any court; but that after such decree he will be protected against the process of every court.

In *Griswold v. Pratt* (1845) 9 Met. 16, the doctrine in the *Ziegenfuss* Case, that until the bankrupt law attaches itself on the person or property of the debtor by proceedings instituted in bankruptcy the state insolvent law may exist and operate, was denied.

In *Reed v. Taylor* (1871) 32 Iowa, 209, 7 Am. Rep. 180, 4 Nat. Bankr. Reg. 710, it was held that an assignment for creditors was valid until questioned by bankrupt proceedings. The court uses an expression as to whether or not the bankrupt law "operated to nullify, supersede, or suspend all the state insolvent laws" but that case was a contest between an attaching creditor and an assignee for creditors. This case has been criticised by some writers and in some cases as holding, like *Ex parte Ziegenfuss*, that state insolvent laws may be enforced notwithstanding the existence of a bankrupt act. But that question was not involved.

In *Re Jacobs* (1871) 12 Abb. Pr. N. S. 273, it was held that an adjudication in bankruptcy, and an assignment of the debtor's property under the bankrupt law of the United States, did not prevent the debtor from making an application under N. Y. Rev. Stat. pt. 2, art. 5, chap. 5, title 1, entitled "Of Voluntary Assignments by an Insolvent, for the Purpose of Exonerating His Person from Imprisonment." The court, conceding that the power delegated to Congress to establish uniform laws on the subject of bankruptcy is exclusive when Congress has legislated, said: "But I have failed to discover any ground for the theory that the state insolvent laws, which provide for cases and remedies other than those mentioned in the bankruptcy act, are thereby suspended. By that act the party is discharged from his debts. This application is made by the insolvent, to be discharged from imprisonment, not from his debts, which are not affected or impaired by such discharge. Upon this subject, Congress has not assumed to legislate, and the state laws in reference thereto are still in force."

In *Clarke v. Ray* (1802) 1 Harr. & J. 318, the state court held that if a person is imprisoned for debt for three months, and the act of bankruptcy is committed at the end of two months, the creditors have only one month to file a petition in bankruptcy, and if they fail within that time the debtor may avail himself of the insolvent laws of the state, under act of Congress, April 4, 1800, providing that if a debtor shall remain in prison two months or more he shall be adjudged a bankrupt providing that no person shall be liable to a commission of bankruptcy if the petition be not preferred within six months after the act of bankruptcy committed, and § 61, providing that the act shall not repeal the law of any state for the relief of insolvent debtors, except so far as to persons who are clearly within the purview of the act, and that if any person within the purview of this act shall be imprisoned for the space of three months for any debt, unless the creditors shall proceed to prosecute a commis-

sion of bankruptcy against him, such debtor shall be entitled to relief under such laws for the relief of insolvent debtors. It appears in this case that the United States court held in regard to the same matter that if a debtor be imprisoned for three months, and no commission is sued out by his creditors, he may apply for the benefit of the insolvent law, and if a commission is not sued out in six months he may have full benefit of the insolvent laws. But if a commission is sued out within six months before the act of bankruptcy it precludes state relief. The case does not show what was the final result or relief granted.

But where proceedings in bankruptcy were pending under the bankrupt act of 1867, and the debtor was arrested under Pa. act July 12, 1842, and gave bond to apply to the court of common pleas for the benefit of the insolvent law, the dismissal of his application because of pending bankruptcy proceedings was a good defense to an action on the bond. *Hubert v. Horter* (1876) 81 Pa. 89.

A bond given under the insolvent act is avoided by a discharge in bankruptcy.

A bond to avoid arrest and to apply to be discharged as an insolvent under Pa. act July 14, 1842, is avoided where, pending the hearing, the debtor is adjudged a bankrupt, as the adjudication, under the bankrupt act of March 2, 1867, suspended the operation of the state insolvent laws. *Barber v. Rodgers* (1872) 71 Pa. 362. The court said that it was unnecessary to determine whether from the time the bankrupt act of Congress March 2, 1867, went into effect, the insolvent laws of the state were *ipso facto* suspended, because it was very clear that this result followed as soon as a person was adjudged a bankrupt, November 28, 1867. In this case the court said that the debtor was liable under U. S. Rev. Stat. § 44, providing punishment upon conviction of fraudulent bankruptcy, and that he could not be subject to a double punishment for the same offense, and that the laws of the United States, being paramount in authority, supersede those of the state.

In *Scully v. Kirkpatrick* (1875) 79 Pa. 324, 21 Am. Rep. 62, it was said that *Barber v. Rodgers* was not a case of a debt fraudulently contracted.

And an insolvent bond given January 11, 1843, to appear on March 21 and file a petition for the benefit of Pa. insolvent laws, was avoided, where on the 18th of March the debtor applied for the benefit of the bankrupt law, and was discharged on the 27th of August. This was a good defense. *Nesbit v. Greaves* (1843) 6 Watts & S. 120. In this case the court said that the proceedings in bankruptcy were commenced before any proceedings in the state court for the benefit of the insolvent law, so the assignee under the bankrupt law became entitled to all the assets leaving nothing to be assigned under the insolvent law.

In *Gregg v. Hilsen* (1877) 12 Phila. 348, it was said that a bond given to take the benefit of the Pennsylvania insolvent law is substantially complied with if the obligor is declared a bankrupt. But in this case it was said that a debtor is not privileged from arrest after the refusal of a discharge in bankruptcy on the ground of fraud.

In *Goodwin v. Sharkey* (1868) 5 Abb. Pr. N. S. 64, where a debtor was arrested under N. Y. insolvent law April 26, 1831, commonly known as the "Stillwell Act," for fraudulent disposition of real estate, and before the warrant was issued he had applied for a discharge under the bankrupt act and had been adjudicated a bankrupt, it was held that a civil proceeding under this act was not the punishment of the debtor

but the collection of the creditor's judgment; and that such a proceeding was in conflict with the bankrupt law in regard to property which passes to the assignee in bankruptcy, and that the prisoner must be discharged.

V. Proceedings for a receiver as affected by bankrupt law.

In *STATE, STROHL, v. KING COUNTY SUPER. CT.* it was held that in the absence of bankrupt proceedings a state court may appoint a receiver for a corporation, under Wash. Code Proc. § 325, subd. 5, 2 Ballinger's C. & S. § 5456, 2 Hill's Code, § 326, authorizing the appointment of receivers for insolvent corporations, and that the state court improperly sustained a plea to the jurisdiction in an action brought by a receiver, and wrongfully held that a receiver's powers cease on the passage of the bankrupt laws. There are but few cases directly in point. That of *Chandler v. Siddle* (1874) 10 Nat. Bankr. Reg. 236, not cited in this case, is directly in point and sustains it. There are a great many analogous authorities as to the effect of a bankrupt law upon deeds of assignment, the two principal cases being *Boese v. King* (1883) 108 U. S. 379, 27 L. ed. 780, and *Mayer v. Hellman* (1875) 91 U. S. 496, 23 L. ed. 377, 13 Nat. Bankr. Reg. 440. See subd. II.

The case of *Re Empire Metallic Bedstead Co.* (1899) 1 Nat. Bankr. News, 386, reversing 1 Nat. Bankr. News, 301, might be construed as sustaining *STATE, STROHL, v. KING COUNTY SUPER. CT.* as it held that an application of an insolvent corporation for a dissolution and for a receiver is not an act of bankruptcy under the laws of 1898; but that is another question, and one that may be said to be somewhat in doubt.

In none of the cases on this subject, unless it be in *Re Shoemaker* (1868) 4 Biss. 245, is the question discussed, as to whether or not the appointment of a receiver for a partnership or corporation is an act of bankruptcy where insolvency is denied.

Under the act of 1898, after making an assignment which is declared to be an act of bankruptcy, the assignor cannot resist bankruptcy proceedings by showing that he was solvent.

The bankrupt act does not *ipso facto* prevent a receiver of a state court from prosecuting a suit against a shareholder. *Chandler v. Siddle* (1874) 10 Nat. Bankr. Reg. 236.

The weight of authority appears to be that the appointment of a receiver in a state court will authorize an adjudication in bankruptcy, when the debtor is insolvent, and that the Federal court will generally take possession of the assets and administer the same in that court, although in some cases they have refused an adjudication in bankruptcy. But lapse of time in attempting to place the control of the estate in the Federal court may prevent such court from interfering with the distribution of property.

The appointment of a receiver for an insolvent in a state court authorizes bankruptcy proceedings. *Hardy v. Bininger*, 4 Nat. Bankr. Reg. 262, S. C., *Re Bininger* (1870) 7 Blatchf. 262, Affirming *Hardy v. Clark*, 8 Nat. Bankr. Reg. 385; *Re New Amsterdam F. Ins. Co.* (1873) 6 Ben. 368; *Re Washington Marine Ins. Co.* (1868) 2 Ben. 292, 2 Nat. Bankr. Reg. 648; *Re Merchants' Ins. Co.* (1871) 6 Nat. Bankr. Reg. 43, 3 Biss. 162; *Mather v. Coe* (1899) 92 Fed. Rep. 333.

An insolvent partnership firm suffering a receiver to be appointed will be adjudged a bankrupt. *Hardy v. Bininger*, 4 Nat. Bankr. Reg. 262, S. C., *Re Bininger* (1870) 7 Blatchf. 262,

Affirming Hardy v. Clark, 8 Nat. Bankr. Reg. 385.

A dissolution of an insolvent corporation and the appointment of a receiver will authorize bankrupt proceedings if commenced within six months after the dissolution of the corporation. *Re New Amsterdam F. Ins. Co.* (1873) 6 Ben. 368.

In this case it was said that the views in *Thornhill v. Bank of Louisiana* (1870) 1 Woods, 1, 5 Nat. Bankr. Reg. 367, and (1870) 3 Nat. Bankr. Reg. 435 (see *infra*), will not be adopted until they are approved by the circuit court of this district.

A decree of involuntary bankruptcy will be granted where a corporation was dissolved and a receiver appointed at the instance of the attorney general in the state court. *Re Washington Marine Ins. Co.* (1868) 2 Ben. 292, 2 Nat. Bankr. Reg. 648. This was on the ground that the company suffered its property to be taken on legal process with intent to defeat the operation of the bankrupt act of 1867. This case does not show whether the company was insolvent or not.

The appointment of a receiver by a state court, to take charge of property of an insolvent corporation, is an attempt to defeat the bankrupt law of 1867, § 39, cl. 8, prohibiting "taking on legal process." *Re Merchants' Ins. Co.* (1871) 3 Biss. 102, 6 Nat. Bankr. Reg. 43. In this case the court said that a state could not defeat the operation of any bankrupt law by providing that an insolvent corporation should be wound up in state courts, and, if insolvency exists, a person or corporation is within the provisions of the bankrupt law, and Federal courts have exclusive jurisdiction of the property, and the corporation will be adjudged bankrupt on petition of the creditors.

The procuring of an appointment of a receiver by an insolvent partnership firm under the insolvent laws of Ohio will authorize steps to be taken to hold assets pending adjudication in bankruptcy. *Mather v. Coe* (1899) 92 Fed. Rep. 333. In this case it is held to be a procuring or suffering their property to be transferred to a receiver, under the insolvent laws of Ohio, which gives preferences to certain creditors for labor, and therefore is a disposition which is an act of bankruptcy, under bankrupt law 1898, § 3, subsec. 2.

But in a suit against a corporation for involuntary bankruptcy, where it was charged that a corporation consented to the appointment of a receiver of its property, and thereby did procure and suffer its property to be taken on legal process, an adjudication was refused where it was not shown that the corporation assented to the proceeding in the state court, although its insolvency was admitted. *Re Safe Deposit & Sav. Inst.* (1872) 7 Nat. Bankr. Reg. 392.

And in *Re Empire Metallic Bedstead Co.* (1899) 1 Nat. Bankr. News, 386, Reversing 1 Nat. Bankr. News, 301, it was held that under the bankrupt act of 1898 an application of an insolvent corporation for a dissolution is not an act of bankruptcy. In this case the referee held that the bankrupt act of 1898, providing that an assignment for creditors is an act of bankruptcy, should be construed to mean also "or the appointment of a receiver" is an act of bankruptcy; but the district court refused to follow his interpretation.

The appointment of a receiver by a state court will not prevent subsequent bankrupt proceedings in the Federal court. *Re Independent Ins. Co.* (1872) Holmes, 103, 6 Nat. Bankr. Reg. 260, Affirming 2 Low. Dec. 97, 6 Nat. Bankr. Reg. 160; *Re Safe Deposit & Sav. Inst.* (1872) 7 Nat. Bankr. Reg. 392; *Re Green Pond R. Co.* 45 L. R. A.

(1876) 13 Nat. Bankr. Reg. 118; *Re National L. Ins. Co.* (1874) 6 Biss. 35; *Re Noonan* (1873) 3 Biss. 491; *Thornhill v. Bank of Louisiana* (1870) 1 Woods, 1, 5 Nat. Bankr. Reg. 367, Affirming (1870) 3 Nat. Bankr. Reg. 435.

A proceeding in bankruptcy against an insolvent insurance company may be maintained, notwithstanding a decree in the state court appointing a receiver to collect its assets and pay debts declared "that the said corporation be and the same is hereby dissolved" under Mass. Gen. Stat. chap. 58, § 6, providing for a dissolution of an insolvent corporation, as the operation of a state law regulating the distribution of an insolvent debtor corporation is suspended by the Federal bankrupt act. *Re Independent Ins. Co.* (1872) Holmes, 103, 6 Nat. Bankr. Reg. 260, Affirming 2 Low. Dec. 97, 6 Nat. Bankr. Reg. 169. In this case the court said: "The sooner it is understood that now, when a uniform law of bankruptcy is in operation under the authority conferred upon Congress by the Constitution of the United States, no power exists to wrest from the jurisdiction of the courts in bankruptcy the assets of such bankrupt individuals and corporations as are within the scope of the provisions of the bankrupt act, the more will the beneficent provisions of that act be felt and appreciated."

The appointment of a receiver for an insolvent corporation, by a state court, will not prevent the bankrupt court taking jurisdiction in proceedings for involuntary bankruptcy. *Re Safe Deposit & Sav. Inst.* (1872) 7 Nat. Bankr. Reg. 392.

That a state court had appointed a receiver for an insolvent corporation will not prevent subsequent proceedings in bankruptcy. *Re Green Pond R. Co.* (1876) 13 Nat. Bankr. Reg. 118. In this case the court said that N. J. Nixon, Dig. 402, act February 16, 1829,—"An. Act to Prevent Frauds by Incorporated Companies," under which the receiver was appointed,—was in effect a bankrupt act, and was superseded by the bankrupt act of 1867.

The appointment of a receiver to take charge of the assets of a corporation will not prevent bankrupt proceedings, where no order for distribution has been made in the state court, under U. S. Rev. Stat. 1874, § 5123, providing that when a proceeding is had to wind up the affairs of a corporation, any order made by the state court for a distribution of assets shall be valid, notwithstanding bankrupt proceedings. *Re National L. Ins. Co.* (1874) 6 Biss. 35.

One member of a firm may file a petition in bankruptcy for himself and for the firm, although in prior proceedings a receiver has been appointed in the state court. *Re Noonan* (1873) 3 Biss. 491.

Commissioners of an insolvent bank, appointed under La. act March 14, 1842, providing for dissolution of banks and for distribution of assets, have no standing in a bankrupt court to object to an adjudication in bankruptcy, as the Louisiana law is a bankrupt or an insolvent act and so held by the state courts, and was suspended by the taking effect of the bankrupt act June 1, 1867, so that thereafter the state courts had no jurisdiction to proceed under it, and all the proceedings against a bank under the state act are null and void. *Thornhill v. Bank of Louisiana* (1870) 1 Woods, 1, 5 Nat. Bankr. Reg. 367, Affirming (1870) 3 Nat. Bankr. Reg. 435.

The Federal court in bankrupt proceedings will take charge of the assets, and in some cases an injunction was granted by the Federal court against interfering with the same, although a receiver had previously been appointed in the state court.

Where a state court issues an order to show cause why a receiver of a corporation shall not be appointed, but makes no order for a distribution of assets, and the next day a petition in involuntary bankruptcy is filed and an adjudication in bankruptcy had before a receiver is appointed, the jurisdiction of the state court is at an end. *Watson v. Citizens' Sav. Bank* (1874) 11 Nat. Bankr. Reg. 161. In this case it was held that act of Congress February 13, 1873, providing that when proceedings are had to wind up the affairs of a corporation in the state courts, and to divide its assets ratably among its creditors, prior to proceedings in bankruptcy having been commenced, any order made in the state courts for distribution while such state court shall remain actually or constructively in control of the assets shall be deemed valid, applies only to such orders relating to ratable distributions as the state court may have passed prior to the commencement of proceedings of adjudication under the bankrupt law.

Where proceedings for a receiver of a bank to administer its assets for the creditors were pending in the state court, and the bank filed a petition in bankruptcy in the Federal court, the latter court ordered the surrender of all the assets to the register in bankruptcy, and issued an injunction to restrain the prosecution of the action by the complainant in the state court. *Re Citizens' Sav. Bank* (1873) 9 Nat. Bankr. Reg. 152.

And where a receiver in a state court was appointed for an insolvent corporation November 13, and involuntary bankruptcy proceedings were had December 23, the Federal court enjoined the receiver from taking charge of the property. *Platt v. Archer* (1872) 9 Blatchf. 559.

In this case the court said that no doctrine can be admitted which would place it in the power of a state or in the courts of a state, to render nugatory the operation of the bankrupt act in respect to such corporations as are subject to it, and the court held that a decree dissolving the corporation after service in the bankrupt case and before return should be disregarded.

Where a receiver was appointed for a corporation in a supplementary proceeding, and afterwards a decree in involuntary bankruptcy was had, and then the receivership extended to all the bankrupt's property, the assignee in bankruptcy is entitled to all the assets at the time of filing bankruptcy proceedings. *Smith v. Buchanan* (1871) 8 Blatchf. 153, 4 Nat. Bankr. Reg. 397. Affirmed in *Buchanan v. Smith* (1872) 16 Wall. 277, 21 L. ed. 280.

This was upon the ground that as the creditors, in proceedings against the corporation, had reason to believe that the corporation was insolvent in neglecting to pay its debts, and that as the corporation in neglecting to take steps contemplated by the bankrupt law was acting in fraud of the law itself, the apparent lien of the judgment creditors would be set aside at the instance of the assignee in bankruptcy.

In *Buchanan v. Smith* (1872) 16 Wall. 277, 21 L. ed. 280. Affirming *Smith v. Buchanan* (1871) 8 Blatchf. 153, 4 Nat. Bankr. Reg. 397, it was held that N. Y. Code, §§ 292, 294, under which the appointment of a receiver was made, had no application whatever to corporations, and that the proceedings thereunder were void, and that judgment creditors must proceed in the state court, under N. Y. Sess. act 1825, p. 449, Rev. Stat. 463, providing for the sequestration of property and effects of corporations for the benefit of creditors. The Federal court held that the judgment under which a receiver was appointed and under which the defendant claimed a lien was void on the ground that the company, 45 L. R. A.

within four months before the filing of the petition against them in bankruptcy, did "procure or suffer" their property to be seized on execution with a view to give a preference to creditors.

Where one member of a partnership firm obtains the appointment of a receiver in a state court, and the other members subsequently apply for an adjudication in bankruptcy for the firm, the Federal court will grant an injunction against the partner proceeding further in the state court and to preserve the assets. *Re Hathorn* (1875) 2 Woods, 73. In this case the court said that this was not a case where a creditor was seeking to enforce his claim in the state court, but was an action by a partner against whose firm bankrupt proceedings were pending.

The Federal court enjoined a receiver and creditors from proceeding in the state court to pursue assets, where an assignment made some ten years prior to bankrupt proceedings was held void by the state court. *Sedgwick v. Menck* (1868) 1 Nat. Bankr. Reg. 425.

But in some cases the Federal courts have refused to interfere with the assets in the hands of a receiver appointed in prior proceedings in the state court. In some of these cases lapse of time prevented an interference.

The bankrupt court will not interfere with the possession of property in the hands of a receiver appointed in a state court in prior proceedings, unless the title of the receiver is impeached under the bankrupt act. *Alden v. Boston, H. & E. R. Co.* (1871) 5 Nat. Bankr. Reg. 230.

And an injunction was refused in the Federal court where the petition in bankruptcy was insufficient and was dismissed, although it was claimed that the appointment of a receiver of partnership assets was an act of bankruptcy. *Re Keller* (1878) 18 Nat. Bankr. Reg. 10. In this case the court said: "I must decline, therefore, to entertain any question concerning, or to express any opinion upon, the alleged improper, unjust, and oppressive acts of the state court, or to permit the alleged existence of such facts to control in any way the action of the court, even in a matter of discretion, if such it is, upon which I am called to act." The petition in bankruptcy lacked the requisite number of petitioners.

And where a receiver of a partnership was appointed in 1898, the Federal court in bankrupt proceedings under the act of 1898 refused to interfere. *Re Price* (1899) 92 Fed. Rep. 987, 1 Am. Bankr. Rep. 606.

The bankrupt court will not interfere with funds obtained by a receiver four months prior to bankrupt proceedings. *Re Meyers* (1899) 1 Nat. Bankr. News, 293.

In this case it was said that the words "state insolvency laws" in the bankrupt act of 1898 refer to those special statutes passed by the various states which are in effect bankrupt laws of local application, such as insolvency laws of Massachusetts and N. Y. Code of Civ. Proc. §§ 2149, 2157, and that "they may include general assignment laws such as N. Y. act 1877, though that may be doubted."

A receiver under a mortgage foreclosure in a state court cannot be dispossessed by subsequent bankrupt proceedings. *Davis v. Alabama & F. R. Co.* (1873) 1 Woods, 661.

And in some cases the state courts have refused to order the assets turned over to an assignee in subsequent bankrupt proceedings. *Appleton v. Bowles* (1874) 9 Nat. Bankr. Reg. 354.

The state court will not on a mere motion order a receiver on a creditor's bill to turn over

the assets to an assignee appointed in subsequent proceedings in bankruptcy. *Freeman v. Fort* (1874) 14 Nat. Bankr. Reg. 46. The court said that the bankrupt court has exclusive jurisdiction in administering the assets of a bankrupt whenever it deems it proper, and may enjoin creditors from proceeding against assets, but until it shall have done so the state court will not surrender its jurisdiction.

In *Watkins v. Pinkney* (1842) 3 Edw. Ch. 533, it was held that where a receiver has been appointed in a creditor's suit, the subsequent application for the benefit of the bankrupt act by the debtor will not protect him from an attachment in refusing to deliver his property to the receiver.

Where a receiver of a corporation is appointed at the instance of creditors, and is administering the assets for the benefit of all creditors, the state court will not turn over the property to an assignee in subsequent bankruptcy proceedings at the instance of some of the creditors. *Myer v. Crystal Lake Pickling & Preserving Works* (1875) 14 Nat. Bankr. Reg. 9. In this case the court said that the Federal cases which show an interference by a Federal court with a receiver appointed in prior proceedings are those where a receiver has been appointed under a state insolvent law that is superseded by the bankrupt act. After the assignment of the debtor's property to a receiver, his title is superior to that of an assignee in bankruptcy appointed in subsequent proceedings, and his release of a debt will be binding. *Roberts v. Albany & W. S. R. Co.* (1857) 25 Barb. 662.

In *Clark v. Blininger* (1870) 3 Nat. Bankr. Reg. 518, an assignee in bankruptcy interfering with assets in the hands of a receiver under a prior appointment of a state court was held guilty of contempt. In this case the action was commenced November 19 in the state court, and a receiver was appointed and took possession, and on December 11 bankruptcy proceedings were instituted and an adjudication had December 22. The court said that under the bankrupt act of 1867 the Federal court had no authority conferred to interfere with process or proceedings in the state court, and that the bankrupt act expressly preserved all liens existing at the commencement of proceedings in bankruptcy; that the partner had a lien on the assets for the payment of debts and surplus to him; that only transfers and assignments in preference or in fraud of creditors were denounced by the bankrupt law of 1867; and that nothing in that act excluded jurisdiction of other tribunals from a just distribution of the debtor's property except in bankruptcy cases.

In *Re Clark* (1870) 3 Nat. Bankr. Reg. 524, the Federal court declined to interfere, saying: "It does not appear that this court has such superior jurisdiction in the premises, or such supervisory control over the state court in respect to the property in question, as to authorize it to take away from the state court the possession of such property, or to enjoin the receiver from further interfering with such property." And in *Re Blininger* (1870) 7 Blatchf. 159, the United States circuit court refused to grant a writ of prohibition to the state court to prevent further proceedings.

In *Re Platt* (1877) 10 Jones & S. 513, 52 How. Pr. 468, the state court refused an assignee in bankruptcy leave to sue a receiver appointed by such court.

A receiver in a state court cannot claim that a previous assignment is void, where the receiver does not institute a suit until after proceedings in bankruptcy are had. *Olney v. Tanner* (1832) 10 Fed. Rep. 101.

The appointment of a receiver at the instance of a partner on the ground that his copartner

is wasting the property will not prevent the plaintiff in that action from subsequently obtaining his discharge in bankruptcy. *Re Shoemaker* (1868) 4 Biss. 245. In this case the court said: "It may be that the appointment of a receiver by a court of equity vests the title to the property in dispute in him temporarily. But it seems to me an error to suppose that, even if done at the instance of a falling partner, it would be such a fraudulent transfer of his property as is contemplated and provided by the bankrupt act. If, in June, 1867, Shoemaker found that his partner was wasting their partnership property, it was perfectly lawful for him to apply to a state court for redress, whether at that time he was insolvent or not. In doing so, the best way to put a stop to that waste would probably be to put the property into the hands of a receiver. Such a course would be likely to contribute to his own advantage and to the security of his creditors. And to argue that in doing so he committed a fraud, either on his creditors or on the bankrupt act, appears to me to be most unreasonable."

VI. Effect of creditor's bill or supplementary proceedings as against bankrupt proceedings.

No lien can be acquired by creditor's bill or supplementary proceedings in the state court after proceedings in bankruptcy are instituted.

Supplementary proceedings after a petition in involuntary bankruptcy is filed are void. *Buchanan v. Smith* (1872) 16 Wall. 277, 21 L. ed. 280.

And after adjudication in bankruptcy a creditor's bill cannot create any lien as against an assignee in bankruptcy. *Winters v. Claitor* (1877) 54 Miss. 341, 18 Nat. Bankr. Reg. 533. In *Re Allen* (1842) 1 N. Y. Legal Obs. 115, it was said that in *Re Thayer*, June 22, 1842, MS., it was held that a lien could not be acquired by a creditor's bill as against prior bankruptcy proceedings.

Under the bankrupt act of 1898, the bankrupt court will enjoin prior supplementary proceedings in the state court if attacked in time. *Re De Long* (1898) 1 Am. Bankr. Rep. 66.

So, supplementary proceedings begun within four months prior to bankruptcy proceedings will be stayed by the Federal court. *Re Kletchka* (1899) 92 Fed. Rep. 901.

Under bankrupt act July 1, 1898, § 70, subd. e, providing that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, an injunction will be granted against an action to set aside a fraudulent conveyance begun July 30, 1898, and a supplementary proceeding where the debtor was examined prior to July 1, and proceedings adjourned to September 24, 1898.

The referee held that the bankrupt act of 1898, § 11, providing that suits upon a claim for which a discharge would be a release shall be stayed, authorized an injunction. *Re Adams* (1898) 1 Am. Bankr. Rep. 94.

Where no lien is acquired in supplementary proceedings or by a creditor's bill in the state court, the assignee in bankruptcy in subsequent proceedings will be entitled to the assets. *Olney v. Tanner* (1883) 18 Fed. Rep. 636; *Re Smith* (1842) Fed. Cas. 12,997; *Re Allen* (1842) 1 N. Y. Legal Obs. 115; *Trow v. Lovett* (1877) 122 Mass. 571.

A lien of a creditor's bill to vacate certain deeds on property secured by the creditor under attachment proceedings must yield to bankrupt proceedings instituted pending the attachment, under the bankrupt act of 1867, as that avoided all attachments within that time. *Hatfield v. Moller* (1880) 4 Fed. Rep. 717.

A judgment creditor has no lien by supplementary proceedings upon choses in action as against subsequent proceedings in bankruptcy where no receiver is appointed by the state court. *Re Wheeler* (1878) 18 Nat. Bankr. Reg. 385.

Where supplementary proceedings were had in the state court prior to filing a petition in bankruptcy, but no appointment of a receiver was made, or any order, as required by N. Y. Code of Procedure, § 298, providing that the receiver shall be vested with property and effects of the judgment debtor from the time of the filing and recording of the order, the Federal court will restrain the creditor from further prosecution of the supplementary proceedings in the state court. *Re Nolan* (1876) 8 Den. 559.

As against an assignee in bankruptcy a creditor had no lien under a bill filed January 23, 1899, where the lien of the judgment under which the proceedings were had was within four months of the time when the bankrupt act of 1898 took effect in such cases. *Re Fellerath* (1899) 2 Am. Bankr. Reg. 40.

And no lien is acquired by a creditor's bill filed February, 1842, where a receiver was appointed April 25, and a petition in bankruptcy was filed February 16, and decree April 30. *Es porte Waddell* (1842) 1 N. Y. Legal Obs. 53. In this case the Federal court declined to make an order for the receiver to turn the assets over to the assignee in bankruptcy on the ground that he had a complete remedy in the state court.

In *Storm v. Waddell* (1845) 2 Sandf. Ch. 494, the court declined to follow this decision.

Delay by an assignee in bankruptcy in asserting his claim to assets may prejudice his rights as against creditor's bills.

So, the failure for three years of an assignee in bankruptcy to sue for assets recovered by creditors in a suit for all creditors to set aside a sale will prevent an injunction against proceedings in the state court. *Re Pitts* (1881) 9 Fed. Rep. 542.

And where a creditor's bill was pending, and a decree of bankruptcy rendered, and the creditors obtained a decree, an injunction was refused by the bankrupt court after the assignee in bankruptcy had for two years delayed taking any action. *Smith v. Gordon* (1843) 2 N. Y. Legal Obs. 325.

If a creditor files his claim in bankruptcy without asserting a lien obtained by creditor's bill, his lien, as against the assignee in bankruptcy, is lost. *Stewart v. Isidor* (1868) 1 Nat. Bankr. Reg. 485.

But a lien acquired by creditor's bill is not affected by subsequent proceedings in bankruptcy. *Kimberling v. Hartly* (1880) 1 Fed. Rep. 571; *Johnson v. Rogers* (1876) 15 Nat. Bankr. Reg. 1; *House v. Swanson* (1871) 7 Helsk. 32; *Cowan v. Dunn* (1878) 1 Lea, 68; *Re Allen* (1842) 1 N. Y. Legal Obs. 115; *Storm v. Waddell* (1845) 2 Sandf. Ch. 494; *Clarke v. Rist* (1844) 3 McLean, 494.

In this latter case it was said that when a state tribunal has rightfully taken jurisdiction of the cause, though having some connection with an estate in bankruptcy, it affords no sufficient reason for its withdrawal from that jurisdiction that a Federal court might have taken cognizance of it.

And a lien acquired by creditor's bill more than six months prior to bankrupt proceedings will not be disturbed, and is superior to the claim of the assignee in bankruptcy. *Pool v. Bagland* (1876) 57 Ala. 414. In this case, although the assignee in bankruptcy was a party, it seems that he made no claim to the assets. 45 L. R. A.

Under N. C. Ordinance, June 23, 1866, § 18, providing that any creditor attempted to be defrauded may maintain a creditor's bill before judgment at law, a lien obtained thereby is not affected by subsequent proceedings in bankruptcy. *Carr v. Fearlington* (1869) 63 N. C. 580.

In *Storm v. Waddell* (1845) 2 Sandf. Ch. 494, it was said that in the United States courts within New York state there are conflicting decisions on the question as to whether the creditor obtains a lien by his suit.

It was also said that in *Smith v. Bleecker*, MS. (1845), a plea of a bankrupt's discharge and assignments in a creditor's suit was overruled where the proceedings in bankruptcy preceded by a few days the filing of the bill, holding that the decree in bankruptcy took effect from its entry, and not from the time of filing the petition.

Supplementary proceedings under N. Y. Code Civ. Proc. § 2464, providing for a receiver, are a substitute for a creditor's bill, and not a proceeding commenced under a state insolvent law, and the title obtained in 1897 by a receiver setting aside a transfer will not be affected by subsequent bankrupt proceedings. *Re Meyers* (1899) 1 Nat. Bankr. News, 293.

In *McCallum House Furnishing Co. v. Wehe* (1899) 1 Nat. Bankr. News, 267, where the debtor was cited in a proceeding under Wis. Rev. Stat. § 4006, providing for an examination of a party in aid of a prosecution or defense, it was held that the bankrupt act did not prohibit the state court from trying cases where claims sounding in tort were brought before them. (The report of this case does not show whether the effect of this proceeding is like a creditor's bill or not.)

Proceedings in bankruptcy supersede proceedings on a creditor's bill, subject to all liens, and the judgment creditor will be enjoined from proceeding in the state court. *Re Whipple* (1870) 13 Nat. Bankr. Reg. 373, 6 Blas. 516.

An order to show cause why a debtor should not be punished for contempt in supplementary proceedings, made prior to bankrupt proceedings, will not be enjoined by the Federal court. *Re Hill* (1868) 2 Nat. Bankr. Reg. 140.

An order made for an examination of a debtor in supplementary proceedings is a "legal process" within the meaning of bankrupt act 1867, § 39, authorizing bankrupt proceedings where the debtor shall conceal himself to avoid service of process in an action for the recovery of a debt or demand provable under the act. *Brock v. Hoppock* (1868) 2 Nat. Bankr. Reg. 7.

VII. Effect of an assignment for creditors on the right to a discharge in bankruptcy.

Some cases hold that a preferential assignment for creditors will prevent a discharge. Other cases hold that an assignment is of itself an intent to defeat the law and will prevent a discharge. There is some conflict, however, most of the cases *contra* turning on the date of the taking effect of the act of 1841.

A preferential assignment for creditors made after January 1, 1841, will prevent a discharge in bankruptcy. *Aspinwall's Case* (1843) 1 Clark (Pa.) 526.

This was held to be contrary to the bankrupt act of 1841, § 2, prohibiting the discharge of a petitioner who has, by assignment or otherwise, after January 1, 1841, or at any other time, in contemplation of the passage of a bankrupt law, given or secured any preference to one creditor over another without the assent of a majority in interest of the creditors who have not been so preferred.

The bankrupt act of 1841, 5 Stat. at L. 442, chap. 9, § 2, proviso 2, providing "in case it

shall be made to appear to the court, in the course of the proceedings in bankruptcy, that the bankrupt, his application being voluntary has, subsequent to the 1st day of January last (or at any other time, in contemplation of the passage of a bankrupt law) by assignment or otherwise, given or secured any preference, etc., he shall not receive a discharge, etc.," is to be punctuated as above, and then it will prevent a discharge where the bankrupt made a preferential assignment for creditors subsequent to the 1st day of January last. *Re Irwine* (1842) 1 Clark (Pa.) 82.

A preferential assignment will prevent a discharge in bankruptcy. *Re Seeley* (1879) 19 Nat. Bankr. Reg. 1.

The qualification in the act of Congress July 26, 1876, 19 Stat. at L. 102, does not authorize a discharge where preferences in trust for certain creditors are made prior to the bankrupt proceedings, as an assignment in trust for some creditors is "not such an assignment as by that act is not to prevent a discharge in involuntary proceedings, since it is not an assignment of all the debtor's property nor for the benefit of all their creditors ratably." *Re Diehl* (1883) 15 Fed. Rep. 234.

The intent to have the debtor's estate wound up and distributed under a general assignment by an assignee named by the debtor constitutes an intent to prevent the property from coming to the assignee in bankruptcy, and of being distributed under the bankrupt law of 1867, and a discharge will be refused. *Re Kraft* (1880) 4 Fed. Rep. 523. In this case it was said that the act of July 26, 1867, providing that a general assignment made in good faith and without preferences, and valid according to local law, shall not prevent a discharge in involuntary cases, shows that a general assignment should have the effect of preventing a discharge in a case of voluntary bankruptcy.

A general assignment made by the bankrupt in trust for creditors, not fraudulent, without preference, although made more than six months before the bankrupt filed his petition to be adjudged a bankrupt, will prevent a discharge. *Re Kasson* (1878) 18 Nat. Bankr. Reg. 379. In this case it was said that the deed is conclusive evidence of the intent of the assignor to prevent the property transferred being distributed under the bankrupt act.

And a discharge in bankruptcy will be refused where the debtor had ten months previously made an assignment of all his property for the benefit of his creditors without preference, the effect of such an assignment being to hinder and delay his creditors. *Re Goldschmidt* (1869) 3 Ben. 379, 8 Nat. Bankr. Reg. 165.

In this case the deed of assignment was said to be an act of bankruptcy, under the bankrupt act, § 39, and must have been executed "in contemplation of becoming bankrupt" under act of 1867, § 29, although the debtor testified that the assignment was made in good faith and not in contemplation of becoming bankrupt. This case was disapproved in *Re Pierce* (1869) 3 Nat. Bankr. Reg. 258.

A bankrupt is not entitled to his discharge where he made a general assignment for creditors without preference four days prior to filing his petition in bankruptcy, notwithstanding his denial that he intended when he made his assignment, to file a petition in bankruptcy. *Re Brodhead* (1868) 3 Ben. 106, 2 Nat. Bankr. Reg. 278.

In this case the assignment was held to contravene the bankrupt act of 1867, § 29, forbidding a discharge to a bankrupt who has made an assignment of his property for the purpose of preventing his property from coming

into the hands of the assignee and being distributed under the act.

A general assignment by a partnership of all their property for the benefit of creditors is an act of bankruptcy, and such assignment is held to have been made for the purpose of preventing the property from coming into the hands of an assignee in bankruptcy, and therefore prevents a discharge in bankruptcy. *Re Croft Bros.* (1878) 8 Blas. 188. In this case the assignment was made February 12, 1876, and a petition of voluntary bankruptcy filed April 11, and shortly after the assignment the assignee turned over to one of the members the fixtures and tools in trade and \$100 worth of stock. The court held that it was evident that the partners expected that these assets were to be withdrawn from the assignee and to go into the control of said partner.

But an assignment without preference in trust for all creditors, made February, 1841, did not affect the right of a bankrupt to a discharge under the act of 1842. *Re parte Quackenboss* (1842) 1 N. Y. Legal Obs. 146.

And an assignment preferring creditors, made October 23, 1841, did not prevent a discharge in bankruptcy on a petition filed March 19, 1842, under bankrupt act 1841, which took effect February 1, 1842. *Re Chadwick* (1842) 5 Law Rep. 457.

In *Swan v. Littlefield* (1849) 4 Cush. 574, it was said that *Re Chadwick* (1842) 5 Law Rep. 457, held that an assignment made by debtors subsequent to the passage of the bankrupt act but before it was to go into operation, of all their property in trust for certain preferred creditors, would not prevent a discharge under the act on their voluntary petition; but a contrary construction was given to this clause by Judge Story in *Hutchins v. Taylor* (1842) 5 Law Rep. 269, who said: "The act became a law by the very terms of the Constitution of the United States, as soon as it was approved by the President, although its operation was suspended until the 1st day of February, 1842."

A condition annexed to a deed of assignment made in 1836, that the accepting creditors shall release the assignor, will not prevent a discharge in bankruptcy. *Re Holmes* (1843) 1 N. Y. Legal Obs. 211. In this case it was said that the condition is nothing more than the bankrupt law would require, and is not a preference condemned by the bankrupt law.

A creditor who consents to an assignment for creditors is estopped from setting up such assignment as a ground for resisting his discharge in bankruptcy. *Re Schuyler* (1869) 3 Ben. 200, 2 Nat. Bankr. Reg. 549.

An assignment of all the estate of a bankrupt giving a preference to fictitious debts in 1839, would not bar a discharge under the United States bankrupt act of 1841. *Re Delavan* (1842) 5 Law Rep. 370. The court said that "the debt must be falsely admitted in proceedings under this act, to affect the bankrupt's petition for a certificate," and further said that any collusive arrangement under the deed was not made in contemplation of the passage of the bankrupt act.

A deed of assignment in 1837 did not affect the discharge of a bankrupt under the act of 1841. *Re Macfarlan* (1842) Fed. Cas. No 8,787.

In *Re Pierce* (1869) 3 Nat. Bankr. Reg. 258, it was held that the execution of a general assignment for the benefit of creditors without any preference, sixteen days before filing the original petition in bankruptcy, did not preclude a discharge in bankruptcy, under bankrupt act of 1867, § 32, providing that no discharge should be granted if the bankrupt has,

in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property for the purpose of preferring any creditor or for the purpose of preventing the property from coming into the hands of the assignee or of being distributed under this act.

In this case *Re Goldschmidt* (1869) 3 Ben.

379, 3 Nat. Bankr. Reg. 167, which refused a discharge where the assignment had been made six months prior to the commencement of proceedings in bankruptcy, was disapproved, saying: "The decision is, however, contrary to the views upon which I have acted in many former cases, and views which I still entertain."

I. T.

ARKANSAS SUPREME COURT.

N. L. DAVIS, *Appt.*,

v.

T. E. WEBBER.

(.....Ark.....)

1. An agreement between attorney and client about to begin suit upon a sheriff's bond for his failure to pay over money as directed by a judgment that the attorney shall have the statutory penalty for the default as his compensation after the client receives his claim in full is not void for champerty, and will not be set aside merely because it did not bring the client the anticipated results.
2. A clause in a contract between attorney and client for compensation for conducting litigation, that the client shall not settle the controversy without the attorney's consent, is void because against public policy.
3. When a contract is against public policy but neither *malum prohibitum* nor *malum in se* courts will allow compensation for services rendered under it upon the rule of *quantum meruit*.
4. One thousand dollars is adequate compensation for the services of an attorney in enforcing the liability of a sheriff's bond for his failure to pay \$7,114.50 as directed by a judgment where the judgment for principal and penalty is \$10,000 and property is turned over to his client in compromise valued at \$8,850.
5. The value of services rendered in one suit cannot be included in a judgment establishing the lien of an attorney for his fees on property received by his client in compromise of a judgment in a different suit.

(*Bunn, Ch. J., dissents.*)

(February 11, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Miller County in a proceeding brought to enforce plaintiff's rights under a contract by which he was to receive certain compensation for legal services. *Reversed.*

The facts are stated in the opinion.

Messrs. Williams & Arnold, for appellant:

The rights of the attorney must not conflict with the interests of the client.

Weeks, Attorneys at Law, § 258; *Marshall v. Dossett*, 57 Ark. 93; *Rogers v. R. E. Lee Min. Co.* 9 Fed. Rep. 721.

NOTE.—For champertous contract with attorney, see also *Croco v. Oregon Short-Line R. Co.* (Utah) 44 L. R. A. 285, and references in footnote thereto.

45 L. R. A.

Attorney and client sustain to each other the severe relation of trustee and *cestui que trust*, and their dealings with each other are subject to the same intendments and imputations as obtain between other trustees and their beneficiaries.

Weeks, Attorneys at Law, § 268.

Equity regards the relation of attorney and client much in the same light as that of guardian and ward, and will relieve a client from hard bargains or from any undue advantage secured over him by his attorney.

3 Am. & Eng. Enc. Law, 2d ed. p. 333.

The burden of establishing the perfect fairness, adequacy, and equity of the contract is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence.

Story, Eq. Jur. §§ 310, 311; *Arden v. Patterson*, 5 Johns. Ch. 48; *Dunn v. Dunn*, 42 N. J. Eq. 431; *North Chicago Street R. Co. v. Ackley*, 171 Ill. 100, 44 L. R. A. 177.

The provision in the contract preventing appellant from settling the controversy without the consent of appellee is void.

Greenhood, Pub. Pol. 774; *Boardman v. Thompson*, 25 Iowa, 487; *Ellwood v. Wilson*, 21 Iowa, 523; *Lewis v. Lewis*, 15 Ohio, 715.

The court, in considering what is reasonable compensation, may take into consideration all the circumstances of the case, and is not bound by the opinion of witnesses summoned as experts, but their opinions, while merely advisory, should be considered in connection with the other evidence in the case.

Cosgrove v. Leonard, 134 Mo. 419; Weeks, Attorneys at Law, 697.

If the court should hold that the contract on its face is valid, the purpose for which it was entered into having failed, it cannot be enforced and plaintiff must recover on *quantum meruit*.

Hargis v. Louisville Gas Co. 15 Ky. L. Rep. 369; *Moore v. Robinson*, 92 Ill. 491; Weeks, Attorneys at Law, 2d ed. 669.

When compensation of an attorney is to be paid to him contingently on the successful prosecution of the suit, the measure of damages is not the contingent fee agreed upon, but a reasonable compensation for the services actually rendered.

3 Am. & Eng. Enc. Law, 2d ed. p. 427; *Badger v. Mayer*, 8 Misc. 533; *Western U. Teleg. Co. v. Semmes*, 73 Md. 9; *Polsley v. Anderson*, 7 W. Va. 202, 23 Am. Rep. 613.

When the recovery is doubtful, in case of compromise, the attorney is not entitled to recover on the contract, but is entitled to be paid the reasonable value of the services rendered up to the time of compromise.

Carey v. Gnant, 59 Barb. 574; *Wright v. Wright*, 9 Jones & S. 432; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350; *Western U. Teleg. Co. v. Semmes*, 73 Md. 9.

In construing the contract sued on, it will be necessary to consider the circumstances surrounding the parties at the time it was executed in order that the purposes of the contract may be understood.

Hargis v. Louisville Gas Co. 15 Ky. J. Rep. 369; *Isham v. Parker*, 3 Wash. 755; *Merriam v. United States*, 107 U. S. 442, 27 L. ed. 533; *Reed v. Merchants' Mut. Ins. Co.* 95 U. S. 23, 24 L. ed. 348; *Maryland v. Baltimore & O. R. Co.* 22 Wall. 111, 22 L. ed. 714.

The plaintiff, by his conduct and express approval, is estopped from denying that the settlement was made without his assent.

Clearly no right of his had been impaired by Davis's agreement, the consideration not having been paid.

Marchbanks v. Banks, 44 Ark. 48.

Messrs. S. R. Cockrill and Ashley Cockrill for appellee.

Wood, J., delivered the opinion of the court:

This is a suit by Webber against Davis to recover the sum of \$2,885.50 for services, as an attorney at law, under a certain contract, and to declare and enforce a lien for same upon certain property. The contract is as follows:

Whereas, by the judgment of the Miller county circuit court in the case of Mansur & Tebbetts Implement Co. and Hargadine, McKittrick Dry-Goods Co. v. Robt. Ellis, in which N. L. Davis was interpleader, the proceeds of the sale of the stock of goods bought from said Ellis by said Davis was adjudged to be the property of N. L. Davis, and ordered to be immediately paid over to him by A. S. Blythe, sheriff, and a similar order was issued by the Hempstead circuit court on the other attachments against Ellis, taken to that county on change of venue; and demand having been made on said sheriff, and he failing to pay the same, it becomes necessary to proceed against him on his official bond; and the said Davis having employed the said T. E. Webber for that purpose: Now, therefore, it is agreed and understood, by and between the said T. E. Webber and the said N. L. Davis, that T. E. Webber is to have, as fees for his services as attorney therein, the 10 per cent per month affixed by the statute as penalty in such default, and that N. L. Davis is to make no settlement with said sheriff, or said bondsmen, or either of them, without the assent of the said T. E. Webber. In the event a proposition of settlement or compromise is submitted, either by the said sheriff and his bondsmen, or by the said T. E. Webber and N. L. Davis, or either of

them, the same is not to be accepted unless agreed to by both T. E. Webber and N. L. Davis; and in such proposition, so mutually agreed to, such allowance shall be made for T. E. Webber's attorney's fees as may be agreed upon by said Webber and said N. L. Davis, or else said proposition shall be rejected. Witness our hands this 30th day of April, 1894, to this agreement, which is separate and distinct from, and in no wise affects or impairs, any agreement heretofore entered into as attorney's fees on the interpleas filed for N. L. Davis in said cause.

[Signed] N. L. Davis.
T. E. Webber.

This amount which the sheriff was ordered to pay Davis was \$7,114.50. The sheriff failing to pay said amount upon the demand of Davis, Webber was employed, as indicated *supra*, to proceed against the sheriff and his bondsmen to collect the money. Accordingly, Webber, as attorney for Davis, instituted proceedings against the sheriff and his sureties, by motion for summary judgment, and on September 14, 1894, obtained judgment against them for \$7,034.50, the amount sued for, less taxes which the sheriff had paid. The judgment was also for interest at the rate of 6 per cent per annum, and 10 per cent per month penalty, on the above amount, from April 23, 1894, until paid. It was provided in the judgment that the amount of principal, interest, and penalty should not exceed \$10,000, the amount of the sheriff's bond. The principal, interest, and penalty would have exceeded \$10,000 at the time the judgment was rendered. So the judgment obtained by Davis against the sheriff and his bondsmen was for \$10,000, and the amount due Webber of said judgment, under the contract with Davis, was something over \$2,800. Webber fixed his lien upon said judgment March 21, 1895. In April thereafter Davis accepted of the sheriff and his sureties certain notes and real estate in satisfaction of the judgment against them. This was done without the payment of Webber's fee, and, as he claims, without his consent; hence this suit.

Several defenses were presented. The only ones we need consider are: First, that the contract was void; second, that there can be no recovery except upon a *quantum meruit*, and, in that case, Davis contends, the decree for \$1,997.05 was excessive.

1. Was the contract void? Long ago (1857) this court, in an elaborate and learned opinion by Mr. Justice Scott, traced the origin, and reviewed the history, of the law of maintenance and champerty, as enacted into statutes and declared by the courts of England. *Lytle v. State*, 17 Ark. 608, 663 *et seq.* The conclusion reached was that such laws were not applicable to contracts between attorney and client providing remuneration to the attorney for services rendered his client in conducting litigation. The English rule avoiding such contracts upon the ground of maintenance and champerty was repudiated, as repugnant to our

Constitution and statutes; and the court showed, and might have added, that such a rule was contrary to the genius of our institutions. As was said by Mr. Justice Cobb in *Newman v. Washington*, Mart. & Y. 79: "It is consonant with the nature of our institutions that faithful labors should be rewarded by reasonable remuneration, and he who works at the bar, and he who works at the plane, the physician, the farrier, the carpenter, and the smith, should all possess an equality of rights, and be paid what they reasonably deserve to have, according to the nature and value of their respective services." And he continues: "We have here no separate orders in society—none of those exclusive privileges which distinguish the lawyer in England, in order to attach him to the existing government, and which constitutes him a sort of noble in the land. . . . But, upon the whole, a lawyer in England is as different from a lawyer here as a man clad in a plain suit of black or blue—his head such as nature made it—is unlike him in appearance who has his body surrounded with a long robe and his head covered with a large wig." As was said by Chief Justice Gibson in *Poster v. Jack*, 4 Watts, 334: "The dignity of the robe, instead of any principle of policy, furnishes all the argument that can be brought to support" the English rule. *Kennedy v. Brown*, 7 L. T. N. S. 828, 9 Jur. N. S. 119. More than once since the decision in *Lytle v. State*, 17 Ark. 608, 663, this court has recognized the validity of contracts between attorney and client, allowing the former a contingent interest in the subject-matter of litigation as compensation for his professional services. *Brodie v. Watkins*, 33 Ark. 545, 34 Am. Rep. 49; *Jacks v. Thueatt*, 39 Ark. 340; *Cockrill v. Sanders* (Ark.) 8 S. W. 831. We are aware that some American courts of eminent respectability have approved the English rule, ignoring such contracts. *Miles v. Collins*, 1 Met. (Ky.) 308; *Dumas v. Smith*, 17 Ala. 305; *Price v. Carney*, 75 Ala. 552. But see *Coquillard v. Beares*, 21 Ind. 479, 83 Am. Dec. 362; *Orr v. Tanner*, 12 R. I. 94. But see *Gilman v. Jones*, 87 Ala. 702, 4 L. R. A. 113, for the doctrine now in Alabama. But the modern, and decidedly prevailing, view in this country is, in accord with the rule adopted by this court, to uphold such contracts. See cases collected in 5 Am. & Eng. Enc. Law, 2d ed. p. 826, and in note to *Kennedy v. Brown* (1863) 2 Am. L. Reg. N. S. 372. Such contracts, however, should be characterized by the utmost good faith on the part of an attorney towards his client, because of the confidence reposed in him. The courts will scrutinize such contracts closely, to see that the *uberrima fides* has been preserved. If there has been "suppression or reserve of fact or exaggeration of apprehended difficulties," or any circumstances of the confidential relationship have been seized upon by the attorney to consummate an oppressive contract with the client, the courts will not hesitate to express their disapprobation of such contracts, and, when called upon, will set them aside or refuse

their enforcement. *Ex parte Plitt*, 2 Wall. Jr. 480; *Chester County v. Barber*, 97 Pa. 455; *Stewart v. Houston & T. C. R. Co.* 62 Tex. 248; 5 Am. & Eng. Enc. Law, 2d ed. p. 827. This court in *Jacks v. Thueatt*, 39 Ark. 340, passed upon a contract containing a stipulation whereby the clients agree "to make no settlement without consulting their attorneys." But the question as to whether that clause rendered the contract void was not raised or decided in that case.

So far as the amount of the fee as fixed by the contract is concerned, there is nothing in the record to show any unjust or unfair advantage taken by Webber of his client, Davis, in determining the amount. At the time the contract was executed (30th of April, 1894) only seven days had expired from the time (23d of April, 1894) demand was made upon the sheriff for the money which he had been ordered to pay over to Davis. Under the contract Webber was to get no fee unless there was a recovery. While the amount Davis was to receive upon recovery was fixed and certain, the amount Webber was to receive was contingent, depending entirely upon the time that elapsed from the demand until the amount sued for was collected. At the time Webber entered into the contract, neither he nor Davis could know what time would intervene before a settlement might be reached. If the sheriff and his bondsmen had settled the amount, with Webber's consent, in a few days after the contract between Davis and Webber was executed, the amount of Webber's fee would have been very small as compared with the amount of same at the time of the judgment. Davis appears to have been well pleased with the agreement. He says: "I told him [Webber] that if he would agree to collect the \$7,114.50 for me, that he could have any penalty that might be allowed; and if he would agree to that and agree to set aside all the money that was collected until the whole amount of the principal was collected for me, that he could have the amount that would be allowed as a penalty." Witness Smith, one of the sheriff's sureties, and who was acting as an intermediary between the sheriff and his other bondsmen and Davis, to bring about a settlement before suit was instituted, and who had made a proposition of settlement to Davis, which Davis had declined, said concerning this: "I told him I was sorry, and that he would regret it more than I ever would; that in twenty-two or twenty-five years from now, when he hadn't gotten a nickle out of it, and a big lawyer's fee on his shoulders, that he would think that Smith was right once. He [Davis] said 'As to my lawyer's fee, Mr. Smith, I have a contract right here in my safe with a good attorney that I am never out a cent attorney's fee, but I must have all of my money before there is any liability for attorney's fee.' I said to him, 'Mr. Davis, you certainly have an elegant contract.' He says, 'I think I have.'" Davis was a merchant, a man of intelligence and considerable experience in

litigation and in the matter of contracts for lawyer's fees, as the record discloses.

A contract with his attorney for fees, which, as the witness reports him, he regarded as "elegant" in the beginning of his important litigation, cannot be avoided for the reason simply that, in the end, it did not bring to him the results which he had anticipated under it. Yet this is about the sum total of his grievance, so far as we can see. Therefore we do not consider what is said by the learned counsel for Davis in their excellent brief, as to good faith, fraud, oppression, extortion, the "severe relationship of trustee and *cestui que trust*," etc., and the authorities cited on these subjects, as applicable under the facts of this case. The facts, as we view them, fail to show any abuse whatever of the confidential relation of attorney and client, and, were this all, we should uphold the contract.

But the contention that "the provision in the contract preventing Davis from settling the controversy without the consent of Webber is void," is well taken. Such a stipulation is against public policy. "The law," says Judge Dillon in *Ellwood v. Wilson*, 21 Iowa, 523, "encourages the amicable adjustment of disputes, and a construction of a contract which would operate to prevent the client from settling will not be favored." It is said in *Lewis v. Lewis*, 15 Ohio, 715, that "a contract with an attorney to prosecute a suit, containing a stipulation that the party should not have the privilege to settle or discontinue it without the assent of the attorney, would be so much against good policy that the court would not enforce it." In *North Chicago Street R. Co. v. Ackley*, 171 Ill. 100, 44 L. R. A. 177, it is held that "any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation." The impeachment of the contract under consideration is peculiarly proper upon the ground of public policy, regardless of the fairness and good faith of the parties in executing it. We would not call in question the good faith of the parties to the contract. The record would not justify our doing so. Davis was anxious to procure the services of an attorney to collect the money coming to him without paying out any "ready cash," and, as he says, he did not know whether any penalty would be allowed. Webber was perfectly willing to take the penalty for his fee, and risk the chance of recovering it. This, at the time, was doubtless considered an admirable arrangement by both, and, but for the clause prohibiting Davis making a settlement without the assent of Webber, we can see no objection to it. This clause was fatal to the entire contract. It is not severable from it. It seems to have been an inducement for entering upon the contract. It is impossible for us to say that the parties would have entered upon the contract at all without this clause. To approve such a contract as a precedent would be unprecedented. It is a wise public policy to allow the parties to a lawsuit, or to dis-

putes that have not even progressed to the proportion and dignity of a lawsuit, to settle their differences without hindrance from disinterested parties. Parties should be permitted to beg or "buy their peace at any time." It would be difficult to estimate the monstrously unjust consequences that might result to parties willing and ready to settle a demand of this kind, if it lay in the power of an attorney to impede or control such settlement, especially when his interest in doing so was quickened by the stimulating influence of a fee which was accumulating at the appalling rate of \$700 per month. It could hardly be expected that such a condition would expedite the litigation, or the settlement either. When a lawsuit has progressed to judgment, then, of course, the attorney, under the statute (§ 4223, Sand. & H. Dig.), may establish his interest in the judgment which has resulted from his services, and this neither party to the litigation can ignore. Then the parties may settle if they wish, but, before there can be any satisfaction of the judgment, the attorney's fee must be paid. Before judgment the attorney can only trust to the integrity and good sense of his client not to compromise without advising with him and making satisfactory arrangements as to the fee. If the attorney should have for his client one who neither has the good sense to consult him nor the integrity to pay him, then, indeed, would he be unfortunate. But where this is the case, generally, the attorney, unless he expects to give his services as *quidam honorarium* will deserve censure, rather than sympathy, for having such a client, and will have to suffer the consequences.

2. While the contract sued on is against public policy, and therefore void, yet the making of such a contract is neither *malum prohibitum* nor *malum in se*. It is not even of questionable propriety. Therefore the courts, although refusing to enforce such a contract, will nevertheless grant compensation for valuable services rendered under it, upon the rule of *quantum meruit*. 5 Am. & Eng. Enc. Law, 2d ed. p. 828, and authorities cited.

The question as to the amount of recovery is one of fact, and one most difficult to decide, in view of the varying opinions of gentlemen distinguished in the profession, as to the value of such services, and also the conflicting opinions of witnesses as to the value of the property accepted by Davis in satisfaction of the judgment; all of which it is proper to consider in fixing the value of the service under a *quantum meruit*. The court may look to the contract for the purpose of ascertaining what the parties themselves thought the services were reasonably worth, and, in connection with the other evidence, to determine what was the reasonable value of the service actually rendered. *Shumate v. Farlow*, 125 Ind. 359, 361; *La Du-King Mfg. Co. v. La Du*, 36 Minn. 473; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189. But it cannot be taken as the criterion of value for such services. *Holloway v. Lowe*, 7

Port. (Ala.) 488; *Elliott v. McClelland*, 17 Ala. 209. The professional standing of the attorney, the amount of his professional business, and the nature and importance of the controversy in which the services were rendered, are all to be considered. 1 Lawson, Rights, Rem. & Pr. § 198. Webber was "no cheap man" and "no mean lawyer." On the contrary, the character of the litigation which the record discloses he conducted to a successful termination, and the fees he demanded and received show him to have been a lawyer of good ability, who doubtless deserved, demanded, and received pay commensurate with his labors and his talents. Now, this being true, what was the reasonable value of the services he rendered Davis in his controversy with the sheriff and his bondsmen? It would serve no useful purpose to set out in detail, and to discuss at length, the evidence (which is voluminous) upon which we base our conclusion. A less intelligent lawyer than Webber must have known, when he entered upon the contract, that there would be but little work and no difficulty in reducing the demand of Davis to judgment. All but a trifle of the amount had been judicially ascertained, and, from the lawyer's standpoint, it could have been but a simple and easy matter to file the motion and have summary judgment entered; for in the state of Davis' claim, however hotly contested, there could absolutely be no defense to it. There could be no uncertainty as to the amount, nor as to the result of the judgment, so far as the principal of the claim was concerned. The only uncertainty or contingency whatever related to the penalty, and there was no contingency about obtaining judgment for this, but only an uncertainty as to the amount that would be allowed, depending upon the time that would intervene the demand and the judgment. It will not do to liken a case of this kind to a suit for damages for personal injury, or any other kind of a suit, where both the question of obtaining judgment, and the amount thereof, if obtained, are trembling in the balance. This is in fact a suit upon a liquidated demand, where there was no issue as to the amount of the judgment and no doubt about obtaining it. The proof shows that the lawyer's fee, based upon the contingency of final recovery, would be much less in the latter case than in the former; necessarily so because of the diminished labor in its prosecution and the anxiety as to the result.

The paramount obstacle that lay in Webber's path was not the difficulty and labor of obtaining judgment, but in collecting it. But even this, in view of actual results, was re-

duced to the minimum; for while suits to recover at one time were thought to be necessary, and investigations made and memoranda taken for the preparation of bills to that end, as a matter of fact such bills were never filed, and there was no long and complicated litigation to collect what was finally received. Now, Webber, under the *quantum meruit*, should only receive pay for the services actually rendered. Suits that were never prosecuted should not be considered. We would not minimize the value of his excellent labors. His known ability, persistence, and vigilance doubtless moved the sureties of the sheriff to make the offer of compromise, both before and after the suit was instituted. We are willing to concede this. Then, how does the case stand? Webber instituted a suit against the sheriff and his bondsmen for the sum of \$7,114.50, and which he must have known at the time, unless settled by them before, would amount to \$10,000, including interest and penalty, by the time judgment would be obtained. To this claim, which had been ascertained by the court, and the penalty fixed by the statute, even though vigorously contested, there could be no defense. He succeeded in obtaining judgment for \$10,000, and recovered of the amount, according to the estimate of the property by the court below, the sum of \$8,850. A majority of the judges are of the opinion that this is the most favorable view of the case that can be taken for Webber; and it is, in our opinion, the correct view. When so considered, under all the proof, the sum of \$1,000 would be reasonable and fair compensation for all his services. This would give him 10 per cent of the amount of the judgment, or 10 per cent of the amount collected, and \$115 for the work done in preparing for suits to uncover, which would be ample to pay for that.

3. The court rendered judgment for \$152 for services in a different suit. This is a suit to declare and enforce a lien for a fee for services rendered in a certain suit, on property which was received as a result of that suit. The controversy over the \$152, being about an entirely different matter, is in no way germane to this issue, and should not have been considered, and judgment for said sum was improper in this proceeding.

The decree is therefore reversed, and the cause remanded, with directions to enter a decree for Webber in the sum of \$1,000, and to proceed to enforce the lien on the property mentioned in the complaint, and for such other proceeding as may be necessary, not inconsistent with this opinion.

Bunn, Ch. J., dissenting.

FLORIDA SUPREME COURT.

W. A. DELL, *Plff. in Err.*,
v.
J. L. MARVIN.

(.....Fla.....)

- *1. In actions at law, the consideration of the appellate court will be confined to the errors assigned and argued by the plaintiff in error.
2. The attorney's fees allowed for the successful establishment and enforcement of the lien provided by the act of 1887, chap. 3747, in favor of mechanics, artisans, laborers, and materialmen, are incidental to the lien claim, and are entitled to payment on the same basis as the judgment for labor or material furnished.
3. The provision in the 20th section of the act of 1887, chap. 3747, for attorney's fees when judgment shall be rendered in favor of the plaintiff, is not in conflict with the Constitution of this state or the Constitution of the United States.

(*Taylor, Ch. J., dissents.*)

(April 13, 1899.)

ERROR to the Circuit Court for Duval County distributing the assets of the Standard Publishing Company upon motion of the sheriff in the cases of A. G. Elliott & Co. and I. N. Megargee & Co. against such publishing company. *Reversed.*

The facts are stated in the opinion.

Messrs. A. W. Cockrell & Son for plaintiff in error.

Mr. Richard H. Liggett for defendant in error.

Mabry, J., delivered the opinion of the court:

A statement of facts in this case, so far as was necessary on the application then before the court, will be found in *Dell v. Marvin*, 31 Fla. 152. It appears from the record that the sheriff of Duval county filed a motion in the circuit court, entitled in the causes of A. G. Elliott & Co. against the Standard Publishing Company and of I. N. Megargee & Co. against the same defendant, and therein stated that in the said entitled causes and thirty-two others, in which judgments had been obtained and executions issued, funds specified were in his hands, realized from the sale of property of the defendant, the Standard Publishing Company, but wholly insufficient to satisfy the said several execution creditors, and a contest had arisen and doubts existed as to the proper application of said funds among the said several creditors, and asking the direction and protection of the court as to the application of the funds. With the motion a list of thirty-

five creditors was filed, and it was prayed that they be made parties by appropriate process, and required to interplead among themselves, and be concluded by the judgment of the court. All the creditors appearing by their respective attorneys, an order was made by the circuit judge that the several creditors file in writing, within a time stated, their respective claims to the funds in the hands of the sheriff and the grounds upon which they claimed priority of lien. The order also directed that each creditor might take issue upon or contest the claim of another creditor. Plaintiff in error, as assignee, filed a statement of claim of twenty-seven judgments obtained by different parties before the county judge of the county, and two obtained in the circuit court, and executions thereon against the Standard Publishing Company. J. L. Marvin, trustee, filed a statement of claim of the judgment and execution of Megargee & Co. and a mortgage given by the Standard Publishing Company to him as trustee. A. G. Elliott & Co. filed a statement of claim of two circuit court judgments and executions issued thereon. The Citizens' Gas & Electric Company filed a statement of claim of a judgment, and Elizabeth S. Robinson filed a statement of claim for rent alleged to be due from the Standard Publishing Company.

The amounts of the various claims propounded, including the dates and amounts of judgments, together with costs and attorney's fee of \$25 allowed in each case, were shown. The grounds of priority of payment out of the funds were set out in the written statements of demands, and there were contests among the various creditors as to the validity of each other's claims, including the constitutionality of the law under which attorney's fees were allowed in the judgments held by plaintiff in error. The final judgment on the motion recites: "Said motion coming on to be again heard, came the several parties interested herein, intervening under the order of this court, and the said defendants, by their several attorneys, and was submitted to the court, upon said several interventions, the objections and exceptions severally thereto, and the issues severally joined thereon, upon the records and proceedings of record and file in this court, and in the court of the county judge of said Duval county, in which the said several records and proceedings were respectively had, and upon the testimony of witnesses and documentary evidence produced in open court, and was argued at length by the respective counsel," and thereupon it was ordered that so much (stating the amount) of each of the twenty-nine judgments held by plaintiff in error as was recovered for services rendered by the plaintiffs therein prior to February 16, 1892,

*Headnotes by **MABRY, J.**

NOTE.—As to constitutionality of provisions for attorney's fees, see *note* to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. on page 586; also *Hocking* 45 L. R. A.

Valley Coal Co. v. Rosser (Ohio) 29 L. R. A. 386; *Vogel v. Pekoc* (Ill.) 30 L. R. A. 491; and *Cameron v. Chicago, M. & St. P. R. Co.* (Minn.) 31 L. R. A. 553.

as employees of the Standard Publishing Company, was a prior lien on the funds, as was also the costs, except \$25 taxed in each case as attorney's fee, under § 20, chap. 3747, Act 1887, which section was, in so far as it allows such fees, declared to be unconstitutional and void; that the Megargee & Co. judgment held by J. L. Marvin, trustee, was entitled to be first paid out of the remaining funds, and the Elliott & Co. and Citizens' Gas & Electric Company judgments be paid, share and share alike, out of the residue; and, as this exhausted the funds held by the sheriff, the claims of the remaining interveners were denied and disallowed.

Dell alone sued out a writ of error, and assigns as error the ruling of the court declaring so much of § 20, chap. 3747, Id., providing for attorneys' fees, to be unconstitutional, and directing that no part of the funds in the hands of the sheriff be applied in payment of such fees.

The case is presented on the record without a bill of exceptions, and no objection is anywhere made to the procedure in the circuit court in settling the conflicting claims of the various creditors to the funds in the hands of the sheriff.

It sufficiently appears from the record that plaintiff in error was holder of judgments obtained under chapter 3747, Act 1887, being "An Act to Protect Mechanics, Artisans, Laborers, and Materialmen, and to Provide for the Speedy Collection of Moneys Due Them for Wages or Materials Furnished," and the order of the court is that so much of each judgment (stating definitely the amount of each), for services rendered by the plaintiffs named therein as employees of the Standard Publishing Company previous to a given date, including costs of suit, but not the attorney's fee taxed therein, was a prior lien on the funds in the hands of the sheriff, and should be first paid. The attorney's fee feature of each judgment was denied participation in the funds on the sole ground that the provision of the act allowing it was unconstitutional. The view of reasonableness of the fee did not enter into the decision, nor has contention been made that the amounts in the judgments were unreasonable.

In brief of counsel filed on behalf of Marvin, one of the defendants in error, it is insisted that the court erred in allowing any part of the judgments held by plaintiff in error to share in the funds, but this contention cannot be entertained by us. Marvin has not sued out any writ of error from the judgment rendered, and the only question open for consideration arises on the error assigned by plaintiff in error, which is the constitutionality of the provision in the act providing for attorney's fees.

The act under which the judgments held by plaintiff in error were rendered created a lien in favor of mechanics, materialmen, and various classes of laborers for work and labor done and material furnished, and the procedure for enforcing the lien is provided.

By § 20 it is enacted "that if upon trial of the case it shall be found in favor of the 45 L. R. A.

plaintiff, then judgment shall be rendered in his favor for the amount as returned by the jury, together with the costs of the court, and an attorney's fee of not less than ten dollars (\$10) if the suit is tried before a justice of the peace, and not less than twenty-five dollars (\$25) if it be tried before the county judge, the judge of the county or circuit court." The attorney's fee provided is for the successful establishment and enforcement of the lien given, and is incidental thereto. If such fees cannot be considered as part of the court costs, they must be regarded as incidents to the enforcement of the lien, and, in our judgment, if the provision for them be valid, they are entitled to payment on the same basis as the judgment for labor or material furnished. *McIntyre v. Trautner*, 78 Cal. 449. The act of 1887 was passed soon after the Constitution of 1885 went into effect, and this instrument declares, in § 22, art. 16, that "the legislature shall provide for giving to mechanics and laborers an adequate lien on the subject-matter of their labor." This provision removes all objection to the act in question on the ground that it is class legislation, as there is an express command to legislate to the extent of providing an adequate lien in favor of the class mentioned. We have heretofore regarded the act as not being special in the sense of violating constitutional restrictions, as it affects alike all persons similarly situated. *Summerlin v. Thompson*, 31 Fla. 389.

We are unable to perceive that the provision allowing attorney's fees to plaintiffs in enforcing mechanics' liens is violative of any part of our Constitution; and, if investigation ended here, the act must be sustained. It is further insisted that the provision allowing attorney's fees is in conflict with the latter clause of § 1, article 14, of the Federal Constitution, prohibiting any state from denying "to any person within its jurisdiction the equal protection of the laws." The decisions in the state courts are conflicting on the direct question presented under our statute. In Michigan and Alabama the rulings are adverse to the constitutionality of such legislative provisions. *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104; *Randolph v. Builders' & Painters' Supply Co.* 108 Ala. 501. The Michigan court denied the right of the legislature to impose an attorney's fee in favor of plaintiffs recovering for stock killed on a railroad in consequence of a failure to fence in obedience to statutory requirement. We do not follow this ruling, and, as we understand the decisions of the Supreme Court of the United States, that court does not sanction such a ruling. *Jacksonville, T. & K. W. R. Co. v. Prior*, 34 Fla. 271. In Ohio a statute was declared void that gave to plaintiffs attorneys' fees, in suits for labor, without any reference to a lien. *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386. The validity of statutes involving the question now raised under ours is fully sustained in decisions in Montana, Washington, and Illinois. *Wortman v. Kleinschmidt*, 12 Mont. 316; *Ivall v. Willis*,

17 Wash. 645; *Vogel v. Pekoc*, 157 Ill. 339, 30 L. R. A. 491. Statutes providing for the taxing of attorney's fees in favor of plaintiffs when successful in various cases, other than for enforcing liens in favor of mechanics, have been sustained,—such as in actions upon policies of insurance, in suits against railroads to recover damages for violation of statutory duties, for injuries caused by fire communicated from engines, and in certain actions of ejectment for land taken by railroads and not condemned under statutes of eminent domain. *Union Cent. L. Ins. Co. v. Channing*, 86 Tex. 654, 24 L. R. A. 504; *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584; *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447; *Cameron v. Chicago, M. & St. P. R. Co.* 63 Minn. 384, 31 L. R. A. 553; *Perkins v. St. Louis, I. M. & S. R. Co.* 103 Mo. 52, 11 L. R. A. 426. It is the plain duty of the court to sustain an act of legislation, unless clearly in violation of some express or implied limitation in the Constitution. On the direct point we are considering no decision of the Supreme Court of the United States has been made so far as we have been able to find. In *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, the supreme court held (reversing the state court, —87 Tex. 19), that a statute allowing attorney's fees to plaintiffs in suits not exceeding \$50 against railroad corporations only was repugnant to the 14th Amendment to the Constitution of the United States. The court holds that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause in the 14th Amendment, and in all cases it must appear, not merely that a classification has been made, but also that it is based upon some reasonable ground,—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. In the opinion in this case it is stated that statutes giving attorney's fees to mechanics and laborers in enforcing liens for their labor had been sustained, and we discover nothing in the reasoning of the court to condemn such state legislation. The class of laborers provided for in the statute was singled out by the framers of our organic law, and legislation for their special benefit was commanded. If there exists some just basis, some real public policy, or just need for the classification and distinction made in favor of the class of persons mentioned, or, in the language of the supreme court, if there is "some difference which bears a just and proper relation to the attempted classification," the act should be sustained. We are of opinion that the act can be sustained on the grounds stated, and therefore hold that the court erred in declaring the act unconstitutional and void.

The judgment of the court below is reversed.

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Taylor, Ch. J., dissenting:

I am unable to agree with the majority of the court as to the constitutionality of that feature of chapter 3747, act 1887, allowing to mechanics, in suits for the enforcement of the liens that the law gives them upon the subject-matter of their labor, besides the costs of such suits, a distinctive attorney's fee in the event of his succeeding in the suit, leaving his opponent, as it does, with the unequal burden of paying his own attorney's fee in the event the mechanic shall fail in the suit. Our Constitution, it is true, expressly enjoins upon the legislative department the duty to provide an adequate lien to secure the wages of mechanics, but it nowhere requires that the judicial means to be provided for the enforcement of such liens shall give to the lienor an unequal and inequitable advantage before the law; nor is such discrimination at all necessary to a perfect compliance with the constitutional requirement to give them an adequate lien on the subject-matter of their labor. While I do not agree with much that is said in the case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, yet I think that, from the facts in that case, the gist of the conclusion reached therein tends more strongly to overturn than to uphold the propriety of our statute under discussion. My view is that the assertion in our own constitutional declaration of rights, to the effect that "all men are equal before the law," and the inhibition of article 14 of the Federal Constitution against the denial by the states to any person of the equal protection of the laws, plainly forbid any such discrimination between suitors or classes of suitors before the courts. To my mind the clear intent and purpose of both of these provisions are that no individual or class of individuals shall be given any undue advantage over any other individual or class of individuals, either in the substance of the law itself or in the judicial procedure provided for the enforcement of such law. In other words, all men shall be equal, not only in and by the law as enacted by the legislature, but before the courts and in the procedure provided for the execution and enforcement of such law. Any law that says, in effect, to one suitor or class of suitors, "You shall have from your adversary in case of recovery your just claim and all court costs, and, besides, your attorney's fee, but your adversary, though he shall prove successful, and though he may establish the fact that your claim was fraudulent and unreal, and conceived in malice for the avowed purpose of subjecting him to the expense of employing skilled professional assistance to defend against and expose the fraud, shall recover nothing but his bare court costs, and nothing to remunerate him for the expense you have designedly forced him to incur," seems to me to be as flagrant an infraction of these constitutional inhibitions as can well be conceived. But this statute goes further. It fixes an arbitrary minimum sum that shall be awarded to the mechanical suitor for his attorney's fees, and, in effect, says that no

smaller sum than that prescribed shall be awarded for such fee, regardless of the amount at which the favored suitor can and does in fact secure the services of the attorney employed. It says, in effect, to the favored suitor, when your litigation is in the circuit court, although your actual recovery therein may be barely nominal, you shall be awarded an attorney's fee of not less than \$25, even though you may have actually secured such attorney's services at the agreed price of \$10. In such a case the overplus of \$15 out of the prescribed award for attor-

ney's fees is forced from the nonmechanical suitor under the guise of attorney's fees, but in reality goes into the pockets of the favored litigant, operating simply as a legal penalty levied upon the nonfavored suitor as punishment for his tardiness in discharging this highly favored class of obligations. A law that makes such a state of affairs possible metes out but partial justice, and puts the citizen upon grossly unequal ground before the law, overflowing the cup of its protection to the one, and but half filling it as to the other.

GEORGIA SUPREME COURT.

Augustus D. ADAIR, Admr., etc., of Sarah C. Hudson, Deceased, *Plff. in Err.*,
v.

SOUTHERN MUTUAL INSURANCE
COMPANY.

(.....Ga.....)

*1. A provision in a policy of fire insurance declaring it shall be forfeited "by any change in the use or condition of the building, including additions or repairs, or by the erection of other buildings, or in any other manner by which the degree of the risk is increased, unless due notice is given to the company, and a new agreement is entered into," applies to such changes as are of a permanent nature, and not to mere temporary changes in the use and occupation of the premises. Therefore a mere temporary use of a machine for threshing grain for a few hours on the premises where the insured property is located will not, *per se*, work either a forfeiture or a suspension of such policy.

2. If, however, the insured, or one to whom he has intrusted the entire custody of the property, and given full freedom in its use, should, by doing any act or acts which one in the exercise of ordinary care and diligence would not do under like circumstances, so change the use and occupancy of the premises as to materially increase the hazard of the insurance, the insurance company would not be liable for a loss directly resulting as a consequence of such increase in the risk.

3. There was sufficient testimony introduced by the plaintiff in this case to require the submission to the jury of the issue of fact as to whether or not there had been such negligent use of the property in question as to materially increase the risk of insurance and to cause the damage complained of, and the judge therefore erred in granting a nonsuit.

(April 21, 1899.)

ERROR to the Superior Court for Hall County to review a judgment in favor of defendant in an action brought to recover

*Headnotes by LEWIS, J.

NOTE.—As to effect on insurance policy of using threshing machine, see also *Thurston v. Burnett & B. D. Farmers' Mut. F. Ins. Co.* (Wis.) 41 L. R. A. 316.
45 L. R. A.

the amount alleged to be due on a fire-insurance policy. *Reversed.*

The facts are stated in the opinion.

Mr. W. R. Hammond, for plaintiff in error:

The clause in the policy forfeiting insurance "by any change in the use or condition of the building," has reference to something not merely temporary, but permanent in its character. It must partake of the nature of permanency, and not be one that is merely temporary or transitory in its character.

Boardman v. Merrimack Mut. F. Ins. Co. 8 Cush. 583; *Loud v. Citizens Mut. Ins. Co.* 2 Gray, 221; *Williams v. New England Mut. F. Ins. Co.* 31 Me. 219; *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121; *Smith v. German Ins. Co.* 107 Mich. 270, 30 L. R. A. 368; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 39 L. R. A. 789.

The policy is to be construed most strongly against insurer and liberally in favor of assured.

Brink v. Merchants & M. Ins. Co. 49 Vt. 442.

In *Alston v. Greenwich Ins. Co.* 100 Ga. 282, the act complained of was the storage of a large quantity of hay in the insured building, which was permanent in its character, and forfeited the policy.

The evidence showed that a sudden, violent storm of wind arose, after the commencement of operations, which blew a spark into the straw and caused the burning. This was the proximate cause of the fire.

Blythe v. Denver & R. G. R. Co. 15 Colo. 333, 11 L. R. A. 615; *Marvin v. Chicago, M. & St. P. R. Co.* 79 Wis. 140, 11 L. R. A. 506.

Questions of negligence are for the jury.

Long v. Beeber, 106 Pa. 466, 51 Am. Rep. 532; *Central R. Co. v. Freeman*, 66 Ga. 170; *Central R. Co. v. Brinson*, 70 Ga. 211; *Stewart v. Head*, 70 Ga. 449; *Western & A. R. Co. v. Wilson*, 71 Ga. 22; *Georgia R. Co. v. Bird*, 76 Ga. 13; *Central R. Co. v. Thompson*, 76 Ga. 771; *Covington v. Western & A. R. Co.* 81 Ga. 275; *Richmond & D. R. Co. v. Howard*, 79 Ga. 44; *Western & A. R. Co. v. King*, 70 Ga. 261; *Killian v. Augusta & K. R. Co.* 79 Ga. 236; *Ferguson v. Columbus & R. R. Co.* 75 Ga. 637; *Cook v. Western & A. R. Co.* 69 Ga. 619.

Messrs. Erwin & Erwin and S. C. Dunlap for defendant in error.

Lewis, J., delivered the opinion of the court:

Suit was brought by Augustus D. Adair, as administrator of the estate of Sarah C. Hudson, deceased, against the Southern Mutual Insurance Company, the same being an action for the recovery of a loss on a policy of fire insurance. This policy was issued to the plaintiff on the 22d of January, 1897, and "insures estate of Mrs. Sarah C. Hudson against loss or damage by fire to the amount of twelve hundred dollars, for the term of one year"; \$1,000 of said sum being on a house that was occupied by the family of the deceased as a dwelling, and the balance on furniture in the house. After plaintiff's evidence had closed the judge granted a nonsuit on motion of defendant's counsel, upon which error is assigned by the plaintiff in his bill of exceptions. It appears from the record that at the time of the fire the premises were in the possession of the husband of deceased, who, with his children, occupied the dwelling. He had a small quantity of wheat, that had been placed on the premises where the dwelling was located, and had procured the owner of a threshing machine run by an engine to move his machine on the premises for the purpose of threshing this wheat. The engine was located about 85 feet from the dwelling. It had no spark arrester. The separator was located about halfway between the engine and the house. As the grain was being threshed, the straw gathered near the separator, some of it falling within a few feet of the dwelling. The work of threshing the grain required only about two hours. When it commenced, the weather was calm,—a gentle breeze blowing from the house towards the engine. Plaintiff's witnesses testified that they regarded the house in no danger from fire, with the weather in that condition; that there were a number of workmen engaged about the machinery,—some ten or fifteen,—and that, even if a spark from the engine had ignited the straw, it could readily have been extinguished, without material danger to the house. The owner of this machine testified that he had been engaged in such business, off and on, for ten or fifteen years, using the same character of engine he had then, threshing thousands of bushels of grain, often, in a season, and he never, before this fire, knew a pile of straw to catch fire from the engine; that often the engine was stationed near houses, barns, stables, etc., as this one was on the day of this fire, and no loss from fire had ever occurred. Plaintiff testified to the same effect. After the work was about half over, there came an unexpected and sudden gust of wind, called by the witnesses a "dry storm," which blew very violently from the engine towards the dwelling. It was described as coming in a whirl, and as being one of the most violent winds plaintiff ever saw, except a cyclone on one occasion. About the same time, fire was noticed in the

straw. It was presumed it came from a spark from the engine, though the witnesses did not know that as a fact. Strong efforts were at once made to extinguish it, but the wind blew so violently as to carry the straw against the house, fan the flames, and blow them for many feet beyond. This wind blew the belt from the machinery. The efforts to save the house proved fruitless, and it was destroyed.

1. The only portion of the policy sued upon, material to be considered in determining the issues involved in this case, is the following clause: "Policies shall be forfeited, first, by any change in the use or conditions of the building, including additions or repairs, or by the erection of buildings, or in any other manner by which the degree of risk is increased, unless due notice is given the company, and a new agreement entered into." It is insisted by counsel for defendant in error that the use of these premises by placing thereon this machinery, and using the same in threshing grain, amounted to a forfeiture of the policy, especially as it caused the fire which destroyed the property insured. We do not think, in the first place, that the clause has any reference to such temporary use of the premises, but that it refers to changes in the use or condition of the buildings, or to changes in any other manner, of a permanent nature, by which the degree of risk is increased. Where premises are occupied as a home, on which is located the dwelling of a family, the use of them is constantly susceptible to changes of a temporary nature, for the convenience of the occupants, and to facilitate the conduct of business pertaining to the industries of the members of the household. We think it would be going a long way towards construing these policies liberally in favor of insurance companies, as well as liberally in favor of the doctrine of forfeiture, to hold that it was intended by the contract that every such temporary change which may for the moment increase to some degree the risk of fire would necessarily work a forfeiture of the policy at the option of the company. There is no person, perhaps, so diligent as to live from day to day with an equal and uniform degree of caution against accidents of this sort. An important thought to consider in this connection is that, while a permanent use of the premises in a certain manner from day to day might materially increase the hazard from fire, yet a mere temporary use for a few hours, while the occupants are vigilant and on the alert to prevent fire, might not be considered as a material risk at all, although the dwelling may be in a little more danger from fire on such special occasions than is generally the case. We think our view of the construction that should be given the terms of the clause above quoted is demanded by the well-known elementary principle of law governing the construction of such instruments, namely,—First, they should be construed strictly against the company or party preparing them; and, second, they should be so con-

strued as to avoid, if possible, a forfeiture. We are satisfied that these views are sustained by a decided weight of authorities, some of which we will now briefly allude to, to show the general trend of judicial decisions on this line. In discussing this provision in policies touching the use and occupancy of premises so as not to increase the risk from fire, we quote the following from 7 Am. & Eng. Enc. Law, old ed. p. 1035: "The change contemplated by the provision is not a mere temporary or incidental change, but a permanent and substantial change." Quite a large number of authorities are cited to support that text. And in this connection we call attention to instances given on page 1034 of the same volume, which have been held by courts not to constitute a change: "The making of repairs to a dwelling house; shutting down a factory temporarily; running the engine and certain shafting of a mill or factory at night, when the policy recites 'run by daylight only'; changing from a dwelling to a boarding house; changing occupants; mixing and keeping paints in a barn, described in the policy as 'used for hay, straw, grain unthreshed, stabling, and shelter,' while painting the house on the same premises; ceasing to occupy the premises; lighting temporarily with gasoline; mortgaging the property insured." In the case of *Westchester F. Ins. Co. v. Foster*, 90 Ill. 121, it was held that "an occasional occupation of a room of a building insured, by a carpenter in his business, is not such a violation of a clause in a policy which forbids that during the term of insurance the premises should be used for any trade or business denominated 'hazardous,' as will defeat a recovery in case of loss. An occasional day's work by a carpenter in a part of the house will not avoid such a policy." In *Loud v. Citizens' Mut. Ins. Co.* 2 Gray, 221, it appeared that, by express directions of the assured, a certain stove in the building was not to be used; the same being in an unsafe condition. The owner allowed the house to be occupied temporarily as a shelter for the crew of a vessel, who built a fire in the stove for one night. It was held that such temporary use did not void the policy. It appeared in that case that the house was actually destroyed as a result of the fire being kindled in the stove. In the case of *Williams v. New England Mut. F. Ins. Co.* 31 Me. 219, it was decided that a warranty in the insurance of an unfinished dwelling house, which was in the process of construction, that there were to be no stoves in it, must be understood to mean that no stove is to be habitually kept and used in it, as stoves are ordinarily kept in dwelling houses, and that the use of a stove for a few days for a purpose connected with the finishing of the house is not a violation of the warranty. In *Smith v. Germania Ins. Co.* 107 Mich. 270, 30 L. R. A. 368, there was a stipulation in the policy sued on that it should be void "if . . . there be kept, used, or allowed on the above-described premises, benzine, . . . naph-

tha, . . . or other explosives." The court decided in that case that gasoline is not "kept, used, or allowed" on the premises insured, within the meaning of a provision for avoiding the policy, by leaving a five-gallon can containing gasoline in the building for a number of days, for use in burning off old paint preparatory to repainting the building. The clause of this policy which we have been construing we do not think amounts to anything more or less than a provision employed in our Civil Code, and it would constitute a part of the contract between the parties whether they made any stipulation in reference thereto or not. Section 2100 of the Code declares: "Any change in the property, or the use to which it is applied, without the consent of the insurer, whereby the risk is increased, voids the policy." The case of *Alston v. Greenwich Ins. Co.* 100 Ga. 282, cited by counsel for defendant in error, we do not think in point. It appeared in that case that the insured had permitted another person to store a large quantity of hay in the storehouse wherein his own goods, covered by the policy, were contained, and it also appeared that the hazard was thereby increased. It was held that a nonsuit was proper under a provision in the policy that the same should be void if the hazard be increased by any means within the knowledge or control of the insured. But manifestly, under the facts of that case, the change made in the use of the house was of a permanent nature. The hay was stored in the house for the purpose of making sales thereof, and was as permanently located there as the goods themselves which were insured. If a mere temporary change in the use or occupation of the premises, which increases the risk of insurance, *per se* forfeits the policy, then the policy is void whether any loss results from such increased risk or not, and even if the change is removed by the insured, and the premises restored to their original condition, without any loss occurring to the property, unless, of course, the insurance company, either expressly or by implication, waives its right of forfeiture. Hence, if the use of the premises complained of by the defendant in this case worked a forfeiture of the policy, it would have been void, at the option of the company, even if the machinery and inflammable matter had been removed without having caused injury from fire. Manifestly, we think it was neither the intention of the provision in the policy above quoted, nor of § 2100 of the Code, that this contract of insurance should have such a construction. There is authority, however, to sustain the position that while a temporary increase of risk could not operate, *per se*, to forfeit the policy, it would have the effect of suspending it during the existence of such risk. See 3 Joyce, Ins. § 2239, and authorities cited. There is quite a difference between forfeiture and suspension. In the latter case the policy is simply inoperative during the time of the suspension. Hence it follows that when the cause of the suspension is removed the policy is revived and con-

tinues in force. But not so in case of forfeiture, for the policy would continue absolutely void unless a waiver occurs as above indicated. But, even in case of a risk simply suspending a policy, if the loss by fire occurs during the existence of the risk there is no liability upon the insurer, although the fire was in no wise the result of such increase of risk. To illustrate: If this property had been destroyed by fire during the time of the operation of the machinery, materially increasing the risk, then there could be no recovery, though the fire was in no wise the result of such increase of risk, but was owing to some accidental cause, entirely unconnected with the change made in the use of the premises. On the other hand, if, under the contract, neither a forfeiture nor a suspension exists, the company would be liable. But we do not think such a temporary use of the premises even operates to suspend the policy, in the sense above indicated. No such construction can be placed on § 2100 of the Civil Code. That refers to such permanent change, as above shown, which "voids the policy;" that is, works an absolute forfeiture. The same thing is true of the contract itself. It does provide for a forfeiture on certain conditions, but nowhere for a mere suspension. What power, then, have the courts to interpolate into the agreement between the insurer and the insured a condition or stipulation not contemplated either by the law or by the contract between the parties?

2. But if the loss directly results from a mere temporary and fleeting change in the use or occupation of the property insured, or of the premises immediately surrounding it, and a material increase of the hazard of insurance is caused by such use, then there still may be nonliability of the company, not growing out of a suspension of the policy by its terms, but from other principles of law sufficiently general in their nature to be applied to such cases. As a rule, no person can recover for an injury caused by his own consent. Under § 2322 of the Civil Code, this has been especially applied to injuries by railroad companies, and, under § 3893, to torts generally. Under § 3830, if a plaintiff by ordinary care could have avoided the consequences of defendant's negligence, there can be no recovery. These provisions apply to torts or to injuries done by another. But that is not this case, which is an action for loss insured against by contract. There are other provisions of the Code which relate directly to such contracts. Section 2096 provides that "the assured is bound to ordinary diligence in protecting the property from fire, and gross negligence on his part will relieve the insurer. Simple negligence by a servant, or the assured, unaffected by fraud or design in the latter, will not relieve the insurer." It is difficult to get the exact intention of the legislature from these words. They bind the assured to "ordinary diligence," and then, in the next clause of the same sentence, seem to relieve the insurer only in case of "gross negligence by the in-

sured." A want of ordinary diligence does not, of course, necessarily imply gross negligence. Nor does the following sentence relieve the difficulty: "Simple negligence," etc., "will not relieve the insurer." Section 2808 of the Code declares that the absence of ordinary diligence "is termed ordinary neglect," and § 2899 calls the absence of extraordinary diligence "slight neglect." Now, as to whether the words "simple negligence," in § 2096, mean ordinary or slight neglect, we are left absolutely in the dark. In view, however, of the ambiguity of that section, we think we are authorized to seek aid in its construction by reference to § 2100, which provides that any change in the property, or the use to which it is applied, whereby the risk is increased, voids the policy. We have already seen that a mere temporary use, not causing such loss, was not intended to have this effect. But we think a fair construction of all the law bearing on this subject would render the insurer not liable, if the loss directly resulted from a temporary change in the use of the property by the assured, so materially increasing the hazard of insurance as to make it apparent to a person of ordinary intelligence, and of reasonable or ordinary care and diligence that the danger from fire was thereby enhanced. Such a construction would be consistent with the general principle of law that no one can recover for an injury which was the result of his own negligence. This policy was taken out in the name of administrator as such, who was simply the representative of the estate intended to be protected by the insurance. At the time of the fire it was occupied as a home by the husband of the deceased and her children, they being her only heirs. The record is not clear or definite as to what sort of contract, if any, existed between the administrator and the husband touching the occupancy of the house. We infer, however, that the husband had absolute custody of the premises, and had perfect freedom to use the same in the conduct of his business, or that he had charge of it in the interest of the estate. He was directly responsible for the acts alleged to have increased the risk of insurance and to have occasioned the loss by fire. The question whether or not his acts bound the administrator, the real party insured, was not discussed in the argument. There is authority to the effect that an increase of risk by a tenant of the insured does not void the policy, unless it contains a stipulation to the effect that such an increase by the tenant will render it null and void. See 2 Beach, Ins. § 712, and authorities cited. There are also decisions cited to the contrary in the same work. We are inclined to think, however, that the correct rule on this subject is laid down by the supreme court of Pennsylvania in the case of *Long v. Beeber*, 106 Pa. 466, 51 Am. Rep. 532, 14 Ins. L. J. 622, where it was held, in effect, that if the act which increased the insurer's risk was that of the tenant, unknown to the landlord, it was no excuse for the infringements of the covenants of the policy. If the hus-

band occupied these premises under the circumstances indicated, as inferable from the record, he would probably be clothed with more power and dominion over the property than in the case of an ordinary tenant who had no interest in the title; and we think his acts of negligence, if any, in this particular matter, would be binding on the insured.

3. The loss having resulted in this case from an alleged increase of hazard by a change in the use of the premises, it would seem practically to make no difference whether we treated the case on the theory of a suspension of the policy, or on our idea of liability, or a want thereof, as herein indicated,—at least, so far as concerns the alleged error in the judgment granting a nonsuit; for in either case the question, in its last analysis, would turn on the negligence or want of negligence of the plaintiff. This particular question is one of fact, and when it becomes one of law, on a motion to nonsuit, its correct determination depends upon the circumstances of each particular case. Questions of negligence being peculiarly for the jury in this state, in cases of any serious doubt its courts should always lean to such construction of the testimony as will leave the matter at issue to the jury. They should avoid encroaching upon the prerogative of that branch of the court, except in matters where the evidence is so plain and palpable as to demand a certain verdict, and make any other finding shocking to a sense of justice and against human reason. Authorities may be found whereby, in similar cases, the courts of other states may, as a matter of law, have ruled that there could be no recovery. The safer rule, however, and the one which we think has been followed by the weight of authority, is to submit such issues to the jury. This course has been pursued in states, some of whose decisions are relied on by counsel for defendant in error, and the trend of whose adjudications seems to hold the insured to a rigid liability for any acts of negligence in increasing the danger to the property insured from fire. In the case of *Long v. Beeber*, 106 Pa. 466, 51 Am. Rep. 532, 14 Ins. L. J. 622 (supreme court of Pennsylvania), it was decided that the temporary use of a steam thresher near the premises of the insured property materially increased the risk to the property insured, and therefore voided the policy. The court held in that case that as to whether or not there was such an increase was properly left to the jury. The same course was adopted with reference to submitting such an issue to the jury in the case of *Williams v. People's F. Ins. Co.* 57 N. Y. 274, reported in *Richards, Ins.* 452. We think this case should have taken a similar direction. We are not prepared to say, under the testimony in this record, as a matter of law, that the plaintiff is not entitled to recover, or that the testimony demanded a finding that the destruction of this property was a result of the negligence of this tenant. Questions of negligence in such matters can-
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not always be safely determined from mere opinions in the human mind, not founded upon observations or experiences, but based solely upon abstract reasoning that to do a certain thing will necessarily increase a risk, and therefore it follows that, when loss results, it is necessarily owing to the negligence of the party who committed the act. In this case the jury had before them the testimony of the plaintiff and the owner of the machinery, besides other witnesses, that in their opinion the temporary location of the engine where it was placed did not increase the hazard from fire. This testimony was not simply a bare opinion, without reason therefor, but was founded upon facts stated by the witnesses. From their actual experience in observing and using such machinery themselves for a number of years, contiguous to houses, and from the fact that no fire before had ever occurred, and they had not even witnessed the burning of a straw pile, some reason was given for the opinion they gave, and upon which they acted. In the case of *Brink v. Merchants' & M. Ins. Co.* 49 Vt. 443, it was decided that a tenant of premises insured, who had charge of all the business done thereon, and knew of all its details and processes, was a competent witness to give an opinion as to whether the business he was carrying on at the time of the fire increased the hazard of the insurer. In addition to these opinions of witnesses in this case, it further appears from the testimony that, with a number of workmen on hand, even if a fire had occurred in the straw, had the weather remained in the condition it was in when the work began, there would have been no difficulty in preventing the house from igniting. Can the court then say, as a matter of law, in the light of this testimony, that it shows that the plaintiff's tenant was not in the exercise of ordinary care and diligence or that the fire was the result of his own negligence? Can it be further said that, as a matter of law, reasonable diligence would have required him to anticipate a violent windstorm, such as this is described to have been, and which seems to have been the direct intervening cause that communicated the fire to the property and produced its destruction? We reverse the judgment of the court below on the ground of error in granting nonsuit, without intending to intimate, of course, any opinion in regard to the weight of the testimony, except to say that in our opinion there was sufficient evidence in the case upon which to submit to the jury the controlling issue as to whether or not the fire was the result of the negligence of the plaintiff or his tenant, and whether or not the increase of risk, if there was any, was material, and was the result of a want of ordinary care and diligence on the part of the plaintiff, or his agent or tenant having charge of the property.

Judgment reversed.

All the Justices concur, except **Cobb, J.**, disqualified.

IOWA SUPREME COURT.

Jane CLOUD

v.

W. H. MALVIN *et al.*

(.....Iowa.....)

1. A conveyance made by a debtor to prevent the apparent lien of an anticipated judgment from attaching to the property conveyed is not fraudulent as against the judgment creditor where she had previously entered into an agreement with the grantee whereby she, in consideration of services rendered by the grantee, was to allow the land to go to sale under foreclosure of a mortgage thereon, and permit the grantee to purchase the sheriff's certificate, who, after the certificate had ripened into a deed, was to bring an action to quiet title, the consummation of such agreement having been prevented by litigation with reference to the land.
2. An estoppel is not available unless pleaded.
3. Grantees of real property cannot, to sustain the conveyance against an attack upon it as fraudulent by the creditors of the grantor, assert that the property was originally purchased and paid for by them and the title conveyed to the grantor merely for the purpose of preventing their creditors from reaching it.
4. A party cannot complain on appeal of a judgment for costs in the lower court where the matter was not brought to the attention of that court.

(May 24, 1898.)

CRoss-APPEALS from a judgment of the District Court for Delaware County in a creditors' bill to subject certain lands to the payment of a judgment against Sarah Malvin; defendants appealing from so much of the judgment as subjected part of the lands; and plaintiff appealing from so much as refused to subject the other part. *Affirmed on plaintiff's appeal. Modified on defendant's appeal.*

Statement by Deemer, Ch. J.:

Creditors' bill to subject certain lands, the title to which is in W. H. Malvin and S. S. Malvin, to the payment of a judgment held by plaintiff against Sarah Malvin. The trial court subjected certain of the lands, and denied relief as to the remainder, and both parties appeal. As the defendants first perfected their appeal, they will be called the appellants. A statement of the issues will be found in the opinion.

Messrs. Dunham & Norris and W. H. Utt for appellants.

Messrs. Yoran & Arnold, for appellee:

The deed from Sarah Malvin to William H. Malvin, of date June 9, 1892, was made and received with intent to hinder and delay

NOTE.—As to right of grantor to attack his own conveyance on the ground that it was fraudulent as to creditors, see also Pittman v. Pittman (N. C.) 11 L. R. A. 456.

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creditors, was voluntary and fraudulent, and should be set aside and decreed to be null and void, as against plaintiff.

Pendency of litigation, knowledge of grantee in deed that conveyance is made in view of and to defeat probable results thereof, are sufficient to defeat deed.

Dunn v. Wolf, 81 Iowa, 688; *Smith v. Utesch*, 85 Iowa, 381; *Johnston Harvester Co. v. Cibula*, 62 Iowa, 697; *Irish v. Bradford*, 64 Iowa, 303.

Where a party, knowing the fraud contrived, aided in its execution and shared its proceeds, he is chargeable with all its consequences, and can be treated and pursued as an original party.

Lincoln v. Claffin, 7 Wall. 132, 19 L. ed. 106; *Craig v. Fowler*, 59 Iowa, 200; *Saar v. Finkin*, 79 Iowa, 61; *Peterson v. Rone*, 76 Iowa, 447; *Bump, Fraud. Conv.* 115.

Voluntary conveyance between relatives must be rebutted by evidence full, clear, and satisfactory.

Ellicell v. Walker, 52 Iowa, 256; *Potter v. Phillips*, 44 Iowa, 353.

Title under quitclaim deed is not as bona fide, but subject to equities.

Watson v. Phelps, 40 Iowa, 482; *Bradley v. Cole*, 67 Iowa, 650.

If said deed has any validity there is a resulting trust in favor of Sarah Malvin, her heirs and creditors, and W. H. Malvin, as trustee, must surrender such property to satisfy plaintiff's claim.

Sullivan v. McLenans, 2 Iowa, 437, 65 Am. Dec. 780; *Claussen v. LaFranz*, 1 Iowa, 226; *Sunderland v. Sunderland*, 19 Iowa, 325; *Schaffner v. Grutzmacher*, 6 Iowa, 137; *Fow v. Doherty*, 30 Iowa, 334.

The deed from Marion C. Malvin to Sarah Malvin should be herein established as a valid deed, and the defendants, W. H. and Sam Malvin, estopped to deny its validity.

Equity will not set aside such a conveyance, enforce a secret trust therein, or grant any relief to the parties making or causing the same to be made.

Holliday v. Holliday, 10 Iowa, 200; *Kenoshia Stove Co. v. Shedd*, 82 Iowa, 540.

Such deed was valid to pass title to Sarah Malvin, and herein available to her creditor.

Stephens v. Harrow, 26 Iowa, 458; *Wright v. Howell*, 35 Iowa, 288.

Deemer, Ch. J., delivered the opinion of the court:

Samuel Malvin, Sr., died intestate January 19, 1872, seized of 220 acres of land, and possessed of personal property to the amount of about \$15,000. His widow, Sarah, and his son Philip S. were appointed administrators of the estate. The son undertook the active management of the property, and squandered nearly all the personal assets in speculation upon the board of trade. In February of 1878 he absconded, and has never since been heard from. Shortly after his departure, various creditors brought suit

against him, as well as against other heirs of the deceased, and the remaining property of the estate was levied on under writs of attachment. While these suits were pending, and on or about July 16, 1878, the heirs—eleven in number—met, and made a voluntary partition of the property. By the terms of this agreement, the widow was to receive sixty acres of the land, in full of her distributive share, and was to assume the payment of \$573.23 of a mortgage upon the land allotted to her; Marion Malvin, a son, was to receive forty acres, and pay \$1,196.34 of the mortgage, and also \$126.56 to some of the other heirs; William H. and Samuel Malvin, also sons, were to jointly receive forty acres of land, and pay \$286 to other heirs; Belle Malvin and Jane Cloud, daughters, were to jointly receive 40 acres, and pay \$165.82; Elizabeth Carpenter, a daughter, was to take a town lot, and pay \$283; and Charles Malvin and Ann Skinner, son and daughter, were to jointly receive 40 acres, and pay \$314. The other heirs were not to receive any of the real estate. At the time of this partition the mortgage to which we have referred, and which will hereafter be called the "Carpenter Mortgage," was being foreclosed; and, as it covered the lands assigned to the widow and to Marion C. Malvin, provision was made for its payment as above indicated. Payment was not made, however, and the land covered by the mortgage was sold under execution upon a judgment obtained in the foreclosure proceedings. In 1886 the widow made a report as administratrix to the county court of Delaware county, in which she stated that her son Philip had squandered the estate, that she was not liable therefor, and that all the heirs, save and except the plaintiff and appellee, who is her daughter, had released her from liability. This report does not appear to have been approved. Plaintiff did not agree to the release of her mother, but on the contrary, brought suit against her for maladministration, and on June 10, 1892, recovered the judgment which lies at the foundation of this suit. In the year 1886 W. H. and S. S. Malvin made conveyance of the land allotted to them to their mother. This conveyance was evidently made with intent to defraud creditors. And at a later date, but during the same year, Marion C. Malvin conveyed to his mother the land received by him. The expressed consideration for this deed was \$1,100. It was paid by the brothers W. H. and S. S. Malvin, and the title was placed in the mother for the purpose of defrauding creditors. In the foreclosure proceedings of which we have spoken, the presiding judge made a memorandum in his docket on or about June 1, 1878, directing the foreclosure of mortgage; but no decree was in fact entered until the trial of this case in the court below, when one was ordered *nunc pro tunc*. An execution issued, however, in May of the year 1888, and the land was sold, as before stated. After the sale, W. H. Malvin, one of the sons, procured an assignment of the sheriff's certifi-

cate, which ripened into a deed on the 10th day of July, 1889. In July of the year 1888, Sarah Malvin executed a will, in which she devised certain of the lands allotted to her to her sons, and at the same time made deeds to 20 acres of the land to her son W. H. Malvin, and 20 acres to her son S. S. Malvin; this being the same land that they conveyed to her in the year 1886. On the 10th day of June, 1892, and shortly before plaintiff obtained judgment against her mother, there were filed for record three deeds from Sarah Malvin, the widow, conveying—First, 20 acres of land to S. S. Malvin; second, 20 acres to W. H. Malvin (these being the deeds that were executed in the year 1888); and, third, a deed to the same and other lands, describing all of which the intestate died seized, to W. H. Malvin, the consideration being stated as \$2,000. This action is brought to subject the lands allotted to the widow, and the 40 acres deeded to her by Marion Malvin, to the payment of plaintiff's judgment. It is alleged in the petition that these last-named conveyances were made to hinder, delay, and defraud the plaintiff in the collection of her judgment. The trial court set aside the sheriff's deed, and also declared the conveyance from Sarah Malvin to W. H. Malvin, which was recorded June 10, 1892, fraudulent and void. It also found that certain of the land theretofore in the name of the widow was a homestead, and exempt from the lien of plaintiff's judgment. The defendants appeal from that part of the judgment setting aside the conveyances, and subjecting the property to the payment of plaintiff's claim; and the plaintiff, from that part of the decree allowing the homestead exemption.

There is no controversy over the facts heretofore stated. The pleadings tender an issue as to the validity of the sheriff's deed, and of the conveyance to W. H. Malvin recorded June 10, 1892. It may be conceded at the outset that the sheriff's deed is of no validity, because of various and substantial defects in the proceedings, but this does not of itself entitle the plaintiff to the relief demanded. With this out of the way, the title still remains in W. H. Malvin, under the deed executed to him by the widow. Plaintiff claims that this conveyance was and is fraudulent and void, and this presents the controlling question in the case. It is agreed between all parties that the title to the 60 acres set apart to the widow shall be quieted in W. H. Malvin, and that the title to the 40 acres set aside to Marion Malvin, and afterwards transferred to the widow, shall be confirmed in S. S. Malvin, unless the plaintiff has shown that the conveyances from the mother are fraudulent as claimed. A careful examination of the record leads us to the following conclusions: Shortly after the voluntary partition in the year 1878, it was agreed between the widow and W. H., S. S., and Belle Malvin that these children should remain at home, farm the lands allotted to the mother and to each of them, and, in consideration of their running the farm, the

mother was to leave the 60 acres allotted to her to them. These children remained at home and worked the farm pursuant to this agreement until the year 1888. At that time notice was given of the sale of the 100 acres allotted to the widow and Marion Malvin under the Carpenter foreclosure, and the parties attempted to make a loan to save the sale. In this they were unsuccessful, because of the condition of the title. Upon consultation with an attorney, it was agreed to let the land go to sale; and W. H. Malvin was then to raise enough money to purchase the sheriff's certificate, and was also to take the deed to the land. The widow concluded at this time that she would give the land to her children, in consideration of labor performed, and the title was to be taken in W. H. Malvin in the manner above indicated. It was also agreed that, after the certificate of sale had ripened into a deed, an action to quiet title should be brought, and the land confirmed in W. H. Malvin. As this action could not be prosecuted inside of a year, the widow also made a will, in which she devised the land allotted to her to W. H. Malvin, and that acquired from Marion C. Malvin to S. S. Malvin. This will was intended for a mere temporary purpose at the time it was made. But it seems to have been probated since the death of the widow, which occurred February 13, 1894, and appellants are now claiming thereunder. In consummation of this 1888 agreement, W. H. Malvin procured an assignment of the sheriff's certificate, and finally acquired a deed to the land. The action to quiet title was not instituted, for the reason that appellee, Jane Cloud, brought suit against her mother for maladministration, and secured the judgment which lies at the foundation of this suit. While the litigation was pending which resulted in this judgment, and on the day before the judgment was obtained, the conveyance in question, covering the entire 100 acres of land, was made. It was manifestly made in view of the expected judgment, and, unless based upon the transactions occurring in the year 1888, it is void as to the 60 acres allotted to the widow. The sheriff's sale and deed are confessedly void, and conveyed no title to W. H. Malvin. We are constrained to believe that the widow intended in the year 1888 to convey the 60 acres allotted to her to her children, who had remained at home and cared for the property, and that the title was to be conferred upon W. H. Malvin through the sheriff's sale under the Carpenter foreclosure, and finally confirmed by action to quiet title, and that the ownership of the land was so transferred. We are also led to believe that this course was taken by advice of her attorney, and that the action to quiet title was not brought because of the litigation commenced by appellee, Cloud. When it became apparent that appellee was about to recover judgment, the widow made the conveyance to her son W. H., in order that the judgment might not be an apparent lien upon the land. If the land in fact belonged to W. H. Malvin, or to W. H. Malvin

and the other heirs who remained upon the farm, at the time the conveyance of June 10, 1892, was made, then such conveyance did not operate as a fraud upon the creditors of the widow. We think, as we have said, that these heirs in fact owned the land, and that the conveyance of June 10, 1892, was not fraudulent, in so far as it covered the 60 acres allotted to the widow.

Appellee's counsel contend in argument that as W. H. and S. S. Malvin have qualified as executors under the will of their mother, and have accepted the provisions thereof, this constitutes an election to take under the will, and that they cannot claim under the agreement of the year 1888, or under the deed of June 10, 1892. We are not called upon to consider this question, for the reason that no election or estoppel is pleaded. It is well settled that, if not pleaded, it cannot be considered. Moreover, the defendants in their pleadings are not making any claim under this will. If there was any election, it was to take under the conveyance of June 10, 1892; and, as this antedated the will, they are probably bound by that election. The conveyance from Marion C. Malvin to his mother in the year 1885 was for the purpose of defrauding creditors. W. H. and S. S. Malvin furnished the consideration therefor, and the title was taken in the name of the mother for the express purpose of defrauding the creditors of W. H. and S. S. Malvin. The mother held title until the conveyance of June, 1892, and that conveyance was made for the purpose of placing the title in the name of W. H. Malvin, so that the appellee's judgment would not be a lien thereon. It does not lie in the mouths of W. H. and S. S. Malvin to say that the conveyance to their mother was fraudulent, and that they in fact owned the land. The conveyance, as between these parties and their mother, was good, and the grantors cannot be heard to impeach it for fraud. Nor will they be permitted to say that the reconveyance in June, 1892, was to transfer the title to lands fraudulently conveyed. Treating the title as in the mother in June, 1892, the conveyance made by her of the 40 acres received from Marion C. Malvin was entirely voluntary, and, as she had no other property, was fraudulent as to her creditors. The sheriff's sale of the land, as we have already seen, was void; and, as defendants make no claim to a lien upon this 40 acres by reason of advancements made, it follows that it should be subjected to the payment of plaintiff's judgment.

We have not cited any authorities in support of the propositions here announced. They are all so plain as to need none in their support. See, on the last proposition, *Butler v. Nelson*, 72 Iowa, 732; *Stephens v. Harrow*, 26 Iowa, 458; *Wright v. Howell*, 35 Iowa, 288.

Our finding that the conveyance of the 60 acres to W. H. Malvin was without fraud relieves us of the necessity of considering the plaintiff's appeal as to the homestead awarded the defendants.

Defendants complain of the judgment for costs in the lower court. It appears that they were taxed against each and all of the defendants, who included, not only those claiming title, but also certain lienholders. This matter was not brought to the attention of the trial court, and was evidently not considered by it. It is well settled that a party will not be heard in this court until his grievance has been presented to, and acted upon by, the trial court. *Allen v. Seaward*, 86 Iowa, 718; *Snell v. Dubuque & S. C. R. Co.* 88 Iowa, 442; *Coa v. Mason City & Ft. D. R. Co.* 77 Iowa, 20. The parties appellants and appellee will each pay one half of the costs of this appeal.

On plaintiff's appeal affirmed. On defendant's appeal modified and affirmed.

A petition for rehearing having been granted, the following response was handed down April 7, 1899:

Per Curiam:

A rehearing was granted in this case because of some doubt we entertained upon one legal proposition announced in the opinion. We found that the conveyance of the Marion 40 acres to Sarah Malvin in the year 1885 was in fraud of the creditors of W. H. and S. S. Malvin, who furnished the consideration therefor, and that the conveyance by the mother in June, 1892, of this same tract, was in fraud of plaintiff's rights. The point made on rehearing by appellants, and upon which our action in reopening the case was based, was that the creditors of a fraudulent grantee have no standing to complain of a

reconveyance to the original grantor. We are met, however, by the objection on the part of appellee that no such issue as this was tendered on the original submission. This we find to be the case. On the first hearing, appellants rested this branch of this case solely on the claim that the conveyance to W. H. and S. S. Malvin was not fraudulent. They expressly conceded that, if the deed was fraudulent as to plaintiff, she could recover. We quote from the argument of appellants' counsel on the original submission: "If the mother transferred the property without consideration, and solely for the purpose of putting it beyond the reach of plaintiff's judgment, then it makes no difference whether there were defects in the proceedings upon which the sheriff's deed is based, or as to the time the quitclaim was made. The conveyances would then be set aside, not because of the defects in the origin of the deeds, or in the deeds themselves, but because the plaintiff had an equitable interest in the land at the time they were made, and the attempted conveyances were consequently fraudulent." Under the circumstances, it is our duty to decline passing upon this question. We may well leave a consideration and comparison of the cases, which are in some conflict, until the issue is properly presented. We may say in this connection, without intending to announce a rule that shall be binding upon us hereafter, that the principle announced in the original opinion is not without support. See *Susong v. Williams*, 1 Heisk. 625; *Chapin v. Pease*, 10 Conn. 69, 25 Am. Dec. 56; *Allison v. Hagan*, 12 Nev. 38.

The original opinion is adhered to.

KENTUCKY COURT OF APPEALS.

Harriette W. COOK, *Appt.*,

v.

A. M. BRAMEL *et al.*

(.....Ky.....)

1. Payments on purchase-money notes secured by a vendor's lien, made after the debtor has made a deed or mortgage of the land, will not, as against the grantee or mortgagee, extend the lien beyond the time for which it would otherwise continue, although they extend the statutory bar with respect to the notes, and the lien, as against the debtor himself, being only an incident of the debt, continues as long as the debt is not barred.

2. An extension of the time of a vendor's lien by payments made by the debtor on notes secured thereby, which interrupt the statute of limitations as to the notes, will operate against his subsequent vendees or mortgagees, as well as against him,

whether they have any notice of the payments or not.

(*Guffy, J., dissents.*)

(June 10, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Mason County giving priority to a mortgage lien of the Union Trust Company in a suit brought to foreclose a vendor's lien on certain real estate. *Reversed.*

The facts are stated in the opinion.

Mr. A. M. J. Cochran, for appellant:

Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181, and *Kendall v. Clarke*, 90 Ky. 178, decide merely that the original vendee cannot extend the purchase-money lien on the land after he parts with it. The second or other remote vendee takes the land subject to the lien that is on the land when the original vendee parts with the land, both as to amount and as to time it has to run.

If a promise was made to pay the debt within fifteen years from the maturity of the note, then the statute commenced run-

NOTE.—As to payment on mortgage to affect running of statute, see *Murdock v. Waterman* (N. Y.) 27 L. R. A. 418.
45 L. R. A.

ning from the date of the promise; and if fifteen years had not elapsed from the date of the promise to the institution of the action, it presented no obstacle in the way of recovery.

Carr v. Robinson, 8 Bush, 274.

The lien can be asserted as against original vendee after the statutory bar has run only in case the payment was made upon the purchase money before the statutory bar had run, and not in case the payment was made after the bar had run.

The payments of interest made by Bramel were made while he was the owner of the land and had full power over it—they were made before the bar had run; and the mortgage to the appellee trust company was made and money loaned upon faith of it before the statutory period had run.

A purchase-money lien or mortgage follows the debt as long as it exists and is unsatisfied.

McCracken County v. Mercantile Trust Co. 84 Ky. 353; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. ed. 142; *Excell v. Daggs*, 108 U. S. 147, 27 L. ed. 683; *Eborn v. Cannon*, 32 Tex. 231; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534; *Flanagan v. Cushman*, 48 Tex. 241.

What right has the appellee trust company, a jur. or lien holder, to plead the statute of limitations to appellant's debt?

Sanger v. Nightingale, 122 U. S. 176, 30 L. ed. 1105.

Mr. Thomas R. Phister, for appellees:

Whatever may be the effect of payments made on a lien note by a purchaser of land they do not and cannot have the effect to continue, beyond the period of fifteen years, the lien as against subsequent purchasers or mortgagees.

Tate v. Hawkins, 81 Ky. 578, 50 Am. Rep. 181; *Kendall v. Clarke*, 90 Ky. 179; *Montgomery v. Tabb*, 19 Ky. L. Rep. 468.

A subsequent mortgagee is a purchaser *pro tanto* and entitled to the same protection to which an absolute purchaser would be entitled.

Murphy v. Boyd, 4 Ky. L. Rep. 441, 1 Ky. L. Rep. 345; *Ricketts v. Hooper*, 4 Ky. L. Rep. 444; *Halbert v. McCulloch*, 3 Met. 456, 79 Am. Dec. 556; *Snyder v. Hitt*, 2 Dana, 204.

White, J., delivered the opinion of the court:

In January, 1875, the executors of A. Hord sold and conveyed to A. M. Bramel certain lands in Mason county for a consideration in cash and with some deferred payments, payable in one and two years from date. The deed to Bramel reserves a lien for these unpaid notes. These two notes were assigned to appellant Cook. In March, 1891, Bramel executed a mortgage on this land to appellee, the Union Trust Company, to secure a loan made by it. In September, 1892, Bramel executed a deed of general assignment of all his property for the benefit of all his creditors. Payments were made on 45 L. R. A.

these two notes of appellant annually up till 1892. In July, 1893, this action was brought by appellant, Cook, seeking a judgment and decree of foreclosure to satisfy the vendor's lien. Appellee trust company was made a party as well as the assignee under the deed of assignment. No defense was made by Bramel or his assignee; but appellee trust company filed its answer and cross petition, and asserted its mortgage lien as being prior to that of appellant by reason of the fact that more than fifteen years had elapsed since the notes of appellant had become due. Appellant, by reply, denied the priority of appellee's mortgage lien, and alleged the fact of payments made by Bramel each year since 1877, and that her notes were not barred, and further, when appellee took its mortgage fifteen years had not elapsed from the maturity of the notes for which a lien was retained in the deed to Bramel. The court sustained a demurrer to this reply, and, appellant failing to plead further, judgment was rendered for the sale of the property, giving the appellee trust company priority. From that judgment this appeal is prosecuted. It is conceded that as to Bramel and his assignee in trust for the benefit of creditors the appellant has a lien on the land by reason of the payments made by Bramel, and that as to part of the judgment there is no contest.

It is contended for appellant that the payments made by Bramel operated to extend from that date the notes, and that the lien is but an incident of the debt, and as long as the debt is not barred the lien exists, and, being a vendor's lien, is superior to all other liens.

On the other hand, it is contended that as to vendees and mortgagees without actual notice, as appellee is alleged to be, the lien does not exist longer than the statutory time that will bar the debt. That the vendee or mortgagee is entitled to know by an inspection of the records for a period of fifteen years next before whether there exist any liens, and, if none, within that time then as to such vendee or mortgagee no lien will exist. It is insisted that the payments on the note operate to extend the statutory bar only as between the payor and payee, and will not extend it as to vendees and mortgagees without at least actual notice of such payments and extensions. To support the contention of appellee, and which was followed by the lower court, we are referred to the cases of *Tate v. Hawkins*, 81 Ky. 578, 50 Am. Rep. 181, and *Kendall v. Clarke*, 90 Ky. 179. The facts of the case of *Tate v. Hawkins*, as stated by the court in the opinion, are: In 1862 Hawkins executed a note due March, 1863, to one Jennings, his vendor, for the balance of purchase price of land. In 1864 this note was assigned to Tate. On the date of this assignment of the note Hawkins sold and conveyed the land for cash consideration to Basket. In 1875 Basket sold for cash consideration the land to Milner. In 1881 an action was brought by Tate against Hawkins and Milner, seeking to recover the note and enforce the vendor's lien claimed. In-

dorsements on the note showed that there was payment made March, 1873, and another March, 1878. Thus the note as to Hawkins was not barred by limitation. The court, per Lewis, J., said: "By the terms of the statute the action of appellant on the note was barred fifteen years after the note matured, and he had then lost his right to maintain the action for the enforcement of the lien. If appellee Milner is now to be deprived of the safeguard provided by law, and upon the faith of which he purchased and paid for the land, it is to be done by an obstruction to the running of the statute, and a recognition of the cause of action after it had by law ceased to exist, made by Hawkins without his consent or notice to him. . . . The lien is a charge upon the land, which it is not the policy of the law, nor in accordance with the analogy of the law, should exist longer than the statutory existence of the note; and, if reasons were necessary to justify this salutary and necessary principle, they are afforded by the circumstances of the case."

In the case of *Kendall v. Clarke* the court, by Lewis, Ch. J., said: "It is obvious more than fifteen years had elapsed from the time the note fell due until the action was instituted; but, to avoid the plea of limitation, a credit of \$18.80 indorsed on the note as of January 2, 1882, is relied on, and seems to have been considered by the lower court sufficient for the purpose. Whatever may be the operation of the credit so far as Royse, while living, and his personal representative and devisees afterwards, might have been, it certainly did not nor should have the effect to continue, beyond the period of fifteen years, the lien on that part of the land purchased by appellant Campbell. For it was expressly decided by this court in *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181, that while a partial payment made by the original vendee on a note for the purchase money within fifteen years would have the effect, as to him, to suspend operation of the statute of limitation between accrual of cause of action on the note and date of payment, the rule could not be applied to the prejudice of a remote vendor not a party to the transaction. Consequently the statute of limitation is, as to Campbell, clearly a bar, and it was error to enforce the alleged lien on, and subject to satisfaction of the note, any portion of the original tract owned by him." The note in the *Kendall Case* was payable December, 1869, and the action was brought May, 1885. The date of Campbell's purchase, as shown by an examination of the record, was before the statutory bar and before the payments that elongated the statute of limitation as a bar,—facts similar in every way to *Tate v. Hawkins*.

These cases, appellee contends, are conclusive of the question that the judgment of the lower court is the law. We are referred by appellant's counsel to the cases of *McCracken County v. Mercantile Trust Co.* 84 Ky. 344; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. ed. 142; *Ewell v. Daggs*, 108 U. S. 149, 27

L. ed. 684; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534; *Flanagan v. Cushman*, 48 Tex. 241; and *Sanger v. Nightingale*, 122 U. S. 176, 30 L. ed. 1105.

In the case 84 Ky. 344, it is said: "There is no statute of limitations as to liens. If the claim becomes barred, the lien dies with it. . . . If the claim could be made an incident of the lien, then the statute of 'repose' would be defeated. As the claim no longer legally existed, the lien had nothing to support its existence." This case was a tax lien, which was barred in five years. In the case of *First Nat. Bank v. Thomas* (Ky.) 3 S. W. 12, the court said: "The mortgage was a mere incident to the debt, and given to secure its payment; and, when the right of recovery as to the debt itself is gone, the lien to secure it necessarily goes with it. The stipulations of the mortgage are not independent covenants upon which a recovery can be had regardless of the debt, to secure the payment of which the mortgage was given. The liability of appellee is on the original paper as the drawer; and, when that liability ceases, the covenants in the mortgage, having created no new right, except the lien, cannot be looked to as extending the liability from five to fifteen years." In the case of *Prewitt v. Wortham*, 79 Ky. 287, the court said: "The rule in this state in reference to mortgages, whether on personal or real estate, is that they are mere securities for the debt. No title passes to the mortgagee and no right is acquired by the mortgagee, except as an incident to the debt. When the debt to secure which the mortgage was given is barred by statute, the incident goes with the principal, and the mortgage ceases to be enforceable." Likewise it has been repeatedly held a mortgage or vendor's lien is an incident of a debt, and that an assignment of the principal obligation carries the right of lien. All this proposition as to the lien being an incident of the debt and lives with the debt it secures is conceded to apply as between the payor and payee of the debt. But it is contended that as to vendees and mortgagees the same rule does not apply; that as to vendees and mortgagees the lien is barred when the period fixed by statute will bar the debt—this regardless of any elongation of the debt by payments of new premises.

We are of opinion that as to vendees and mortgagees the same rule does not apply as between the parties; but we do not assent to the doctrine that as to vendees and mortgagees all liens are barred in fifteen years after the accrual of the right of foreclosure. We are of opinion that after the payee of the note has sold the property in lien, or, as in this case, mortgaged the property, a subsequent payment by Bramel would not elongate the lien on the lands as to the appellee trust company, for then the trust company would be subject to the action of Bramel, over whose actions it had no control, and against which it could not guard. However, we are of the opinion that, as to the appellee

trust company, mortgagee, the lien of appellant for purchase money existed for the full length of time from the date of the last payment or last promise by Bramel made before the execution of the mortgage to appellee trust company, which payment, as stated in the reply of appellant, was January 6, 1892, the mortgage being executed in September, 1892. Wood, *Limitation of Actions*, § 229: "Any act of the mortgagor which operates to keep the mortgage debt on foot also operates to keep up the mortgage lien, as an acknowledgment of the debt by the mortgagor in the mode and with the formalities required by law. A part payment of principal or interest made by the mortgagor or his agent revives the mortgage, and gives it a new lease of validity from the date of such payment. . . . But, in order to have that effect, the payment must be made while the mortgagor owns the equity of redemption, and a payment made after he has parted with the same does not revive or keep on foot the mortgage security, as, from the time when he parts with his interest in the land, his power to bind it in any manner is gone, either as to past or future debts." Jones, *Mortg.* 5th ed. § 1201, lays down this rule: "Moreover, any purchaser from the mortgagor, with actual or constructive notice of the mortgage, is bound by any previous acknowledgment of the debt by his grantor,"—citing *Heyer v. Pruyn*, 7 Paige, 465, 34 Am. Dec. 355; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. ed. 142; *Carson v. Cochran*, 52 Minn. 67. The same author, continuing (§ 1202), says: "A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the encumbrance; and his title and possession are no more adverse to the mortgagee than was the title and possession of the mortgagor. The purchaser is bound by the acts and declarations of the mortgagor . . . while he retains the equity of redemption, or any part of it; as, for instance, the purchaser of a part of the mortgaged premises cannot claim a presumption of payment of the mortgage from lapse of time when this presumption is repelled by payments of interest made by the mortgagor within twenty years, or by his admissions within this time that the mortgage was then subsisting. A purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time, if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser; and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage,"—citing *Herndt v. Porterfield* (Iowa) 9 N. W. 322; *Johnston v. Lasker Real Estate Assn.* 2 Tex. Civ. App. 494; *Whittacre v. Fuller*, 5 45 L. R. A.

Minn. 508 (5 Gil. 401); *Ware v. Bennett*, 18 Tex. 794.

In the case of *Hughes v. Edwards*, 9 Wheat. 497, 6 L. ed. 144, the Supreme Court said: "It is objected, in the third place, that the respondents are barred of their right to foreclose by length of time. It is not alleged or pretended that there is any statute of limitations in the state of Kentucky which bars the right of foreclosure or redemption, and the counsel for the appellants place this point entirely upon those general principles which have been adopted by courts of equity in relation to this subject. In the case of a mortgagor coming to redeem, that court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years' adverse possession, fixed upon that as the period, after forfeiture and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee who is seeking to foreclose the equity of redemption, the general rule is that, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. Now this case seems to be strictly within the terms of this rule. The two letters from the mortgagor to the female plaintiff, in 1803 and 1808, admit that the mortgage was then subsisting, and the debt was unpaid, and they contain promises to pay it when it should be in the power of the writer. In addition to these circumstances, credits were indorsed on the bond for payments acknowledged to have been made, which, though blank, the court below ascertained to have been made on the 15th of January, 1798, the 15th of May, 1803, and the 2d of August, 1808. The mortgagor, then, cannot rely upon the length of time to warrant a presumption that this debt has been paid or released, the circumstances above detailed having occurred from eight to thirteen years only prior to the institution of this suit. But it is insisted that, although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchased from him parts of the mortgaged premises for a valuable consideration. The conclusive answer to this argument is that they were purchasers with notice of this encumbrance. It must be admitted that it was but constructive notice; but, for every purpose essential to the protection of the mortgagee against the effect of those alienations, it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky. A purchaser with notice can be in no better situation than

the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them. The court is therefore of opinion that this objection cannot be sustained by either of the appellants." But when the obligor has parted with title to the property, either by sale absolute or by mortgage, his right to further bind the property ceases, except as his interest therein exists; and the elongation of the debt by payments or new promises can only operate, as against the obligor and his property, for no act of his would work an estoppel against his vendee or mortgagee. This principle is not in conflict with that of *Tate v. Hawkins*, but accords therewith. In that case Hawkins sold the land by deed in 1864 to Basket. The lien notes then had some fourteen years to run. Tate could at any time within the fourteen years have enforced his lien on the land. The subsequent payments by Hawkins in 1873 and 1878, made after the alienation of the land by Hawkins, operated to elongate the note, but could not extend to the land, for the reason that at the date of these payments Hawkins had no control over the land, and could not bind it further than he had done so while he was the owner. The same is true in the case of *Kendall v. Clarke*.

In this case the notes given, if no payments had been made, were not barred by limitation at the date of the mortgage to appellee trust company, and any inspection of the record would have put it on notice concerning appellant's debt. At the date of the mortgage to appellee, the appellant, by reason of the annual payments made by Bramel, had fourteen years in which she could collect her notes and enforce her lien, and it cannot be said that by reason of the fact that Bramel executed a mortgage to appellee trust company, this right to enforce collection and her lien was reduced to fifteen years from the original date of maturity. To so hold would allow a debtor to defeat the collection altogether of a debt, if by payments he had been indulged beyond the period of limitation, on the idea that, being the payor and owner of the property, he could by payments elongate both note and lien. For after the lapse of fifteen years from the date of maturity, when it would be barred, except for the payments, the debtor could sell the property free of lien. This cannot be the law. The vendee or mortgagee accepts the position as it is when his conveyance is executed. The holder of the lien has all the time to enforce the lien as the facts of the case at that time give him no more. It follows that the appellant's lien for purchase money is

not barred by limitation, and she is entitled to have same enforced, even as against the mortgagee trust company. Being a vendor's lien, it is prior to the mortgage lien. The trial court, therefore, erred in sustaining a demurrer to her reply.

For the reasons indicated, *the judgment appealed from is reversed, and cause remanded for proceedings consistent herewith.*

Guffy, J., dissents.

Lean COOPER, *Appt.*,
v.

COMMONWEALTH of Kentucky.

(.....Ky.....)

Acquittal on a charge of a criminal offense is a bar to a prosecution of the accused for perjury in swearing that he did not commit the offense.

(Hobson, J., dissents.)

(June 17, 1899.)

APPPEAL by defendant from a judgment of the Circuit Court for Rowan County convicting him of perjury. *Reversed.*

The facts are stated in the opinion.

Messrs. A. T. Wood and R. Blair for appellant.

Mr. W. S. Taylor for appellee.

Burnam, J., delivered the opinion of the court:

The appellant and one Libbie Purvis were jointly indicted in the Rowan circuit court for the offense of adultery. The trial under that indictment resulted in a verdict of acquittal for appellant. The grand jury of Rowan county thereupon reported this indictment against him, in which it is charged that upon the trial of appellant and Libbie Purvis upon the charge of adultery "he did knowingly, wilfully, and corruptly swear that he had not had carnal sexual intercourse with Libbie Purvis, when same was false and untrue, and was known by him to be false and untrue." The trial under this indictment resulted in a verdict of guilty, and a judgment sentencing appellant to confinement in the penitentiary, which we are asked upon this appeal to reverse.

The principal question to be considered is the effect which is to be given to the indictment, trial, verdict, and judgment of acquittal of appellant under the indictment for adultery, as it is manifest that appellant cannot be guilty in this case if he was innocent of the charge contained in the other indictment. His guilt or innocence of the offense of having had carnal sexual inter-

NOTE.—The above decision as to the effect of an acquittal as a bar to prosecution for perjury in securing the acquittal seems to be a novel one.

As to the effect of an acquittal procured by bribery, see *Shideler v. State* (Ind.) 16 L. R. A. 225.

course with Libbie Purvis was the exact question which was tried in the first proceeding, and as a result of that trial the defendant was found not guilty. In order to convict him in this case, it was necessary for the jury to believe that he was guilty of the identical offense for which he had been tried and acquitted under the other indictment, as it is evident that, if he was innocent of having had carnal sexual intercourse with Libbie Purvis, he was not guilty of false swearing when he stated that he had not had such intercourse with her. We therefore have, as a result of the trial of appellant under these two indictments, a verdict and judgment finding him not guilty of the offense of having had carnal sexual intercourse with Libbie Purvis, and in the second case a verdict and judgment finding him guilty of false swearing when he testified that he had not had such intercourse with her; in other words, the first jury found him innocent of the misdemeanor with which he was charged, and the second jury found him guilty of a felony because he testified that he was not guilty of such misdemeanor. It certainly was never intended that the enginery of the law should be used to accomplish such inconsistent results. It appears to us from the conflicting character of the testimony in the case upon the question of defendant's guilt or innocence that a verdict of the jury might have been upheld in the first case whether found one way or the other, but certainly the finding of the jury must be conclusive of the fact considered as against the commonwealth, and preclude any further prosecution which involves the ascertainment of such fact.

A question analogous to the one at bar was considered in the case of *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, the facts in which case are about as follows: Coffey was a distiller, and was proceeded against under a section of the statute for defrauding, or attempting to defraud, the United States of the tax on spirits distilled by him, and the copper stills and other distillery apparatuses used by him and the distilled spirits found on his distillery premises were seized. One section of the statute provides, as a consequence of the commission of the prohibited act, that this certain property should be forfeited, and that the offender should be fined and imprisoned. Coffey was first proceeded against on the criminal charge, and acquitted. Subsequently a proceeding to enforce the forfeiture against the *res* was instituted. The defendant in the proceeding *in rem* relied upon his acquittal under the criminal charge, and Judge Blatchford, in delivering the opinion of the court, said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the

same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue, and determined against the United States; and all that is imposed by the statute as a consequence of guilt is a punishment therefore. There could be no new trial of the criminal prosecution after the acquittal in it." And the conclusion reached in that case is in consonance with principles laid down by the United States supreme court in the case of *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. ed. 381. In the case of *Rex v. Kingston*, 20 How. St. Tr. 355, 538, the court held: "The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court." And in the case of *United States v. McKee*, 4 Dill. 128, the defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without the payment of taxes thereon. He was afterwards sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The court held that the two alleged transactions were but one, and that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty. And Judge Van Fleet, in his Treatise on the Law of Former Adjudications (p. 1242, § 628), says: "If there is a contest between the state and the defendant in a criminal case over an issue, I know of no reason why it is not *res judicata* in another criminal case;" citing a number of American decisions in support of the text. Appellant in this case had already been tried and acquitted of the offense of having had carnal sexual intercourse with Libbie Purvis, and the judgment in that case is *res judicata* against the commonwealth, and he cannot again be put on trial where the truth or falsity of the charge in that indictment is the gist of the question under investigation.

It therefore follows that appellant was entitled to a peremptory instruction to the jury to find him not guilty. For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

Hobson, J., dissents.

MINNESOTA SUPREME COURT.

P. H. KRAY, *Respt.*,
v.
Anton MUGGLI *et al.*, *Appts.*

(.....Minn.....)

1. *A milldam was constructed across a small river in such a manner as to create a vast reservoir of water in the river, and in a chain of lakes through which the river runs, thereby flooding a large area of lowlands. After the dam was maintained for forty-one years, and the mill owner had acquired a prescriptive right to maintain it, he sold to the owners of certain of the flooded lands the right to destroy the dam and reclaim their flooded lands. In an action brought by another riparian owner to enjoin the removal of the dam or the lowering of the stage of water thereby maintained,—*held*, the dam being of a perishable character, and the mill owner being liable for negligence in maintaining it, if not an insurer of its safety as to all persons who may be injured by the bursting of the reservoir, the conditions continue always to be of an artificial character, the reservoir does not become, by lapse of time, analogous to a natural lake or watercourse, and the riparian owners have not acquired a reciprocal prescriptive right to have the dam maintained for their benefit after the mill owner has abandoned it for the purposes of water power.

2. *Held*, further, even in such a case, the riparian owners may, by equitable estoppel, acquire the right to maintain the dam or have it maintained, but in such a case their equities must be strong and substantial. In this case the equities are not of that character, and there are strong counter equities in defendants which defeat the claims of the plaintiff.

(July 3, 1899.)

A PPEAL by defendants from a judgment of the District Court for Stearns County enjoining defendants from removing a milldam, to the alleged injury of plaintiff's property. *Reversed*.

The facts are stated in the opinion.

Mr. George W. Stewart, for appellants:

To establish an easement by prescription there must be an uninterrupted user or enjoyment of the easement claimed for the full statutory period of fifteen years.

Mueller v. Fruen, 36 Minn. 273; *Matthews v. Stillwater Gas & Electric Light Co.* 63 Minn. 493.

This user must be adverse under a claim of right exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate in, over, or out, of which the easement prescribed for is claimed, and while such owner was able in law to assert and enforce his rights and resist such adverse claim if not well founded.

Washb. Easements & Servitudes, 150;

*Headnotes by CANTY, J.

NOTE.—For right to have an artificial condition of a watercourse or body of water continued, see also *Whittenton Mfg. Co. v. Staples* 45 L. R. A.

Gould, Waters, 545; Jones, Prescriptions & Easements, § 164.

To constitute title by prescription there must be a thing claimed which may be granted a person to whom the grant may be made and who may be a party to such grant.

Washb. Easements & Servitudes, 137, 138; *Rockdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Proprietors of Stafford & W. Canal Navigation v. Proprietors of Birmingham Canal Navigation*, L. R. 1 H. L. 254; 2 Bl. Com. 267.

The extent of a usage of water is evidence only of a right commensurate with that use.

Washb. Easements & Servitudes, 135; *Marchand v. Maple Grove*, 48 Minn. 271; *Matthews v. Stillwater Gas & Electric Light Co.* 63 Minn. 493.

A prescriptive right cannot be claimed in what is common to all.

Washb. Easements & Servitudes, 163; *Davis v. Bingham*, 29 Me. 391; *Thomas v. Marshfield*, 13 Pick. 240; *Gloucester v. Beach*, 2 Pick. 60, note.

No person can claim a prescriptive right to do that which he cannot be prevented from doing.

Felton v. Simpson, 33 N. C. (11 Ired. L.) 84; *Mebane v. Patrick*, 46 N. C. (1 Jones, L.) 23; Washb. Easements & Servitudes, 153, 192; *Osborne v. Johnston*, 65 N. C. 26; *Ashman v. Wigton*, 20 W. N. C. 280; *State v. Suttle*, 115 N. C. 784; *Emery v. Raleigh & G. R. Co.* 102 N. C. 232; *Swan v. Munoh*, 65 Minn. 500, 35 L. R. A. 743.

An easement, moreover, cannot be prescribed for unless the party claiming it has actually used and enjoyed it as well as claimed the right.

Washb. Easements & Servitudes, 161; *Ware v. Brookhouse*, 7 Gray, 454; *Tinker v. Forbes*, 136 Ill. 221.

The enjoyment of a thing by one cannot be held to be adverse to another who is in no way injured thereby.

Washb. Easements & Servitudes, 155.

In case of an easement arising by prescription the duties imposed on the owner of the servient tenement are passive and negative to suffer the owner of the dominant tenement to enjoy the easement and to allow him to enter and amend and repair, and also to refrain from doing any act upon his own premises which would interfere with the enjoyment of the easement.

Goddard, Easements, 2, 17; Gale, Easements, 307; *Johnston v. Hyde*, 33 N. J. Eq. 633; *Goodhart v. Hyett*, L. R. 25 Ch. Div. 182; *Perry v. Pennsylvania R. Co.* 55 N. J. L. 178.

This stream is not a navigable stream for steamboats in its natural state.

A stream which can only be made floatable by artificial means can in no sense be deemed a public highway.

(Mass.) 20 L. R. A. 500; *Warren v. Westbrook Mfg. Co. (Me.)* 35 L. R. A. 388; and *Case v. Hoffman (Wis.)* 44 L. R. A. 728.

Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Cardwell v. Sacramento County*, 79 Cal. 347; *Rove v. Granite Bridge Corp.* 21 Pick. 344; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Haines v. Welch*, 14 Or. 319; *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609.

A private person cannot maintain an action to enjoin the maintenance of a public nuisance or prevent the abatement of one, unless such person is specially injured thereby.

Shaubut v. St. Paul & S. C. R. Co. 21 Minn. 502; *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201; *Barnum v. Minnesota Transfer R. Co.* 33 Minn. 365; *Shero v. Carey*, 35 Minn. 423; *Thelan v. Farmer*, 36 Minn. 225.

The removal of the dam will not cause plaintiff special injury different in kind from that suffered by the public generally.

Blackwell v. Old Colony R. Co. 122 Mass.

1. Defendants necessarily have the same right to remove this dam which Muggli or any of his immediate grantors would have had, and if any of the holders of the prescriptive right to maintain the dam could have removed it then the defendant can remove it. An easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist upon its continuance or to claim damages upon its abandonment.

Jones, Prescriptions & Easements, § 6; *Mason v. Shreetsbury & H. R. Co.* L. R. 6 Q. B. 578, 10 English Ruling Cases, 22; *Felton v. Simpson*, 33 N. C. (11 Ired. L.) 84; *Peter v. Caswell*, 38 Ohio St. 518; *Arkwright v. Gell*, 5 Mees. & W. 203; *Brace v. Yale*, 99 Mass. 488.

To create an estoppel *in pais* some act must be done or omitted, or some declaration made or omitted, or there should have been constructive fraud or gross neglect on the part of the party so to be estopped in regard to the subject-matter claimed.

Caldwell v. Auger, 4 Minn. 217, 77 Am. Dec. 515; *Califf v. Hillhouse*, 3 Minn. 311; *Combs v. Cooper*, 5 Minn. 254; *Pence v. Arbuckle*, 22 Minn. 417; *Hawkins v. Methodist Episcopal Church*, 23 Minn. 256; *Whitacre v. Culver*, 8 Minn. 133; *Sutton v. Wood*, 27 Minn. 363.

One who seeks the aid of a court of equity must be prepared to show that its interference is necessary to protect him from that species of injury which the law calls "irreparable," and "irreparable injury" is "such an injury that money cannot atone for it."

Kerr, Inj. *199; *Gause v. Perkins*, 56 N. C. (3 Jones, Eq.) 177, 69 Am. Dec. 728; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581; *Carney v. Hadley*, 32 Fla. 344, 22 L. R. A. 233; *Schurmeier v. St. Paul & P. R. Co.* 8 Minn. 113, 83 Am. Dec. 770; *Heilman v. Lebanon & A. Street R. Co.* 175 Pa. 188.

To justify the interference of a court of 45 L. R. A.

equity in cases of trespass in order to avoid a multiplicity of suits there must be several persons controverting the same right and each stands upon his own claim or pretension.

Carney v. Hadley, 32 Fla. 344, 22 L. R. A. 233; *Hatcher v. Hampton*, 7 Ga. 49; *Nicodemus v. Nicodemus*, 41 Md. 529; *Thorn v. Sweeney*, 12 Nev. 251; *John A. Roebling Sons' Co. v. First Nat. Bank*, 30 Fed. Rep. 744; *High*, Inj. 700.

The remedy at law is entirely adequate to the necessities of plaintiff's case.

Bond v. Wool, 107 N. C. 139; *Garrett v. Bishop*, 27 Or. 349; *Woodford v. Alexander*, 35 Fla. 333; *Haskell v. Thurston*, 80 Me. 129; *Ewing v. Rourke*, 14 Or. 514; *George W. Helme Co. v. Outcalt* (N. J.) 9 Atl. 683; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808; *Watson v. Ferrell*, 34 W. Va. 406; *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57; *Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L. R. A. 371; *Lazzell v. Garlow*, 44 W. Va. 466.

More harm would be done by the injunction than would be done by refusing it.

North v. Kershaw, 4 Blatchf. 70; *Swift v. Jenks*, 19 Fed. Rep. 641; *Peterson v. Santa Rosa*, 119 Cal. 387; *Robinson v. Clapp*, 67 Conn. 538; *Big Rapids v. Comstock*, 65 Mich. 78; *Potter v. Saginaw Union Street R. Co.* 83 Mich. 285, 10 L. R. A. 176.

In determining what is a reasonable use of one's own land, consideration shall be given to the amount of benefit to the estate drained or improved as compared with the amount of injury to the estate on which the burden of the surface water is cast.

Sheehan v. Flynn, 59 Minn. 436, 26 L. R. A. 632; *Gilfillan v. Schmidt*, 64 Minn. 30, 31 L. R. A. 547; *Jungblum v. Minneapolis, N. U. & S. W. R. Co.* 70 Minn. 153.

Equity will not interfere for the prevention of an illegal act merely because it is illegal, and in the absence of any injury to property rights it will not lend its aid by injunction to restrain the violation of public or penal statutes or the commission of immoral or illegal acts.

Re Debs, 158 U. S. 564, 39 L. ed. 1092; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *State v. Patterson*, 14 Tex. Civ. App. 466; *Hamilton-Brown Shoe Co. v. Sawey*, 131 Mo. 212; *Manor Casino v. State* (Tex. Civ. App.) 34 S. W. 769; *Babcock v. New Jersey Stock Yard Co.* 20 N. J. Eq. 296; *Cranford v. Tyrrell*, 128 N. Y. 341; 1 High, Inj. 20; *Suess v. Noble*, 31 Fed. Rep. 855; *Neaf v. Palmer*, 20 Ky. L. Rep. 176, 41 L. R. A. 219; *Tiede v. Schneidt*, 99 Wis. 201.

Messrs. Reynolds & Roeser and Calhoun & Bennett, for respondent:

The right which the defendants purchased was the right to remove and destroy the mill-dam across the Sauk river, the removal and destruction of which would draw down the waters of the Sauk river and of at least three meandered lakes, which right so granted and purchased is prohibited and made a criminal act by the statute.

Gen Stat. 1894, § 6878; *Handy v. St. Paul Globe Pub. Co.* 41 Minn. 188, 4 L. R. A. 466; *Buckley v. Humason*, 50 Minn. 195, 16 L. R. A. 423; *Bishop, Contr.* §§ 471, 547; 1 Pom. Eq. Jur. § 402; *Sandage v. Studabaker Bros. Mfg. Co.* 142 Ind. 148, 34 L. R. A. 363; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 674; *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759; *Cranford v. Tyrrell*, 128 N. Y. 341; *Port of Mobile v. Louisville & N. R. Co.* 84 Ala. 115.

The meandered lakes above the dam, being more than 160 acres in extent, and capable of a beneficial use for fishing, fowling, boating, or furnishing water supplies for domestic, municipal, or agricultural purposes, are public waters, whose use cannot be interfered with by individuals, whether riparian owners or not.

General Laws 1897, chap. 257, § 1; *Lamprey v. State*, 52 Minn. 181, 18 L. R. A. 670; *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89; *Minneapolis Mill Co. v. St. Paul Water Comrs.* 56 Minn. 485; *Page v. Mille Lacs Lumber Co.* 53 Minn. 492; *Aldrich v. Wetmore*, 52 Minn. 164; *Potter v. Howe*, 141 Mass. 357; *French v. Connecticut River Lumber Co.* 145 Mass. 261.

The defendant Muggli, and his grantors, have obtained by adverse possession for a period of more than forty years the right to maintain a dam across the Sauk river, and to flow the water upon the lands of riparian owners above such dam; and such riparian owners have also, through the adverse possession of themselves and their grantors for the same period, obtained the reciprocal right to have the water remain at such high stage, and the defendant Muggli, and the other defendants claiming under him, are estopped from restoring the water of such river to its original state.

Beeston v. Weate, 5 El. & Bl. 986, 25 L. J. Q. B. N. S. 115; *Sutcliffe v. Booth*, 32 L. J. Q. B. N. S. 136; *Nuttall v. Bracewell*, 4 Hurlst. & C. 714, 36 L. J. Exch. N. S. 1; *Holker v. Porritt*, L. R. 8 Exch. 107, 42 L. J. Exch. N. S. 85, Affirmed L. R. 10 Exch. 59, 44 L. J. Exch. N. S. 52; *Roberts v. Richards*, 50 L. J. Ch. N. S. 297, 44 L. T. N. S. 271; *Jones, Prescriptions & Easements*, §§ 808-810; Washb. Easements & Servitudes, § 47, pp. 411, 419; *Gould, Waters*, §§ 159, 225, 340; *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344; *Ford v. Whitlock*, 27 Vt. 265; *Belknap v. Trimble*, 3 Paige, 577; *Shepardson v. Perkins*, 58 N. H. 354; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349; *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285; *Murchie v. Gates*, 78 Me. 300; *Canton Iron Co. v. Biwabik Bessemer Co.* 63 Minn. 367; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *Bullen v. Runnels*, 2 N. H. 255, 9 Am. Dec. 55; *Fleming's Appeal*, 65 Pa. 445; *Green v. Carotta*, 72 Cal. 267; *Freeman v. Weeks*, 45 Mich. 335; *Adams v. Manning*, 48 Conn. 477; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Middleton v. Gregorie*, 2 Rich. L. 638, Appx.; *Reading v. Althouse*, 93 Va. 400.

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Where a permanent obstruction has been placed in a natural watercourse, and the flow and level of the waters have been diverted and changed, and such change continues for more than twenty years, the same rights may be presumed in favor of the owners of land through which it flows as if such artificial stream had been the natural one.

Magor v. Chadwick, 11 Ad. & El. 571; *Beeston v. Weate*, 5 El. & Bl. 986, 25 L. J. Q. B. N. S. 115; *Sutcliffe v. Booth*, 32 L. J. Q. B. N. S. 136; *Nuttall v. Bracewell*, 4 Hurlst. & C. 714, 36 L. J. Exch. N. S. 1; *Holker v. Porritt*, L. R. 8 Exch. 107, 42 L. J. Exch. N. S. 85, Affirmed L. R. 10 Exch. 59, 44 L. J. Exch. N. S. 52; *Roberts v. Richards*, 50 L. J. Exch. N. S. 297, 44 L. T. N. S. 271; *Gould, Waters*, § 225; *Adams v. Manning*, 48 Conn. 477; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349; *Belknap v. Trimble*, 3 Paige, 577; *Finley v. Hershey*, 41 Iowa, 389; *Smith v. Youmans*, 96 Wis. 103, 37 L. R. A. 285; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Murchie v. Gates*, 78 Me. 300; *Shepardson v. Perkins*, 58 N. H. 354; *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *Fleming's Appeal*, 65 Pa. 444; *Canton Iron Co. v. Biwabik Bessemer Co.* 63 Minn. 367.

If the defendant Muggli should be conceded the right to abandon his easement and no longer use the mill power to operate his mill, still he would not have the right to take out the dam where the doing so would injure or damage upper or lower riparian proprietors.

Washb. Easements & Servitudes, 440; *Middleton v. Gregorie*, 2 Rich. L. 631, Appx.

A person in the quiet and undisturbed possession of real estate can maintain any and all actions necessary to protect the enjoyment of such possession, and all easements pertaining thereto.

Wright v. Lewis, 5 Rich. L. 212, 55 Am. Dec. 714; *Ferguson v. Witsell*, 5 Rich. L. 280, 57 Am. Dec. 744; *Brown v. Bowen*, 30 N. Y. 519, 86 Am. Dec. 406; *Nicholson v. Drennan*, 35 S. C. 333; *Gress Lumber Co. v. Leitner*, 91 Ga. 810; *Allen v. Dunlap*, 24 Or. 229; *Swift v. Agnes*, 33 Wis. 240.

The right being established, together with the wrongful interruption of that right tending to the great injury of the person aggrieved, equity will interfere.

High, Inj. § 794; *Lyon v. McLaughlin*, 32 Vt. 423; *Jones, Prescriptions & Easements*, § 879; *Angell, Watercourses*, § 444.

Canty, J., delivered the opinion of the court:

This is an appeal from a judgment enjoining the defendants from removing a mill-dam at Cold Springs, Stearns county, Minnesota. Plaintiff is a riparian owner, whose land is partly flooded by the water held back by the dam. Two other actions were also brought by other parties against these defendants, and permanent injunctions were awarded against them thereon. They appealed in those actions also, and the three appeals were argued at the same time.

The dam was built in 1856, across the Sauk river, a small stream. A few miles

above the dam the river ran through a chain of lakes. At the point where the dam was constructed, it raised the water in the river $7\frac{1}{2}$ feet. The flowage caused by the dam extends up the river 16 miles, covering the chain of lakes, increasing the depth of water in them from $2\frac{1}{2}$ to 4 feet, and overflowing large tracts of lowland around the lakes and along the river. The dam was maintained at this height for more than forty-one years. The head of water thus obtained was used first to operate a sawmill, and afterwards a flourmill, and it is conceded that the owner of the mill and dam had long since acquired a prescriptive right to maintain the dam and flood the land which was flooded thereby. In 1897 the defendant Muggli was the owner of the mill and dam, and he entered into a contract with the other defendants whereby, in consideration of \$5,000, he agreed to give them the right to remove the dam, and agreed that it should never be rebuilt. The \$5,000 was contributed by some forty farmers (including said other defendants) who owned land overflowed by the dam. The money was paid to Muggli, and the other defendants were about to remove the dam when this action was commenced. This plaintiff is the owner of 270 acres of land, a part of which borders on the flooded district, and a part is flooded by reason of the dam. The trial court finds that, two years before the commencement of this action, plaintiff purchased this land, the same being then wild and unoccupied; that he purchased the same relying on the stage of water that had been maintained by the dam for more than forty years, and with the intent to make of the land a pleasure resort for boating, fishing, and other amusements, and immediately thereafter expended \$300 in improving it and fitting it for these purposes; that, as a part of such plan, he and those associated with him constructed a steamboat on said water at the cost and of the reasonable value of \$900, and he built at Cold Springs a boat house at a cost of \$500, and purchased numerous rowboats, and placed them in the river. All of this was done relying on the then existing conditions, and believing that the dam, and the stage of water thereby created, would be permanently maintained. The steamboat can now make on the lakes and river a round trip of 40 miles. The court finds "that there is no evidence in this action as to the amount of profit made by said plaintiff and his associates in and about the operation of the said steamboat." If the dam is removed, it will lower the water bordering on plaintiff's land from $2\frac{1}{2}$ to 4 feet, and destroy the value of these improvements for the purposes for which they were intended. Plaintiff also uses his land for pasturing stock, and the lowering of the water will require him to build some additional fence, but will also give him a considerable area of land which is now submerged. The court further finds "that the waters in the flowage of said river were never used for the purposes for which they are used by plaintiff until the year 1895," and "that the benefits

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which the said defendants and their associates will receive from the removal of said dam will be largely in excess of the damages thereby sustained by the plaintiff," and that the purpose of such removal is to reclaim said overflowed lands for agricultural purposes.

Respondent contends that water rights obtained by prescription are reciprocal; that when one party obtains by prescription the right to divert or change the water the other parties affected thereby obtain at the same time the right to have it remain changed or diverted. The following authorities cited by respondent would seem to sustain him in his position: *Sutcliffe v. Booth*, 32 L. J. Q. B. N. S. 136; *Holker v. Porritt*, L. R. 8 Exch. 107; *Woodbury v. Short*, 17 Vt. 387, 44 Am. Dec. 344; *Ford v. Whitlock*, 27 Vt. 265; *Shepardson v. Perkins*, 58 N. H. 354; *Delaney v. Boston*, 2 Harr. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349; *Smith v. Founans*, 96 Wis. 103, 37 L. R. A. 285; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Middleton v. Gregorie*, 2 Rich. L. 638, Appx.

It is rather difficult to see on what principle such a reciprocal prescriptive right can be sustained, and especially so in this case. Plaintiff's land was wild and unoccupied by him and his grantors, during all the time in which the owners of the mill were acquiring their prescriptive right. How can the owner of wild and unoccupied land acquire therein a prescriptive right which he has never used and never even asserted? It was conceded by respondents on the argument that it is immaterial, for the purposes of this case, whether the mill owner acquired the easement of flowage by prescription or by grant. It is claimed that, in either case, a reciprocal right would be acquired by prescription after the right of flowage had been exercised by the mill owner continuously for the twenty years, at least, if the owner of the servient estate actually occupied his land during all that time. Friedman, the plaintiff in one of the other actions, did, before the commencement of that action, occupy his land for a sufficient length of time to acquire such a reciprocal prescriptive right, if it can be so acquired, and respondents contend that in that action, at least, the judgment should be affirmed.

The position so taken by the respondents and by the cases so cited amounts to this: Although nothing is done during the whole prescriptive period which is inconsistent with the rights of the party diverting or changing the water, or which will give him a cause of action, or which he can prevent, yet the owner of the servient estate will acquire by prescription a reciprocal easement. But we do not deem it necessary to decide whether such a reciprocal easement can be thus acquired. In all of these cases, except, perhaps, *Woodbury v. Short*, the equities were all on one side. Those equities were strong, and the result arrived at could have been sustained on the ground of equitable estoppel, which also was one of the grounds

given in many of the cases. In each of the cases, the party had made valuable and substantial improvements relying on the apparently permanent character of the change or diversion, and there were no counter equities entitled to very much consideration. In our opinion, there are two elements in this case which distinguish it from nearly all of the cases so cited: (1) The presumably perishable character of the dam which holds back this vast reservoir of water; and (2) the strong counter equities of the defendants.

1. Whether or not this dam is of a perishable character is not disclosed by the findings, and the evidence is not returned. Such dams usually are of a perishable character. The burden was on the plaintiff to make out a case that will sustain an injunction, and, if the character of this dam is material, the burden was on him to show its character. We will therefore assume that the dam is perishable. When such a dam holds back such a vast volume of water, it is highly dangerous, and great and constant vigilance is necessary to keep the dam in repair, and of sufficient strength to hold back the water, and keep it from bursting away and causing destruction to life and property below the dam. Such a condition of things is highly artificial, and always continues to be so, and is not, as respondent insists, analogous to the conditions existing in a natural water-course. As long as the mill owner uses his mill, and runs it by water power, he will keep up these artificial conditions. But it is not ordinarily fair to assume that he will keep them up longer. These defendants have purchased the rights of the mill owner, stand in his shoes, and now propose to abandon the use of the water for water power in connection with the mill. Have they, under the circumstances, a right to do so? It is clearly the duty of the owner of such a dam, after he has abandoned the use of it for his own purposes, either to keep it in good and sufficient repair, or else tear it out in such a way as to release, in a careful and proper manner, the reservoir of water which it confines. He cannot, as respondent assumes, let nature take her course, and permit the dam to go gradually to decay. Then, if he cannot tear the dam out, he must keep it in sufficient repair. It might cost him \$1,000 a year to keep it in repair, and the total benefit to all the riparian owners resulting from the maintenance of the dam might not exceed \$10 per year; and yet, if respondent's position is correct, these riparian owners would have acquired a reciprocal prescriptive right by which they could compel the perpetual maintenance of this dam. And, even if it were held that they could enter upon his premises and make the repairs themselves, that would not relieve him from liability if the repairs were not properly made, but he would still be liable for any damages resulting from maintaining a nuisance upon his premises. See *Simpson v. Stillwater Water Co.* 62 Minn. 446. In fact, it is generally held that the owner of such a dam is, except in cases

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of *vis major*, an insurer of its safety as to all persons who may be injured by the bursting of it. See *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292) 10 Am. Rep. 184; *Berger v. Minneapolis Gaslight Co.* 60 Minn. 296, and cases cited. We must hold that, under these circumstances, the riparian owner cannot acquire a reciprocal prescriptive right to have the dam maintained, whether the mill owner acquired his right by prescription or by grant. However, even in the case where a large reservoir of water is held back by a perishable dam, the riparian owner may, in our opinion, acquire, by equitable estoppel, the right to have the dam maintained at his own expense or at the expense of the owner thereof. But the equities which will give such a riparian owner such a right in such a case must be strong and substantial, and it does not appear that the equities of these plaintiffs are of this character. For all that appears, the burden or risk of maintaining this dam may be so great as to make it highly inequitable that the owners of it should be compelled to maintain it or permit it to be maintained for the benefit of a few of these riparian owners after it had ceased to be used for the purposes of water power.

2. But there is still another reason why the equities of the plaintiffs in these actions are neither strong nor substantial. The defendants have strong counter equities. The principles which control the application of the doctrine of equitable estoppel are very equitable and flexible, and, in our opinion, such counter equities are entitled to due consideration. Otherwise, the plaintiff would prevail, even though the benefit to him from the maintenance of the dam might not be \$50, while the benefits to the defendants from the removal would exceed \$50,000. We need not determine whether the equities of anyone not a party to this action should be considered in it, even if pleaded and proved. The equities of the plaintiffs in the other two actions were neither pleaded in this action nor found by the court. But all of these plaintiffs might have joined in one action (see *Grant v. Schmidt*, 22 Minn. 1, and 14 Enc. Pl. & Pr. 1108), and we will consider the case as though they had so joined. We have already stated what are the equities of the plaintiff in this action. One Friedman brought one of the other actions. The river runs along one side of his farm, and, in its present high stage, furnishes a barrier on one side of his pasture. If the dam is removed, the water will be lowered in the river to such an extent that he will have to build a fence along that side of his pasture, and he will be "somewhat damaged and interfered with." The court further finds that it is entirely practicable and feasible to build this fence at comparatively small cost, and in such a manner that the stock in the pasture may still drink at the river. The other action was brought by the town of Wakefield. Many years ago the town constructed a public bridge across the Sauk river just below the outlet of the lowest lake of said chain of lakes. In that action the trial court found

as follows: "That if said dam is removed, as threatened by the defendants herein, and the water in said millpond drawn out, a larger current may be created at a point where said pier is erected on the easterly side of said river, on said highway, and the foundation upon which rests said easterly pier may become undermined, in which event said bridge may be endangered, but such result may be avoided by carefully and properly drawing off the water from above the dam, or by protecting the piers of the bridge by riprapping, at a cost of not to exceed \$75." Under these circumstances, the only relief to which the town is entitled is that the defendants should be enjoined from removing the dam, except in such a manner as to draw the water off in "a careful and proper manner." So far as appears, these are all the equities which can be urged by anyone against the removal of this dam, and, in our opinion, they are not, under the circumstances, sufficiently strong or substantial to prevent its removal. In none of the cases above cited were the conditions similar to those here presented. True, in *Smith v. Youmans*, so much relied on by respondent, there was a large reservoir of water confined by a dam; but there were strong equities in favor of the riparian owners who sought to have the ordinary stage of water maintained by the dam, there were no counter equities entitled to any great

amount of consideration, and the mill owner did not seek to abandon his dam or his water power. He simply proceeded to use the water in an unusual and irregular manner, by drawing it out of the reservoir in large quantities, and lowering very greatly the stage of water, and then closing the gates, and permitting the reservoir to fill again. This created a constantly recurring nuisance by periodically exposing the boggy and slimy bottom of the reservoir around the shore. We are of the opinion that the findings of fact will not support the conclusions of law or the judgment.

The judgment is reversed, and judgment for defendants is ordered on the findings.

A petition for rehearing having been filed, *Start*, Ch. J., on August 1, 1899, handed down the following response:

A petition for reargument herein having been duly made and considered, it is ordered that the petition be, and it is hereby, denied, and the stay heretofore entered herein vacated; but ordered, further, that the order heretofore entered herein, remanding the case to the district court, be modified so as to read as follows: "Ordered, that a new trial be, and is hereby, granted in each of the cases, and that remittiturs be sent down accordingly."

MISSISSIPPI SUPREME COURT.

MOBILE & OHIO RAILROAD COMPANY,
Appt.,
v.

POSTAL TELEGRAPH CABLE COMPANY.

(.....Miss.....)

The measure of damages for a telegraph line over a railroad right of way is not the value of the land embraced within the right of way between the poles and under the wires, but it is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes.

(March 15, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Chickasaw County in favor of plaintiff in a proceeding to condemn a right of way for telegraph purposes along the right of way of the railroad company. *Affirmed*.

The proceeding was instituted before a justice of the peace, who excluded all evidence of anything but nominal damages; and a verdict was returned in favor of defendant for \$3.10 compensation for the 310 miles of right of way taken. The defendant appealed to

the circuit court insisting that it had acquired a right of way, according to law, 100 feet wide, the whole of which was necessary to its use and no part of which was necessary to the use of the telegraph company; that it had made an exclusive contract with the Western Union Telegraph Company to furnish it with necessary telegraph facilities upon consideration that the Western Union Company had exclusive right of way along its tracks. That for a part of the distance the plaintiff already had a right of way which exhausted its right to acquire a further one; that in any event it was entitled to actual, and not merely to nominal, damages. The trial in the circuit court resulted in a verdict in defendant's favor for \$310, and defendant took the further appeal.

Further facts appear in the opinion.

Messrs. Bristow & Sykes, for appellant:

The right of eminent domain is far from being arbitrary and unlimited or subject to be capriciously exercised. Condemnation of property under the right of eminent domain is a judicial proceeding, and the necessity therefor, and the right thereto, to be judicially ascertained.

Lewis, Em. Dom. § 650.

In every case of condemnation the first question to be decided, if any contest is made by the property owner, is the necessity and propriety of the condemnation.

Lewis, Em. Dom. 303, note.

NOTE.—For telegraph line as an additional servitude or burden on a railroad right of way, see *American Teleph. & Teleg. Co. v. Smith* (Md.) 7 L. R. A. 200, and note.
45 L. R. A.

If upon a hearing the court determines that the petitioner is seeking to condemn property which is not necessary the application should be denied *in toto*.

State, Central R. Co., v. Hudson Terminal R. Co. 46 N. J. L. 289; Miss. Const. § 17.

The right of way or other franchise of a railroad corporation is private property, stands exactly on the same footing as other property, and can be taken or damaged for public use only in the same manner and on the same conditions as to compensation or otherwise as other property.

Miss. Const. § 17; U. S. Const. 5th and 14th Amendments.

Granting that an overwhelming necessity for such taking be shown, still the petitioner is not entitled to it for nothing, or a mere nominal sum.

Postal Telegraph Cable Co. v. Alabama & V. R. Co. 68 Miss. 314; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 735; *Stowers v. Postal Telegraph Cable Co.* 68 Miss. 559, 12 L. R. A. 864; *Alabama & V. R. Co. v. Bloom*, 71 Miss. 247.

The property owner has the legal right to contest, not only the question of *quantum* of damages, but the justice, propriety, and necessity of the condemnation, and if he can show that the entire property is necessary for his purposes, and that he will be irreparably injured by the condemnation, and at the same time, that it is not necessary for the petitioner's purposes, the court will deny the condemnation *in toto*.

Lewis, Em. Dom. § 393.

An exclusive contract between a railroad and telegraph line for right of way, which does not, and cannot, prevent a competing telegraph company from acquiring a right of way and establishing its lines along the line of the railroad and only a few feet from the 100 feet right of way, is not against public policy, and will be upheld.

2 Beach, Priv. Corp. 405 (b); *Western U. Tele. Co. v. Atlantic & P. Tele. Co.* 7 Biss. 367; Randolph, Em. Dom. § 83.

Not only are the actual taking, absorption, and possession of the property sought to be condemned a "taking" under the constitutional inhibition, but any gross burden, easement, or servitude, imposed on said property, is such a taking as demands compensation.

6 Am. & Eng. Enc. Law, p. 542; *Dodson v. Cincinnati*, 34 Ohio St. 276; *East Pennsylvania R. Co. v. Schollenberger*, 54 Pa. 144; *Pumpelly v. Green Bay Co.* 13 Wall. 166, 20 L. ed. 557.

Under the Mississippi Constitution there need be no "taking" at all, either actual or constructive. In that instrument the words "or damaged" are added, thus materially widening the scope of the "due compensation" demanded.

Vicksburg v. Herman, 72 Miss. 215; *Miller v. New York & E. R. Co.* 21 Barb. 513; *Taylor, Corporations*, § 470; *Postal Telegraph Cable Co. v. Alabama & V. R. Co.* 68 Miss. 314.

The construction of a telegraph line along

the right of way of a railroad is the taking of the company's railroad property for which the railroad is entitled to compensation.

Atlantic & P. Tele. Co. v. Chicago, R. I. & P. R. Co. 6 Biss. 158; *Southwestern R. Co. v. Southern & A. Tele. Co.* 46 Ga. 43, 12 Am. Rep. 585; *Western U. Tele. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; Randolph, Em. Dom. § 161, and cases cited in notes; *Central Bridge Corp. v. Lovell*, 4 Gray, 474; Lewis, Em. Dom. § 274, note.

The owner of property may show the adaptability of the property to other and more profitable uses than that to which it is at present devoted, and have the market value appraised with reference to the new use.

Randolph, Em. Dom. § 245; *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95; *Re Furman Street*, 17 Wend. 649; *Young v. Harrison*, 17 Ga. 30; *Maynard v. Northampton*, 157 Mass. 218; 6 Am. & Eng. Enc. Law, p. 569, note 7; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss. 405; *Sullivan v. Lafayette County Supers.* 61 Miss. 282.

The general doctrine as to compensation for property condemned under the right of eminent domain applies to the condemnation of the right of way of a railroad company.

Postal Telegraph Cable Co. v. Alabama & V. R. Co. 68 Miss. 314.

To the extent that the right of way to a telegraph company over the railroad right of way is of value to the railroad company for any use or for sale, and for any damage to the railroad company, besides the deprivation of the use and the profit of a sale, the railroad company is entitled to be compensated, for less than this will not make it whole, and to be made whole is the measure of its rights.

Postal Telegraph Cable Co. v. Alabama & V. R. Co. 68 Miss. 314; Randolph, Em. Dom. §§ 83, 161, 165, 166, 168, 244; *Central Bridge Corp. v. Lovell*, 4 Gray, 474; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515, 88 Am. Dec. 119 note; *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95; *Texas & St. L. R. Co. v. Matthews*, 60 Tex. 215; *Chicago & W. I. R. Co. v. Chicago, St. L. & P. R. Co.* 15 Ill. App. 587; *Chicago & W. I. R. Co. v. Englewood Connecting R. Co.* 115 Ill. 375, 56 Am. Rep. 173; *Kansas City, M. & B. R. Co. v. Spencer*, 72 Miss. 491; *Alabama & V. R. Co. v. Odeneal*, 73 Miss. 34.

"Damage" to the property sought to be condemned must be paid for, as well as the value of the property taken, and there is as little doubt that the value of our right of way for telegraph purposes must be considered in fixing the compensation.

Little Rock Junction R. Co. v. Woodruff, 49 Ark. 381; *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 672; *Drury v. Midland R. Co.* 127 Mass. 571; *Calumet River R. Co. v. Moore*, 124 Ill. 329; *Dupuis v. Chicago & N. W. R. Co.* 115 Ill. 97; *Louisville, N. O. & T. R. Co. v. Ryan*, 64 Miss. 399.

Mr. J. R. McIntosh for appellee.

Whitfield, J., delivered the opinion of the court:

The only question of importance in this case is, What is the true measure of damages in cases of this character? In *St. Louis & C. R. Co. v. Postal Telegr. Co.* 173 Ill. 508,—a case almost identical with this,—that court, in the course of an ably-reasoned opinion, said: "The measure of damages therefore suffered by the railroad company is not the value of the land embraced within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes,"—citing *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, and 166 U. S. 226, 41 L. ed. 979. Again, the court says: "The spaces over which the wires are strung from pole to pole are not taken by the telegraph company. Such damage as the construction and operation of the telegraph line cause to the spaces between the poles the appellants are entitled to recover. The telegraph company does not acquire by the judgment of condemnation the fee to any portion of the right of way. Any construction which holds that it does acquire the fee is not sanctioned by the language of the act in relation to telegraph companies. The act does not confer the right to use the land condemned for any other purpose than for telegraph purposes. The company cannot take possession of it, or injure it, for any other purpose than to erect telegraph poles, and suspend wires upon them, and to maintain and repair the same. The company will have the right to enter upon that portion of the right of way which is between the telegraph poles and under its wires for the purpose of repairing its line. But the telegraph company acquires no right to exclude the railroad company from the use of the land. The ownership of the railroad companies remains as it was before, while the telegraph company merely acquires an easement upon what it condemns for the purpose of entering thereon in order to erect and repair the line." *St. Louis & C. R. Co. v. Postal Telegr. Co.* (1898) 173 Ill. 508.

And the supreme court of Alabama, in the case of *Mobile & O. R. Co. v. Postal Telegr. Cable Co.* (Ala.) 24 So. 408, appealed from the circuit court of Mobile county. Justice Haralson speaking for the court, said: "This case is an appeal from the circuit court to review the proceedings of that court in the trial of the cause on appeal from the probate court, where they were instituted, for the condemnation of an easement in favor of the appellee company to construct and operate its line of telegraph over the right of way of appellant company. The case is here on appeal by the railroad company, but the real party in interest, as reasonably appears from the proceedings, is the Western Union Telegraph Company, with which the railroad company has a contract for an exclusive line over its right of way; and under its contract said telegraph company may use the name of the railroad company to resist the attempt

of any other line to construct on the right of way of the railroad any competing telegraph line. . . . In the case before us, a very nominal amount of the land constituting right of way is proposed to be taken,—only that part of it occupied by the posts, 175 feet apart, leaving the way for all other purposes unobstructed. It is really an easement in an easement; a servitude, true, for which the company is entitled to some compensation under the Constitution. The railroad company, however, holds its right of way, so far as is made to appear, simply for railroad purposes, and is restricted in its use of the same for such purposes. Under this view of the estate that the railroad company has in its right of way, it is difficult to see how the damages sustained by the road can be anything more than nominal. Indeed, if we might weigh advantages and disadvantages, a competing line would naturally and reasonably appear to be an advantage to the railroad company. . . . It has not been shown that the company holds the land as a private individual, to devote it to any purpose it pleases, or to sell it, at will, at the highest price it will bring on the market. The land constituting the right of way really has no market value so long as it is used for such purpose. It has been withdrawn, by the very uses of the company, from marketable land; and when there can be no market value of land by reason of its use as a part of an extensive business or enterprise, its value must be determined by the use to which it is applied, and necessarily not by any supposed market value it has. *Illinois C. R. Co. v. Chicago*, 141 Ill. 509; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 166 U. S. 226, 41 L. ed. 979; *Lewis, Em. Dom.* § 485. Commenting on the decision of the Illinois case last cited, which was a case for the extension of a street across railroad tracks or right of way,—the Supreme Court of the United States, in the case last cited, used language well adapted to the case in hand. They say: "The land, as such, was not taken; the railroad company was not prevented from using it; and its use for all the purposes for which it was held by the railroad company was interfered with, only so far as its exclusive enjoyment for the purpose of railroad tracks was diminished in value by subjecting the land within the crossing to public use as a street. The supreme court of Illinois well said "that the measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for purposes of a street, such use of a street being exercised jointly with the use of the companies for railroad purposes. In other words, the company is to be compensated for the diminution in its right to use its tracks, caused by the existence and use of the street." The supreme court of Illinois held in that case that the trial court did not err in excluding evidence to show the general salable value of the land constituting the right of way included in the crossing, or its general value for other uses than that to which it was applied. The soundness of this principle was approved by the Federal

court, and it appears to be sustained by reason and authority. 149 Ill. 457, 166 U. S. 249, 41 L. ed. 989; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403, April term, 1898 (two cases tried and decided together)."

In this case that court sustained a judgment for nominal damages, and that court said: "This is simply a case where the railroad is not using the space occupied by the posts and wires, and when it cannot convey it to another for any purpose, in which only nominal damages arise." In that case nominal damages only were awarded to the railroad company in a condemnation proceeding by the telegraph company for the right to construct, maintain, and operate its telegraph lines along and upon the right of way of the railroad. There were two causes at the same time before the court on appeal by the railroad company between the same parties, and involving the same question. Under the statutes of Tennessee, a separate condemnation proceeding was required by the telegraph company in each circuit-court district through which the road ran; hence there were two causes appealed from two separate circuit-court districts which were heard by the supreme court together. The court said: "The cases are before us on appeal by the railroad company, but the real party in interest is the Western Union Telegraph Company, a competing line, with which the railroad has a contract for an exclusive line over its right of way, and which has a right, under its contract, to use the name of the railroad company in any suit to resist the attempt of any competing line to construct any other line upon its right of way." Again, this court says: "It does not acquire any estate in fee. It only requires an easement or right of way, and this only for railroad purposes. While its right of way extends to a certain distance on each side of its track, it has no right to occupy the way beyond its track, cuts, and fills, or to such distance and to such extent as to maintain its track and operate its trains. It can only go beyond these limits for necessary railroad purposes. It cannot sell, transfer, encumber, or use its right of way, except as its necessities and convenience may demand for the proper operation of its road. It cannot license the appropriation of any part of such right of way to private business purposes nor to public purposes, except so far as needful and helpful to the operation of the road itself. Jones, Easements, § 383. Its rights of way can, therefore, have no market value, because it cannot be placed upon the market, either at private sale or public outcry. A railroad company is entitled to have a right of way by process of condemnation, because it is a work of internal improvement,—a quasi public use. But it has been held that land already taken by the exercise of eminent domain for public use, and actually used for that purpose, may be taken by legislative authority for other public uses not inconsistent with or destructive to the former use. Mills, Em. Dom. § 45, and cases there cited. It is not insisted 45 L. R. A.

in this case that the use of the right of way and construction of the telegraph line will be any detriment or obstruction to the railroad, but, on the contrary, it is shown it would be a benefit and convenience. A telegraph line along a railroad is not only a convenience, but a necessity, and is very properly treated as a railroad appurtenance. A railroad company may therefore construct a telegraph line along its right of way, or permit another to do so; but it acquires and can confer no exclusive right to do so. *Western Union Teleg. Co. v. Baltimore & O. Teleg. Co.* 19 Fed. Rep. 660; *Western Union Teleg. Co. v. Burlington & S. W. R. Co.* 11 Fed. Rep. 1; *Western Union Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781; *Pensacola Teleg. Co. v. Western Union Teleg. Co.* 96 U. S. 1, 24, 24 L. ed. 708, 715; 3 Am. & Eng. Enc. Law, 1st ed. pp. 885, 886. Under this view of the estate and interest which railroad companies have in their right of way, it is difficult to see how the damages sustained by the road can be anything but nominal. . . . It is said with much earnestness, and with some degree of plausibility, that it would be unjust to allow a telegraph company to plant its poles along the right of way, when the railroad company had expended thousands of dollars to clear and keep it free of obstructions, and yet pay nothing for the privilege. But this view is more specious than sound, for the railroad must incur this expense for its own purposes, whether the telegraph line is there or not, and must keep its right of way clear of obstructions, whether it is occupied by a telegraph line or not, and there is no greater burden or expense because of the presence of the telegraph line. The learned trial judge in the Madison county case held: "The measure of damages to the defendant is the amount of decrease in the value of the use of the right of way for railroad purposes when it is jointly used for telegraph purposes." This rule was, no doubt, adopted from the rule laid down by the Supreme Court of the United States in the case of *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 248, 41 L. ed. 988."

We approve the principles announced in these cases, except that we do not say that the damages are merely nominal. We adopt the rule as first above stated in *St. Louis & C. R. Co. v. Postal Teleg. Co.* 173 Ill., at page 534, to wit: "The measure of damages, therefore, suffered by the railroad company, is not the value of the land embraced within the right of way between the poles and under the wires, but the measure of damages is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes." This is the true measure of damages in cases of this character. In respect to the proposition that the railroad company might, in future, possibly change its route (whether with or without legislative permission), and, in the future, "use the lands for purposes other than a right of way," that this possible use should be taken into account as an element

of damages, Mr. Justice Harlan, speaking for the United States Supreme Court, said (166 U. S., at page 249, 41 L. ed. 989): "Such a possibility was too remote and contingent to have been taken into account. While, as held in *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 408, 25 L. ed. 206, 208, the general rule is that 'compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future,' it is well settled that mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded."—citing the authorities. This is undoubtedly the sound view. Again, Mr. Justice Harlan puts the point with great clearness in the same case at page 258, 166 U. S., and page 992, 41 L. ed., saying: "Compensation was awarded to the railroad company upon the basis of the value of the thing actually appropriated by the public,—the use of the company's right of way for a street crossing, having regard to the purposes for which the land in question was acquired and held, and was always likely to be held. In the case of individual owners, they were deprived of the entire use and enjoyment of their property, while the railroad company was left in the possession and use of its property, for the purposes for which it was being used, and for which it was best adapted, subject only to the right of the public to have a street across it. In this there was no denial of the equal protection of the laws," etc. The doctrine of *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206, has no application to this case. Patterson owned his island absolutely, to be used or sold for any purpose he pleased. His use of it was not limited, as is the use of its right of way by a railroad. The difference in the nature and character of the uses to which the property in the two cases may be put makes the difference in the ele-

ments of damage, proper, respectively, in the two kinds of cases. It was proper to consider the "adaptability" (p. 409) "of the lands for the purpose of a farm" in *Patterson's Case*, because that was, under the law, a use to which, as owner in fee, unrestrictedly, he could put it. So far as the contention that the railroad company might, in the future, conclude to lay other tracks or side tracks, and that, if it did, the telegraph poles would be in the way, is concerned, it is enough to say that the appellee agrees in such case to remove such poles to such other point or points on the said right of way adjacent thereto which shall be designated by said railroad company, upon reasonable notice, and at the expense of the telegraph company; and we think, with the supreme court of Illinois (173 Ill. 535), that this is a valid, enforceable stipulation. The exclusive contract between the railroad and the Western Union Telegraph Company was, of course, void as in restraint of trade and as creating a monopoly, as has been repeatedly held. Appellant relies (as to the measure of damages) on *Postal Teleg. Cable Co. v. Alabama & V. R. Co.* 68 Miss. 314. It is not entirely clear what rule is meant to be declared therein. A single sentence covers all that is said. There are no authorities cited, and there is no discussion. It is to be remarked that the law on this subject, applicable to damages caused in this way by this modern agency, is of very recent development. The doctrine announced by Mr. Justice Harlan for the United States Supreme Court above, and of the supreme courts of Illinois, Tennessee, and Alabama, is undoubtedly the only correct view, and if the case of *Postal Teleg. Cable Co. v. Alabama & V. R. Co.* 68 Miss. 314, conflicts with what we have herein announced, it is, to the extent of such conflict, hereby overruled.

The right result was reached in the court below, and the judgment is affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

WAVERLY WATER FRONT IMPROVEMENT & DEVELOPMENT COMPANY
et al., Appts.,

v.

E. V. WHITE et al.

(.....Va.....)

Riparian rights, including the right to the soil between ordinary high and

low water mark, as incident or appurtenant to the adjacent land, pass in Virginia by virtue of the operation of the statutes extending the rights of individuals to low-water mark, although the conveyance is in terms made to "high-water mark," unless the deed manifests a clear intention to control the operation of the statutes.

(June 15, 1899.)

NOTE.—Title to land between high and low water mark.

- I. The rule in England.
- II. The rule in the United States.
- III. Conflicting rights of owner and public.
- IV. What is shore.
- V. Boundary of municipal corporations.

I. The rule in England.

Early authorities.

The law upon this subject is in a very unsatisfactory condition. The question seems not to have been of sufficient importance to get before the courts until well along into the seventeenth century, long after the titles to the lands adjoining the shores had been settled, and when decisions unqualifiedly in favor of the Crown might involve large individual loss. The consequence is that the judges have been unwilling to express opinions unless necessary, and the question can hardly be considered to be settled at the present time. There appears to be no definite evidence in the Domesday Book, which contains the record of taxable titles.

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A PPEAL by plaintiffs from a judgment of the Corporation Court of Norfolk in favor of defendants in a proceeding brought to enforce riparian rights in the water in front of plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. Watts & Hutton, for appellants:

When a piece of land in this state is conveyed, bounded by high-water mark on a navigable stream, the space between high and low water mark is, by virtue of the statute, appurtenant to it, and it is entitled to riparian rights.

French v. Bankhead, 11 Gratt. 160; *Garrison v. Hall*, 75 Va. 159; *Norfolk City v. Cooke*, 27 Gratt. 430; *Groner v. Foster*, 94 Va. 657; *McDonald v. Whitehurst*, 47 Fed. Rep. 757; *Whitehurst v. McDonald*, 8 U. S. App. 164, 52 Fed. Rep. 633, 3 C. C. A. 214; *Shively v. Bowlby*, 152 U. S. 1, 38 L. ed. 331.

As bearing upon the question in that book, it is stated that the men of Southwark testified that in King Edward's time no one took toll on the strand or in the water-street save the King, and if anyone in the act of committing an offense was there challenged he paid the amends to the King, but if without being challenged he escaped under a man who had sake and soke that man had the amends. *Maltland's Domesday*, 98.

But Southwark was a part of London on the Thames, and the question at once arises whether this act of King Edward was peculiar to that place or was universal throughout the Kingdom. On this question there is nothing but surmise.

Also from Domesday it appears that the Bishop of Baleux had possession of a tide mill at Dover. Conceding that the Bishop was a half brother of the Conqueror, and received the mill as a grant from him as contended by Jerwood (*Seashore*, p. 18), the question is still unsettled as to whether it passed as parcel of an adjoining manor or by grant in grass, and until the character in which the seashore was regarded at that time can be determined very little can be said definitely as to who owned it after the King had parted with the adjoining land.

In Rot. Parl. 8 Hen. V., N. 6: The commons pray, that whereas the King and his progenitors always have been lords of the sea, and now it happened that the King is lord of the coast on both sides of the sea; and therefore pray the King to lay an imposition upon strangers passing over the sea. *Woolrych, Waters*, p. 23.

That, however, plainly refers to a governmental right, and cannot support a private right to the shore, although in early times little or no distinction is made between the King's governmental and his private rights.

The case of Sir Henry Nevill, 5 Edw. III., fol. 11, has been referred to in connection with this subject, but contains nothing definite. In that case it appeared that William de Newport brought replevin against De Nevill for some herrings taken in the vill of Walring. On behalf of defendant the answer was that the goods were cast by tempest of the sea upon De Nevill's land in Walring and that he had franchise of wreck for all the vill as appurtenant to his manor, so that the goods became his and he demanded judgment if the writ should be answered. There was then a controversy as to the sufficiency of the answer and as to the form of the action, but no reference is made to land between high and low water mark or the title to it, and the Nevill Case is not authority upon 45 L. R. A.

Every man's right by virtue of his patent extends into the rivers or creeks so far as low-water mark.

2 Hening, Stat. 456; *Garrison v. Hall*, 75 Va. 159.

Riparian rights include, "among others, the right of access from the front of his land to the navigable part of the watercourse, and also the right to the soil under the water between his land and the navigable line of the watercourse, whereon he may erect wharves, piers, or bulkheads, for his own use or the use of the public, subject to such rules and regulations as the legislature may see proper to impose for the protection of the public."

Groner v. Foster, 94 Va. 651; *Norfolk City v. Cooke*, 27 Gratt. 430; *Alexandria & F. R. Co. v. Faunce*, 31 Gratt. 761; *Dutton v. Strong*, 1 Black, 23, 17 L. ed. 29; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

The several deeds from Crawford for the

that question unless such title is necessary to a franchise of wreck.

In *Abbot of Ramsay's Case* and *Digges v. Hamond*, referred to in 3 Dyer, 326b, judgments were given against the King in favor of riparian owners for land within the flow of the tide, although the land in question was marsh and not shore proper. And in the same book and page is a note of Corporation of Rumney's Case, in which it was adjudged that in case land within the flow of the tides is gained from the sea in such a way that the sea marks are known, it belongs to the owner and not to the King.

In *Constable's Case*, 5 Coke, 106a, trespass was brought for taking wreck in plaintiff's manor between high and low water mark. It was alleged that plaintiff had wreck of the sea, and it was found that part of the property was wreck and part was flotsam, and since damages had been assessed for all, and plaintiff was not entitled to the flotsam, judgment was given against him. But the court resolved that the soil on which the sea ebbs and flows may be parcel of the manor of a subject.

In that case it is said so it was adjudged in *Lacy's Case*. But from the reports of *Lacy's Case* in 1 Leonard, 270, and *F. Moore*, 121, it appears that the question in *Lacy's Case* was as to whether the admiral had jurisdiction of a murder committed between high and low water mark; and there is nothing to show that the question as to the *locus in quo* being a part of a manor was raised or decided. But *Rolle* states (*Abr.* 170, pl. 12) that in a case between the King's attorney and Sir Samuel *Rolle et al.* it was resolved and adjudged by decree of all the barons that the soil between high and low water mark might be a parcel of a manor.

In *Johnson v. Barret* (1647) *Aleyn*, 10, where the question was as to the right to a quay which had been erected in Yarmouth and destroyed by the balliffs and burgesses of the town, *Rolle, J.*, said that if it were erected between the high-water mark and low-water mark then it belonged to him that had the land adjoining. But *Hale*, counsel for defendants, did earnestly affirm the contrary, *viz.*, that it belonged to the King of common right. It was agreed, however, that if it were erected beneath the low-water mark then it belonged to the King.

The first intimation to the contrary in the reports is found in the reign of Charles II.

In *Kirby v. Gibs*, 19 Car. II., 2 Keble, 294, the court agreed that the lord may have lands between high and low water mark as belonging to his manor by grant or prescription, but

lots now owned by the appellants conveyed those lots by a water boundary.

St. Clair County v. Livingston, 23 Wall. 46, 23 L. ed. 59; *Luce v. Carley*, 24 Wend. 451, 35 Am Dec. 637; *Weber v. Harbor Comrs.* 18 Wall. 65, 21 L. ed. 801; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

Messrs. Burroughs & Brother and R. H. Baker & Son, for appellees:

At common law in England the patent for lands extended only to high-water mark. Between high and low water mark was vested in the Crown.

This was changed in Virginia in 1679, the colonial assembly enacting that "every man's right by virtue of his patent extends into the rivers and creeks so far as low-water mark."

3 Hening, Stat. p. 412; Gould, Waters, 350; *Garrison v. Hall*, 75 Va. 159; *Groner v.*

Foster, 94 Va. 650; Code 1887, § 1339; *Shively v. Bowlby*, 152 U. S. 24, 38 L. ed. 340.

The riparian right is a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded to the water for the purpose of navigation.

Gould, Waters, §§ 149, 303-305.

This right when once vested cannot be divested, except according to law for public purposes.

Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; *Norfolk City v. Cooke*, 27 Gratt. 435; *Alexandria & F. R. Co. v. Faunce*, 31 Gratt. 764.

Crawford had the power, in making sales of his land, to separate these rights attached to his land from the land sold, and transfer them to others.

stated that by common Intendment in a royal river it belonged to the King till the contrary appeared. And that by grant of lands by a particular name the land between high and low water mark will not pass without showing that such profits as were proper to be taken thereof were taken by the grantee.

And in *Whitaker v. Wise*, 2 Keble, 759, which was ejectment for marsh land, the defendant claimed it as parcel of a manor, upon the authority of Sir Henry Constable's Case. But Moreton, Justice, said that it had been decided, contrary to Constable's Case, in the reign of 6 Charles I., in a case of Carllie v. Stepkins, that lands between high and low water mark are in the Crown only. That question was not decided, however, in the *Whitaker* Case since it appeared that a recovery was had against defendant's title on the ground that the *locus in quo* had been gained from the sea, and therefore belonged to the Crown as derelict.

Mr. Serjeant Merewether, in his speech in *Infra*, Gen. v. London, which is commented on *infra*, treats the Carllie Case as identical with the Philpot Case mentioned by him, in which a ruling against Constable's Case was made. Whether the cases are the same or not cannot be determined without access to the records. If there were two cases instead of one decided against Constable's Case, it amounts to nothing more than cumulative evidence of the change which was taking place in the judicial opinion.

From these cases it appears that when the question was first raised in the courts the judges were agreed that the land between high and low water mark might be parcel of the manor, and the first judicial expression upon the direct question affirmed positively against the contention of Lord Hale that they were so. It was not until the reign of Charles II. that the contrary contention received judicial recognition.

Lord Hale's position.

As noticed above, Lord Hale as counsel in the case of *Johnson v. Barret*, Aleyn, 10, earnestly affirmed that the title to soil between high and low water mark belonged to the King of common right. After his death a manuscript (afterward published as *De Jure Maris*) was found among his papers in which that position is maintained. The circumstances under which that manuscript was composed are not known. How far the contention in *Johnson v. Barret* was influenced by the manuscript, or the labor bestowed on the case was incorporated in the manuscript, is a matter of conjecture.

In that manuscript Lord Hale says the shore is that ground that is between ordinary high

water and low water mark. This doth prima facie and of common right belong to the King both in the shore of the sea and the shore of the arms of the sea. Hale, *De Jure Maris*, chap. 4.

Lord Hale supports this by saying it is admitted that *de jure communis* between high-water and low-water mark doth prima facie belong to the King. 5 Coke, 107; *Constable's Case*, 3 Dyer, 326.

By whom the admission was made the learned lord does not state. The books referred to contain no such admission. To support his contention Lord Hale cites the case of *Newcastle v. Prior of Tinnmouth*, 20 E. I., and a case which has been referred to in the books as *Philpot's Case*.

The town of Newcastle brought suit against the prior of Tinnmouth, who was charged with interfering with one of the King's ports and among the charges was, that he had built houses at Sheles upon the river Tyne between high and low water mark. The prior pleaded that he built on his own soil where the reigning King had no soil nor free tenement, and that his house, soil, and free tenement extended to the thread of the Tyne beyond the dry land, and that between the thread of the stream and the dry land and house aforesaid, he had free fishery the same in the length of the land as in the water. The King's attorney replied that whatever houses might have been in this place in the times of the predecessor of the prior, the same prior who now is made in his time twenty-six houses in the same place above the soil which ought to be of the reigning King, it being comprehended within the flow of the tide. It was subsequently adjudged (20 Edw. I. B. R. Rot. 59 Northumb. Hale, *De Portibus Maris*, chap. 6) that the reigning King had all the port from the sea even to a certain place called Hildenam streams, and that no one in this port ought to load or unload without license of the reigning King or his balliffs, and that this port remains to the reigning King and his heirs with prize and towage and all liberties pertaining to a port. Hale's comment is, after stating the pleadings, "afterwards judgment was given against the prior, but not in express terms for the soil, but implicitly."

The judgment, however, did not refer to the right to the soil, but was confined to the rights in the port for interference with which the judgment went against the prior. This case does not in the slightest degree support Lord Hale's doctrine. Lord Hale further states that there is a decree in *Pasc. 8 Car. I.*, entered in the book of orders of that term, folio 66, whereby it was decreed that the soil and ground lying between Wapping Wall and the river Thames is

Gould, Waters, 339, note 9; *Storer v. Freeman*, 6 Mass. 437, 4 Am. Dec. 155; *Lapish v. Bangor Bank*, 8 Me. 85; *Dunlap v. Stetson*, 4 Mason, 365; *Niles v. Patch*, 13 Gray, 257; *Lufkin v. Haskell*, 3 Pick. 356.

Uplands and flats may be separated; the owner may alien any part; what passes depends on the terms of the conveyance.

Codman v. Winslow, 10 Mass. 146; *Com. v. Roxbury*, 9 Gray, 524; *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 672, 27 L. ed. 1070.

From the earliest times in England the law has vested the title to and the control over the navigable waters therein in the Crown and Parliament. A distinction was taken between the mere ownership of soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of upland, was regarded as *jus privatum* and was vested in

the Crown. But the right to use and control both the land and water was deemed a *jus publicum*, and was vested in Parliament. The Crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the Kingdom, could be exercised only by Parliament.

Langdon v. New York, 93 N. Y. 155.

The *jus privatum* applying to the space between high and low water mark became the subject of grant from the state just as the upland, and where, as in Virginia, there was a statute extending the right of its patentee, he became possessed of that space under his patent, just as he did of the upland.

The contention that the act of 1882 and the action of the harbor commissioners under it, repealed the act of 1871, which fixed the line of 610 feet north of North street and

parcel of the port of London, and therefore for that the same lies between high and low water mark all the houses thereon are decreed to the King. And then Lord Hale says this shall suffice for the King's right in the shore of the sea between high and low water mark at ordinary tide.

The correctness of the conclusion drawn by Lord Hale from the Philipot Case is not obvious since from the report of the case in a note in 4 Kay & J. 295, it appears that the land in controversy was parcel of the port of London, and as such belonged to the King, which is quite a different proposition from that stated by Lord Hale.

Lord Hale further says, it is true that such shore may be and commonly is parcel of the manor adjacent and so may be belonging to a subject, yet prima facie it is the King's. Chap. 4.

Also, he says that evidences to prove that the seashore is part of the adjoining manor are commonly these: Constant and usual fetching gravel and seaweed and sea sand between the high-water and low-water mark, and licensing others so to do; inclosing and banking against the sea and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of the manor, and such like. So that he that hath wreck of the sea or royal fish by prescription *infra manerium* it is a great presumption that the shore is part of the manor, as otherwise he could not have them. Hale, De Jure Maris, chap. 6.

The latter statements so greatly qualify the former one that his doctrine amounts only to this, that under the feudal theory of the English law the seashore, as well as all other parcels of land in the Kingdom, once belonged to the King, and continued to do so unless he had parted with the title, which would not be presumed, but must be proved by the one alleging it, for which purpose the ordinary acts of ownership are sufficient. This doctrine is not as harsh as the one generally stated, although it perhaps places an unfair burden on defendant, which he does not bear in ordinary ejectment cases.

In *Beaufort v. Swansea*, 3 Exch. 413, Parke, B., interprets the language of Lord Hale in *De Jure Maris* to the effect that in point of practice the seashore is taken and treated as part of the adjoining manor.

Other English text writers.

Text writers and pamphleteers have exhibited 45 L. R. A.

great zeal in maintaining Lord Hale's doctrine, and in carrying it even further to the point that the title to the seashore was a prerogative with which the King could not part.

The soil between high and low water mark has always been claimed for the Crown. Of late years (1851), however, an attempt has been made, fruitlessly hitherto, to defeat this ancient prerogative of the King, and much legal ingenuity has been resorted to in contravention of his dominion. Woolrych, Waters, p. 23.

The soil may be in a subject as parcel of his manor, for all manors were originally derived from the Crown, or it may be in gross. Id. p. 25.

The right of property in the shore being in the first instance in the Crown, it is capable of transfer, and it may be qualified by the *jus publicum* of the subject when the two rights are inconsistent. *Ibid.*

The land between high and low water mark may undoubtedly become private property, subject to the public convenience, but the right emanated from the prerogative. Id. *441.

The subject may have the soil between high and low water mark by a grant from the Crown. He may show his grant or claim by prescription. Id. *440.

The same principle which requires that the ruling authority of a country had the control of the seas in its neighborhood governs the imperial right over land between high and low water mark. This sovereignty on the part of the Crown has been acquiesced in for many centuries. Id. p. 433.

Not only is the soil of the coast in the King as one of the flowers of his prerogative, not merely that he has had the immemorial but almost undisputed dominion over the shores, but it is essential and important for the public welfare that he should be endowed with such a right of propriety. For in the absence of a grant the Crown looks upon every private assumption as a trespass and, notwithstanding a grant, if the public interest is invaded or the privileges of the people narrowed the grant *pro tanto* is void, and in the room of a rightful user by the grantee there arises a purpresture. Id. p. 449.

Attention is called to the fact that all through his discussion of the question Woolrych confuses the governmental right and the property right, which is a frequent fault on the part of persons discussing the question.

The soil, banks, and shores as high as the flow and reflow belong to the King. Sheppard's Abr. part 3, p. 97.

parallel thereto, as the limit for the appellants, and allows them now to go to another line perpendicular thereto, and share that line with the appellees, thus diminishing to that extent the share of the appellees on the port warden's line of the harbor commissioners in front of them, should not be imputed to the legislature unless required by the plain words of the statute.

If the intention were plainly expressed, it would be void as divesting vested rights.

Yates v. Milwaukee, 10 Wall. 504, 19 L. ed. 986; *Norfolk City v. Cooke*, 27 Gratt. 435; *Lyon v. Fishmonger's Co.* L. R. 1 App. Cas. 652; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Langdon v. New York*, 93 N. Y. 129.

Conceding that the parties on both sides of Crawford's bay had full riparian rights, the port warden's line of the harbor commissioners would have been divided among them

in proportion to their shore line, and the lines of division leading to the port warden's line would have diverged from the side lines of the lots, and none of the parties would have been entitled to reach the line of navigability by lines perpendicular to their shore lines, or in the extension of the side lines of their lots.

Adams v. Boston Wharf Co. 10 Gray, 521; *Valentine v. Piper*, 22 Pick. 96; *Com. v. Roxbury*, 9 Gray, 523; Gould, Waters, §§ 164, 105.

The owners of lots on Crawford street wharfed out in perpendicular lines as their lots were laid out by Crawford, and as these lots grew the legislature gave them another street parallel to Crawford street, Water street, and from this street they continued to wharf and build out on the same perpendicular lines, according to the plan of the town.

In point of ownership the shore is the King's as lord of the seas. But the subject may have the same as belonging to his manor by prescription. Callis, Sewers, 54.

The King has the propriety of the shores. But the people have the necessary use of the same. *Ibid.*

Hall, Sea Shore, 2d ed. p. 13, says: Below this ordinary high-water mark, down to low-water mark, throughout the coasts of England, as well of the sea as of creeks and tide rivers, the shore doth *de jure communis* belong to the King.

A person may show his right to the shore by proving that he and those under whom he claimed have immemorably, frequently and without restriction to any part of the soil, dug gravel, fetched away seaweed or sand, and embanked against the sea. The right to wreck of the sea or royal fish by prescription is a strong presumption for the shore being parcel of the manor. Co. Litt. 261a; Butler's note, 205.

Magna Charta, 9 Hen. III., provided that no one might appropriate to himself a several right in the banks of rivers so as to exclude others from the passage there or from fishing, except he had that right in the reign of Henry II. Reeves, History of English Law, 267.

The soil of the seashore between high and low water mark is presumed to belong to the Crown. Best, Presumptive Evidence, 240.

The King is by his prerogative the prima facie owner of the shores of the sea and navigable rivers and arms of the seas within his dominions. Chitty, Prerogatives of the Crown, 207.

The jurisdiction of land left by the sea on the shore of a county palatine belongs to the lord of the county. Callis, Sewers, 52.

Hall says (Sea Shore, 2d ed. p. 219), the Crown on behalf of the public has an interest in the shores of the seacoast manors within its dominions, and the public are still more directly and continually concerned in the clearness and certainty of this portion of our law. It may be a question whether it ought ever to have been in the power of the Crown to alienate by grants to individuals any portions of the seashores of the realm; and it may be still more questionable whether such alienation ought ever to have been presumed by a court of law when no grant whatever could be produced. It may be thought that prescription or presumption of law ought in no case to be allowed to prevail against the title of the Crown to so important a trust confided by the law to its charge for the good of the common law. If the King were to make the seashores of the realm a source of 45 L. R. A.

private sale and profit, he would, according to what is said before by the justices, be acting contrary to the trust for which the ownership of the shore was vested in the Crown by common law. Still less, therefore, ought private individuals to be aided by presumption of law in their claims upon the shore when the Crown and public are both thereby greatly impoverished.

One digester, however, stated the law as it was laid down by the courts regardless of his theory as to how it ought to be.

Land between high and low water mark belongs to the lord of the manor next adjoining as part of his manor, and he can claim by prescription to have wreck or fishing there. 2 Lilly, Practical Register, title Rights, D.

Both theories are opposed to the Roman law, for under it *res communes* are those in which no person has any property, neither can anyone be possessed of them or deprived thereby of the use of them. For by their situation their use is common to all, both man and beast, as the sea, air, running water, and the seashore. Wood, Civil Law, 82.

The property in the seashore is in no one. Taylor, Roman Law, 246.

The case of Attorney General v. London and Serjeant Merewether's speech.

About 1847 or 1848 arose a case of Atty. Gen. v. London, 2 Macn. & G. 247, 2 Hall & Tw. 1, 19 L. J. Ch. N. S. 314, 14 Jur. 205, in which land between high and low water mark in the river Thames in possession of the corporation of London was sought on behalf of the Crown as part of the prerogative. The corporation denied the right of the Crown, and attempted to put it to its proof. The case went off on a question of pleading, but at the argument Mr. Serjeant Merewether went at length into the validity of the claim set up by the Crown. Much of his evidence is of a negative character and he cites few cases having any direct bearing on the question. His speech was published, and is found, *inter alia*, in an appendix to the second edition of Hall on Sea Shore. For the purpose of showing the condition of the authorities on the question, those cited by him together with the remarks upon some of them by Mr. Jerwood, who wrote a pamphlet in reply to the speech, will be set out. Both men show bias, so neither can safely be trusted without verification. Sufficient comment will therefore be made to show the value of the citations.

Mr. Serjeant Merewether states that no trace

Keith, P., delivered the opinion of the court:

It was held by this court in *Groner v. Foster*, 94 Va. 650, that "every riparian owner has the right to the water frontage belonging by nature to his land. This right includes, among others, the right of access from the front of his land to the navigable part of the watercourse, and also the right to the soil under the water between his land and the navigable line of the watercourse, whereon he may erect wharves, piers, or bulkheads for his own use, or the use of the public, subject to such rules and regulations as the legislature may see proper to impose for the protection of the public. . . . In this state the enjoyment of the right is made subject by statute to the limitation that its exercise shall not result in the obstruction of navigation, nor in other injury to the private rights of any person. Va. Code, § 998.

Each riparian proprietor is entitled, in conformity to such right, to have the extent of its enjoyment upon the line of navigability of the watercourse determined and marked, and his proper share of the flats or land under the water, for the purposes aforesaid set apart, and its boundaries defined. A court of equity has jurisdiction, and is the proper tribunal, to make the apportionment, and to determine and establish the boundary lines of the coterminous owners."

Upon the authority of this case, we think there was no error in overruling the demurrer to the plaintiff's bill; and we are of opinion that the objection taken by some of the appellants to the decrees complained of, that it was made in the absence of certain necessary parties, should also be overruled.

The lots which are the subject-matter of this suit form the shore of Elizabeth river, at that portion thereof known as "Cray-

of a claim on behalf of the King to the soil between high and low water mark can be found in the Saxon Charters, Saxon Laws, Domesday Book, Laws of William I. or Henry I., Glanville, Magna Charta, Bracton, Britton, the statute of 4 Edw. I., enumerating the rights belonging to manors, the Year Books, the Abridgments of Statute or Fitzherbert, the statute of 17 Edw. II., concerning the prerogatives of the King, Horne's Myrrour of Justices, or any other authority down to the time of James First.

The *Shinberge Case* (Hale, De Jure Maris, chap. 4) involved rather the question of reliction than that of title to the shore, but is referred to by Serjeant Merewether as showing that the title to the shore was in the owner of the manor. In that case the river Severn had changed its course so as to encroach upon Shinberge, but subsequently returned to its original course, and the question was as to title to the land left by its return. Lord Hale states that it was decided that it did not belong to Aure, the town on the other side of the river, "neither was it at all claimed by the King," but it was restored to Shinberge as before. The land at that place belonged to the barons of Barclay, and in a subsequent case (Hale, chap. 6), the question of their title was again raised as to land relicted by the river. The land was claimed by the King as part of his prerogative, but on behalf of Lord Barclay it was claimed as part of the manor from the time of Henry II. And upon the proofs being produced they were so overwhelmingly in favor of the baron's title that the King's counsel moved defendant to consent to withdraw a juror, which, upon the earnest desire of the court and the King's counsel, defendant agreed to do, so that the baron's possession remained undisturbed, although no judgment was entered in the case.

In the *Toppesham Case*, cited by him, it appeared that the port and fishery and sea at Toppesham had been in the Earls of Devon and their ancestors from the conquest of England, so that that case furnished little evidence of a general rule.

The case of the Abbot of Tichfend involved only the question of the right to a weir in the water.

The *Tinmouth Case* is set out *supra*.

The *Hacchesham Case*, in 8 Edw. II., was a conflict between private individuals as to the right to possession of land which had been overflowed by the sea and reclaimed by the stopping of the breach in the dyke.

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In the case of Abbot of St. Benedict Hulme, Trinity, 10 Edw. II. B. R. Rot. 83 Norf. the abbot impleaded certain persons for fishing in his *riparia*. Pending the suit, the king's attorney came in and alleged that such *riparia* was an arm of the sea and belonged to the King, and said that at the last itinerary it was presented before Solomon de Rosa and his associate justices, that the predecessor of the abbot made a purpresture upon the said *riparia* and the attorney general sought a stay of proceedings that they should not take any inquisition thereon until the justices were certified upon the record and process. Thereupon search was granted and the record certified, and afterwards a procedendo was obtained, the issue joined, and found for the abbot and judgment and execution given in his favor. Lord Hale says: "Upon this record it is observable that of common right the right of such arms of the sea belongs to the King." How that observation is sustainable is not manifest. The most that can be said is that the record produced did not sustain the contention of the King's attorney. The reason does not appear.

In 14 Edw. II., Easter Term, there was a case with respect to some boats which had been seized on the Thames as being on the shore damage feasant, and it was there stated that there was no right to land without leave of the lord within the flow and reflow of the tide. That case is evidence of the right of the lord in that case, but it does not appear whether the judgment was placed upon the general law or upon a private grant to plaintiff.

In Sir Henry Nevill's Case, Year Book, 5 Edw. III., folio 11, Sir Henry prescribed for wreck belonging to his manor, but it is only by inference that the claim can be made that the manor included the seashore. See *supra*.

In the case of Abbot of St. Austin, 5 Edw. III., a portion of a creek was found to belong to the abbot, and not to the King.

The cases of Abbot of Peterborough, 23 Edw. III., and Abbot of Ramsey, 43 Edw. III., appear to have been cases involving accretion and marshes.

In Year Book, 34 Edw. III. pl. II., a quantity of land and weirs were recovered as parcel of the manor of Burnham.

In Diggs v. Hammond, 17 Eliz., Serjeant Merewether says that it was held that land between the flow and reflow of the sea belonged to the lord of the manor, basing his statement on the authority of Sir Edward Coke. See, however, *supra*.

ford's bay;" the lots owned by the appellants being on the north side of the city of Portsmouth, and forming the south shore of the bay, while those of the appellees form its west shore. These two shore lines run nearly at right angles to each other, so that the shore lines of the bay may be said to form a right angle, the hypothenuse of which is formed by the port warden's line running from the northeastern corner of the city of Portsmouth to the end of the point on the United States naval hospital grounds, and with the dividing line between the city of Portsmouth and the county running diagonally through it, as shown on map filed with the record. The controversy here is as to the extent of the riparian rights which attached to the lots conveyed to appellants or those under whom they claim. All the property affected was embraced in the grant from the commonwealth to William Crawford,

dated October 31, 1716. In 1752 the town of Portsmouth, which had been laid out from a portion of this grant, was established, the north boundary of said town being the south shore of Crawford's bay. After laying out the town, Crawford sold lots on the north end thereof to sundry parties, privies in estate of the appellants, who are the present owners of these lots; while the lots on the west shore of this bay are the property of the appellees, owned by Crawford at his death, and which passed at his death to his devisees, who are the privies in estate of the present owners, the appellees.

Appellees claim that, by virtue of their ownership of the land on the west shore, they have the right to all of the flats or bottom of this bay to the port warden's line, and to fill in the same, and build their structures thereon, to said port warden's line, to the exclusion of the owners on the south shore of

In 8 Edw. IV., folio 18, certain fishermen proceeded against as trespassers for digging holes on the shore to put stakes in for drying nets pleaded a custom to do so, which was held bad, Chief Justice Choke saying there could be no custom to dig my land.

In Year Book, 8 Edw. IV., persons who were digging on the seacoast to erect defenses against the King's enemies were adjudged trespassers upon the land of the lord of the manor.

In Sir John Constable's Case, Anderson, 86, and Sir Henry Constable's Case, 5 Coke, 106a, it appeared that a royal grant had conveyed the manor of Holderness with wreck of the sea *infra manerium*, and it was decided that the grantees were entitled to wreck cast upon the shore, it being stated by the justices that the shore between high and low water mark may be parcel of a manor belonging to the subject. Serjeant Merewether contends that this case shows that the shore is within the manor, while Jerwood (Seashore, p. 59) states that the word *infra* means below, so that the grant was of wreck below the manor, the soil upon which it was thrown remaining in the King.

The Banne Case, Davies Rep. 149, involves simply the right of a fishery, and not the right of a shore.

In Atty. Gen. v. Parmeter, 10 Price, 378, in which a grant from Chas. I. of a stretch of sea coast was involved, the grant was held void, and Serjeant Merewether states that it was not strange since at the time of the grant there were parties entitled to and in actual possession of that coast and the shore adjoining it. The decision seems, however, to have been placed upon the ground that the grant would interfere with public rights, and was therefore void.

And Jerwood says in that case, it is said it is perfectly clear that all the soil under the salt water between high-water mark and low-water mark is the property of the Crown. Such property has certainly been as it may be communicated in a great many instances to the subject; but that is always subversive to the public right of the King's subjects generally. It is compared by Lord Hale, with his usual simplicity, to the case of a highway. The private right of the Crown may be disposed of, but the public right of the subject cannot, even if it be within this grant.

In reference to Philipot's Case, 8 Car. I. (see *supra*, citation by Lord Hale, and *infra*, *Modern English cases*), Serjeant Merewether says that it was not reported, and he believed it had never been acted upon. And that if the circumstances 45 L. R. A.

connected with it are looked into, "I am sure it will not at this day be acted upon. At that time, it is well known as matter of history, the coffers of the Crown were not full; and it was desirable that proceedings of this kind should take place for the improvement of the King's revenue, and accordingly it will be found, when that case is looked into, that the Lord High Treasurer and the Chancellor of the Exchequer sat with the learned judges upon the bench and were present at the decision of that case. I think I may say with confidence that case will not be relied upon." And he says that in Whitaker v. Wise, 2 Keble, 759, the reporter at the end of the report states, "that case was decided against Sir Henry Constables."

He cites the case of Johnson v. Barret, Aleyn, 10 (see *supra*), and then says, in Bulstrode v. Hall, Sid. 148, the reporter states that "In this case it was oftentimes affirmed and not denied that the soil of all rivers so far as the flux and reflux of the sea is in the King and not in the lords of the manors, except by prescription," as though that doctrine was a new *notabilia* to be put down in the note book.

In the Trematon Case, 16 Chas. II., and Garrow v. St. Aubyn, Wightw. 187, it was held that the shore of the sea adjoining the manor of Trematon belonged to the Duke of Cornwall as parcel of his manor. But Jerwood says (Seashore, p. 62) that the Dukes of Cornwall had always enjoyed royal jurisdiction and the Crown rights, and that the fact that the seashore was parcel of their manor would not tend to prove that such was the fact generally.

In Brooke v. Spering, the right of the lord of the manor to the shores of the Sheppy Island was upheld.

In Lord Grosvenor's Case, the right to the soil under the river Thames was referred to as being in the city of London.

Blundell v. Catterall, 5 Barn. & Ald. 268, referred to the rights of bathing on the seashore. Chad v. Tilised involved the right to the shore on Brownsea Island, in which the plaintiff's right was made out under a charter without any grant by express words from the Crown.

In Gray v. Bond, 2 Brod. & B. 667, 5 J. B. Moore, 527, the right to the shore was held to be in the lord of the manor.

In Dickens v. Shaw it was observed that the right of the Crown was for the protection of the public.

In Scrutton v. Brown, 4 Barn. & C. 485, 6 Dowl. & R. 536, the lord of the manor estab-

the bay; which assumption is based upon the boundaries given in the several deeds from William Crawford to his immediate grantees, it being claimed that these boundaries were to "high-water mark," and therefore the lots so bounded had no riparian rights, while the lots of the appellees were bounded by the river, and hence riparian rights were included therein. The hustings court sustained the position of appellees, and denied riparian rights to the appellants. In this there was error.

The several deeds under which appellants claim convey to them to "high-water mark," and in the deed to Page and the Waverly Water Front & Improvement Company the lines called for are to "high-water mark"; "then east on the river side, to Daniel Hale's lot; . . . with waters, watercourses," etc. The deed to the lot to Mary A. Peters uses

substantially the same language; so, also, the deed to the lot on Court street, now held by the Waverly Water Front & Improvement Company; while the conveyance to James Whitehurst of the lot owned by Eastwood is not materially variant from those quoted. These deeds were made prior to 1760.

"As early as 1679 it was ordered and declared by the legislative assembly of Virginia that 'every man's right, by virtue of his patent, extends into the rivers or creeks so far as low-water mark;' . . . and the present statute declares that, subject to certain designated provisions, 'the limits or bounds of the several tracts of land lying on the said bays, rivers, creeks, and shores, and the rights and privileges of the owners of such lands, shall extend to low-water mark, but no further, unless where a creek or river, or some part thereof, is comprised within

lished his right to the shore on the coast of Essex.

He then cites *Benest v. Pipon* where Lord Wynford stated that whatever never has had an individual owner belongs to the sovereign in whose Kingdom it is; whatever any sovereign has allowed any individual to possess or improve he cannot take away, because he would be taking from the occupant the value of the labor expended on it.

In the Duke of Beaufort's Case, it was found that the seashore passed under a grant of terra de Gower, accompanied by act of ownership.

Serjeant Merewether concludes that with the exception of the case of the river Mersey and the few cases, comparatively speaking, in the river Humber where parties, tired of proceedings with the Crown, which never pays costs, consented to take leases at small rents under the Crown, there is no proof whatever of this prerogative right ever having been put in force, and "I believe I am fully within compass when I say that these cases are all within the last twenty years."

That Serjeant Merewether and Mr. Jerwood were able to adduce so little authority upon the question can be accounted for only by the fact that until comparatively modern times the sea shore had not enough of value to warrant legal contests over the ownership of it.

Modern English cases.

After the doctrine of a prerogative right to the seashore residing in the Crown had been broached and the further doctrine had been established that prerogative rights were held for the benefit of the people, Lord Hale's doctrine found expression in many judicial opinions, some of which practically establish the law so far as the presumption of title is concerned.

In *Pearce v. Bunting* [1896] 2 Q. B. 360, 65 L. J. M. C. N. S. 131, 73 L. T. N. S. 184, Cave, J., in construing the Thames conservancy act, stated that her Majesty is *prima facie* entitled to bed and shores of navigable rivers, and to the foreshore of the open sea.

The land between high and low water mark is *prima facie* in the Crown. It may, however, be in the subject, and different rights in that description of property may be vested in a subject according to the terms of the grant. The Queen may have granted to the subject the soil itself or the general privilege of fishing, or of laying, keeping, or taking oysters on the spot. *Serrott v. Brown*, 4 Barn. & C. 485, 6 Dowl. & R. 536.

The soil between high and low water mark is *prima facie* in the Crown, though it may be in 45 L. R. A.

the subject. *Queen v. Musson*, 8 El. & Bl. 900.

In *Rex v. Grosvenor*, 2 Starkie, 511, it seems to have been admitted that the soil between high and low water mark on the river Thames was in the city of London.

In *Atty. Gen. v. Philpot*, set out in note in 4 Kay & J. 295, it was held that the soil of the river Thames between high and low water mark was parcel of the port of London and inheritance of the Crown, and that buildings between high and low water mark should be abated or rented at his Majesty's good pleasure for the increase of revenues of the Crown.

In *Dickens v. Shaw*, Hall on Sea Shore XLV., Appx., which was an action of trespass by the lord of the manor against persons who were digging and taking away sand from the seashore, a verdict was found in favor of defendants, and upon motion for new trial it was said that *prima facie* the right to the soil between high and low water mark was in the Crown. The right of the Crown is not in general for any beneficial interest to the Crown itself, but for securing to the public certain privileges in the spot between high and low water mark. And that although the Crown may grant the soil between high and low water mark to the lord of the manor, the lord must make out a strong case.

In *LeStrange v. Rowe*, 4 Fost. & F. 1048, the judge said, the soil between high and low water mark is presumed to be in the Crown unless the Crown at some time or other has parted with it. In a great number of cases the Crown has parted with it. There are some manors that remain in the Crown. But I take it that in the great majority of cases the right to the foreshore between high and low water mark is in the lord of the manor.

In *Vynor v. Mersey Docks & H. Board*, 14 C. B. N. S. 753, Byles, J., says that a recital in an act referring to construction of tidal basins in Chester county, "whereas her majesty in right of her Crown is, or claims to be, entitled to the *fundus* or soil between high and low water mark of the pool called Wallasey pool," is to be construed to mean that her Majesty is entitled to the soil between high and low water mark only at the place specified, and that it had nothing to do with land higher up the same stream.

In *Atty. Gen. v. London*, 8 Beav. 270, 14 L. J. Ch. N. S. 305, 9 Jur. 626, the information stated that the Crown was seised of the shore between high and low water mark at ordinary tides in waters where the sea ebbcd and flowed, but the case went off on a question of pleading.

the limits of a lawful survey.' Va. Code, § 1339. See also 1 Rev. Code 1819, p. 341, chap. 87." *Groner v. Foster*, 94 Va. 657.

"Thus, the limits or boundaries of the several parcels of land under consideration," as was said in the case just cited, "were extended, by operation of law, down to the ordinary low-water mark, and the right to the soil between ordinary high and low water mark annexed, 'as incident or appurtenant to the adjacent land.'" *French v. Bankhead*, 11 Gratt. 160.

French v. Bankhead is a very strong case. It was decided in 1854 by a unanimous court, and has never been questioned to this day. The state of Virginia agreed to cede to the United States its soil and jurisdiction to the extent of 250 acres at Old Point Comfort, for the purpose of fortification and other objects of national defense, and authorized the governor to convey the land by

deed to the United States. The land is a peninsula bounded by Chesapeake bay, Hampton Roads, and Mill creek. A survey of the land was ordered by the governor, and the surveyor was directed to lay off 250 acres, as "the United States shall elect to take it." The surveyor returned a plat and report in which he says that the United States elected to take by high-water mark, and he gives the courses and distances, commencing at a point at high-water mark, and running nearly coincident with high-water mark, except where it runs from Mill creek to the bay, and in that course it stops on the bay at high-water mark. Upon this state of facts it was held that under the act (1 Rev. Code 1819, p. 341, chap. 87), which is a virtual re-enactment of the colonial statute of 1679, "the conveyance by the high-water mark boundary passed to the United States soil and jurisdiction to the low-water mark."

In *Re Chabot*, 17 L. J. Q. B. N. S. 336, 12 Jur. 1023, which was a proceeding to prohibit the commissioners of woods and forests from entering an assessment for property required by them, land which was situated between high and low water mark was claimed for the Crown. But the question whether it belonged to the Crown or not was not decided in the case.

The burden placed upon the landowner by the presumption of title in the Crown is illustrated by the case of *Atty. Gen. v. Chamberlaine*, 4 Kay & J. 292, which was an information on the part of the Crown for land between high and low water mark in Tranmere pool. The defendant denied the right of the Crown, and the Crown proposed issues to try whether or not the Queen was seised in right of her Crown of that part of the shore lying between high and low water mark. Defendant objected to this issue on the ground that it should first be determined what the Crown claimed to be land lying between high and low water mark. The vice chancellor, however, decided that when the right of the Crown was denied, the defendant had the burden of establishing his right to the shore, and that he might by evidence offered to prove his right admit that the space where the act was done was part of the foreshore, so that in case the verdict went against him his own evidence would prove the Crown's title. Whereas, if the title of the Crown to the present foreshore was admitted the burden might be cast upon the Crown to prove the extent of such foreshore.

Title may be in individual.

Although the judges usually state that *prima facie* the title is in the King, yet it is agreed that it may be in the individual, and the individual has usually prevailed in the suits.

The seashore, subject to the public easements of navigation and fishery, may be granted by the Crown. *Parker v. Elliott*, 1 U. C. C. P. 470.

The fact that the shore is subject to grant makes it also subject to be acquired by prescription. Hale, *De Portibus Maris*, chap. 4; Butcher's note, 205; Co. Litt. 261a; Callis, *Sewers*, 49.

In *Queen v. Clinton*, Ir. Rep. 4 C. L. 6, it was found that the right to the shore was in the adjoining proprietor by prescription.

The sea is the property of the King, and so is the land beneath it, except such part of that land as is capable of being usefully occupied without prejudice to navigation, and of which a subject has either had a grant from the King or has exclusively used for so long a time as to 45 L. R. A.

confer on him a title by prescription. *Benest v. Pipon*, 1 Knapp, P. C. C. 68. Whatever the sovereign has allowed an individual to possess or improve he cannot take from that individual because by thus doing he would take from the occupant the value of the labor which he had been permitted to expend on the property and which must far exceed the original value of the soil.

Title to land between high and low water mark may be acquired by adverse possession. *Church v. Meeker*, 84 Conn. 421.

Forty years' possession of land between high and low water mark will give the possessor title thereto. *Peck v. Lockwood*, 5 Day, 28.

Private claimant must show his title.

The effect of the rule which places the title *prima facie* in the King is to cast upon the private claimant the burden of showing his title.

The burden of showing a title adverse to the King of a part of the seashore is upon the one alleging it. *Atty. Gen. v. Richards*, 2 Anstr. 803.

In that case, the information stated that the sea coasts as far as the sea flows and reflows between the high and low water marks belong to the King, and ought to be preserved for the use of the King's subjects; and it charged that defendant had erected an embankment there which prevented vessels from coming up to Gasport. Defendant set up title under letters patent from the Crown and by prescription. The court said it is clear that the right to the soil between high and low water mark is *prima facie* in the Crown. The onus of proving an adverse title is thrown upon the defendants. And it was held that not only had defendants failed to make out their title, but, having permitted the land to lie open to the public for one hundred and fifty years, the complainants were precluded from claiming any adverse title in themselves.

The burden is upon one who sets up a prescriptive right to the shore of proving his title. *Queen v. Dublin County Justices*, Ir. Rep. 5 C. L. 548.

In a controversy between the Crown and a riparian owner as to the title to the foreshore, if the owner cannot produce an actual grant he must give evidence of such acts of ownership as would be sufficient to lead a jury to presume that there was once a grant of the foreshore. *Atty. Gen. v. Chamberlaine*, 4 Kay & J. 292.

What is evidence of title.

By the laws of North Wales whosoever own-

As we have seen, the act of 1679 was in force when the deeds in question in this case were executed, and upon the authority of *French v. Bankhead*, 11 Gratt. 160, they vested in the grantees the right to the soil between ordinary high and low water mark, as incident or appurtenant to the adjacent land. We do not, of course, mean to say that the operation of the grant may not be so limited to high-water mark as to exclude riparian rights as incident to it; but in order to control the operation of the statute of 1679, substantially in force to this day, as construed by this court in *French v. Bankhead*, 11 Gratt. 160, the intention so to do must be clear and manifest upon the face of the deed. The presumption is that the right attached as incident to the grant to high-water mark; therefore we hold that, as to those lots with respect to which the decree of the

hustings court is silent, it is to be presumed, in the absence of evidence to the contrary, that the original deeds conveyed to high-water mark, and consequently they will be placed upon the same footing with other lots upon the north side of the city of Portsmouth and the south shore of Crawford's bay.

The apportionment of riparian rights should be made in accordance with the principles established in the case of *Groner v. Foster*, 94 Va. 657, of which this is the converse. In that case the port warden's line was longer than the shore line, while in this the two shore lines are longer than the port warden's line, but the principle established in that case applies with equal force in this.

We are of opinion that the decree of the court below should be reversed, with directions to proceed in conformity with the views herein expressed.

eth land on the side of the shore owneth the breadth of his land on the shore. Atty. Gen. v. Jones, 33 L. J. Exch. N. S. 249, 2 Hurlst. & C. 847, 6 L. T. N. S. 655.

In *Macalister v. Campbell*, 15 Shaw & D. 493, Lord Gillies says it would be a very serious matter indeed if this court would hold that the shore was reserved, out of the grant wherever it was not expressly inserted in it. I see no warrant for so construing a grant of lands on the sea coast. I hold, therefore, that the conveyance of an estate which is notoriously bounded by the sea conveys the shore as effectively as if the words "bounded by the sea" were in the charter. In that case, however, there was evidence of user which was held sufficient to show the title in the claimant.

In that case it is said that it has been found that a grant of land which was described as bounded by the sea was good against a subsequent special Crown grant of the seashore.

The charter of 11 Edward III., as interpreted by statute 21 & 22 Vict. chap. 109, conveyed to the Duke of Cornwall all the rights of the Crown in the foreshore of the county of Cornwall. *Penryn v. Holm*, L. R. 2 Exch. Div. 332, 46 L. J. Exch. N. S. 506, 37 L. T. N. S. 133, 25 Week. Rep. 498.

Claims to exclusive rights in land between high and low water mark may rest on grant or on usage which presupposes a grant. And when a grant of remote antiquity contains general words the best exposition of such a grant is long usage under it. *Chad v. Tilset*, 2 Brod. & B. 403, 5 J. B. Moore, 185.

The title will be shown to be in the owner of the adjoining land where he was granted the manor abutting on the shore together with the right of wreck and fishery, and he and his tenant had for many years exercised the right of taking sand, stones, and seaweed, and allowed other persons to come there only by permission. *Calmady v. Rowe*, 8 C. B. 870.

The shore between high and low water mark may be parcel of an adjoining manor, and where by an ancient grant the limits of the manor are not defined, modern usage is admissible in evidence to show that the seashore is a parcel of it. *Beaufort v. Swansea*, 3 Exch. 413.

In *Beaufort's Case*, Baron Parke said: By grant of the manor everything would pass which was parcel of the manor; the only question is whether it would be uncertain how much constituted the terra de Gower in the reign of King John. Modern usage may be made use of to show what was comprised within the limits of the manor, that is, what was the boundary of 45 L. R. A.

the manor both upon the land side and the sea side.

A grant of a manor which is located on the seashore together with anchorage, groundage, and wreck of the sea raises a strong presumption of law that the shore was intended to pass. *LeStrange v. Rowe*, 4 Fost. & F. 1048.

In *Lopez v. Andrew*, 3 Mann. & R. 329, note, which was a trespass for sinking a shaft between high and low water mark, the court told the jury that the land *prima facie* belonged to the Crown, but that evidence of enjoyment by the owner of the adjoining manor would justify the presumption of a grant from the Crown.

A grant of property on the seashore together with wreck of the sea, flotsam, jetsam, and all the appurtenances belonging to it, coupled with proof of enjoyment of the foreshore for seventy years by letting to tenants to take seaweed, etc., is sufficient to support a finding that the shore passed under the grant. *Healy v. Thorne*, Ir. Rep. 4 C. L. 495.

Land between high and low water mark is within the meaning of the word "waste" so as to pass by a patent granting waste *inter alia*. Atty. Gen. v. Hammer, 27 L. J. Ch. N. S. 837.

A grant of land bounded on the seashore, together with the wastes, waters, fisheries, wreck of the sea and hereditaments whatsoever, accompanied by evidence of exclusive ownership, will show a title to the shore. *Hamilton v. Atty. Gen.* Ir. L. R. 5 Eq. 555, affirming Ir. L. R. 9 Eq. 271.

Although in the case of *Dickens v. Shaw*, Hall, Appx. Justice Holroyd says that if the Crown grant the right of wreck alone, by that grant the party would have a right to come and take the wreck as incidental to the grant.

General words of a patent may be explained by user and enjoyment. *Daly v. Murray*, Ir. L. R. 17 Eq. 185.

The title to the shore may be shown by the fact that the tenants of the manor have for a great length of time enjoyed rights of common in the lands. *Ex parte Gwydir*, 4 Madd. 321.

In *Lord Advocate v. Blantyre*, L. R. 4 App. Cas. 770, it was held that where the title alone did not include the foreshore, every act shown to have been done on the part of the claimants which was not lawful, unless they were owners of the foreshore, is evidence that they were in possession as owners of the spot where the act was done, and if such acts extended for forty years their title was complete.

A grant of land on the seashore, and also all and singular lands, tenements, etc., to the aforesaid premises, etc., belonging, etc., or with the

said premises or any part or parcel thereof used, occupied, or enjoyed, followed by claim to the seashore and conviction of trespassers, will pass the title to the grantee. *Brew v. Haren*, Ir. Rep. 11 C. L. 198, *Affirming Ir. Rep. 9 C. L. 29*.

The limiting of the grant by the shore will not exclude the shore if the grantee exercises dominion over it. *Re Belfast Dock Act*, Ir. Rep. 1 Eq. 128.

Proof of acts of ownership for sixty years will establish title to the foreshore, although no evidence of a direct grant is offered. *Mulholland v. Killen*, Ir. Rep. 9 Eq. 471.

Proof of ownership of a several fishery along the foreshore will raise a presumption that the title is in the adjoining owner. *Atty. Gen. v. Emerson* [1891] A. C. 649.

A grant of a manor with all its rights and appurtenances, wastes, marshes, fisheries, wreck of the sea, and all other rights, franchises, privileges, profits, and hereditaments will not of itself pass the shore between high and low water mark; but it may do so when coupled with proof of occupation. *Atty. Gen. v. Jones*, 33 L. J. Exch. N. S. 249, 2 Hurlst. & C. 347, 6 L. T. N. S. 655.

Bounding the grant of upland by the shore will exclude the shore if no attempt is ever made to occupy and use it. *Smith v. Scotland*, 13 Jur. 713.

A grant "to the lake" or "to the bank of the lake," will convey title only to high-water mark. The judge says: "I think that in grants of land in our waters having a river or lake boundary, the grant extends to the water, and there is no place between the land conceded and the water on which to place a highway. *Parker v. Elliott*, 1 U. C. C. P. 470.

In a suit against a trespasser by persons claiming title to the foreshore and giving evidence of acts of ownership in support of their title, it is not open to defendant to prove any act of ownership by the Crown except such as can be shown to have been done with the knowledge of the plaintiffs, and the plaintiffs may recover on evidence which would be insufficient to displace the title of the Crown. *Hastings v. Ivall*, L. R. 19 Eq. 558.

In *Cowper v. Baker*, 17 Ves. Jr. 128, it was alleged in the bill that the manor extended in the sea as far as a buoy as large as a barrel could be seen.

In *Maloon v. White*, 57 N. H. 152, relief by injunction against trespasses on the shore between high and low water mark was refused on the ground that plaintiff must first establish his right at law.

Reason for the diversity of opinion.

The principal reason that the law in regard to this subject is so chaotic and unsettled is to be found in the attempt to apply the fully evolved modern law of real property to rights and interests which had become fully established long before the legal rules were perceived. In other words, it was an attempt to apply a new system of law to an old state of facts upon the theory that the law had always existed in its improved form, which was merely a fiction, and was impossible of application in the present instance. The view that the King once had title to all the lands in Great Britain is by no means above dispute. *Maitland* says, in considering the condition of things at the time of William the Conqueror, *Domesday*, p. 170: "Many things seem to indicate that the distinction between private rights and governmental powers has been but faintly perceived in the past." That distinction was one of the things 45 L. R. A.

which became clear under the modern law. But, adopting the view that the title to all the lands in the Kingdom were in the King in his private right, which is the one most favorable to his right to the seacoast, all that can be said is, with Lord Hale, that *prima facie* the title is in the King but may be in the subject, which the latter must prove. When the distinction between private and governmental rights was faintly perceived the King did not much concern himself with the question whether a right which he wished to exercise resided in him as an individual or as King, and the subject was certainly in no position to raise it. The private-land titles in the Kingdom were for the most part acquired at this time, and were for many years held merely at the pleasure of the one who bestowed them. Obscure appurtenances of the grant were of little consequence, and not worth a controversy so long as the main inheritance could be preserved. Moreover, the King had neither interest nor inclination to assert or define his rights in a particular marsh or coast or pool. Any attempt to apply the refinement of modern real-property law to estates acquired under these circumstances cannot but be fraught with great difficulty. Modern lawyers distinguish the King's rights as prerogative and private. Prerogative rights include governmental powers and the rights, lands, and perquisites which are attached to the Crown as such. The latter are now held for the most part in trust for the people, which doctrine was undreamed of in the Conqueror's time. How can rights acquired under the Conqueror be interpreted by law which has stripped the sovereign of his arbitrary power and converted him into a trustee with no authority to dispose of the trust property? That is a question which the English judges have hesitated to answer.

Viewed by the modern lawyer, the solution is this: "The dominion of the sea is in the King, as argued by Selden, in *Mare Clausum*. Title theoretically follows dominion. Title undisposed of remains in the King. This title is a prerogative right which is held in trust for the subjects, and cannot be alienated. The sea extends as far as the tide flows, which is to high-water mark. The prerogative title, therefore, extends to that point.

From the view point of the landowner, the question may be considered thus: When the titles passed from the King to private owners the land between high and low water mark was not recognized as a separate class of property. The grants were usually of a particular manor whose location was on the seacoast, or of a parcel of land bounded by the sea. The only distinction in the mind of the grantee between land and water was that the land was regarded as subject to his use as far as the sea would permit such use. And he regarded his right as extending to the sea with no estate between, and acted accordingly.

The shipping interests were protected by the King's right to the ports, so that there was no necessity of raising the question of his rights to the seacoast in general. In this condition the question rested, the riparian owner making such use of the coast as he chose until, by the evolution of the law, legal theory placed the *prima facie* right to the coast in the King, and the riparian owner was compelled to prove his right, which, if the modern law was applied to its full extent, it would be impossible to do because the Crown has no power to part with Crown lands. Under these conditions, it is not strange that the courts have hesitated to lay down any general doctrine, but have been largely content to determine each title as it has been brought to their attention by the evidence which

could be educed in reference thereto. See note to *Hanlon v. Hobson* (Colo.) 42 L. R. A. 502.

II. The rule in the United States.

When the title of the King passed to the respective states in the Union they were actually in the position where the law had theoretically placed William I. They had the title and could part with it or not as they chose. In many of the states statutes have been passed expressly extending the riparian title to low-water mark. In others the title has been expressly reserved by law to the states, while in still others the question depends upon the construction of the particular grants, and is to be determined by the courts.

Grants by United States.

The United States government has held the title to a large portion of the lands within its territory. The question has arisen whether or not, while it held the title, it had the power to make grants of shore lands to individuals.

In case, upon cession of territory from one government to another the government acquiring the territory recognizes and perfects grants by the former government to land between high and low water mark the title so acquired will be good. *Leese v. Clark*, 18 Cal. 535.

If territory was acquired by the United States from a foreign government which had previously granted a portion of the tide lands to other parties, or had subjected them to trusts which would require their disposition to private persons, the United States could not interfere with the rights of such persons. *Knight v. United States Land Asso.* 142 U. S. 183, 35 L. ed. 982.

Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on, or bounded by, navigable waters, convey of their own force no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States. *Shively v. Bowby*, 152 U. S. 1, 38 L. ed. 331; *Hardin v. Jordan*, 140 U. S. 381, 35 L. ed. 433.

The United States upon acquiring a territory, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, take the title and dominion of lands below high-water mark of tide waters for the benefit of the whole people and in trust for the future states to be created out of the territory. *Shively v. Bowby*, 152 U. S. 1, 38 L. ed. 331.

In that case the court says: "Notwithstanding the *dicta* contained in some of the opinions of this . . . [the Supreme Court of the United States], to the effect that Congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true. . . . We cannot doubt that Congress has the power to make grants of land below high-water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory."

After the admission of a state into the Union, 45 L. R. A.

Congress could make no grant of land between high and low water mark within its jurisdiction. *Goodtitle, Pollard, v. Kibbe*, 9 How. 477, 13 L. ed. 222.

The shores of navigable waters and the soil under them were reserved by the states, and not granted to the United States. *Johnson v. Knott*, 13 Or. 308.

The shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states had. *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565.

It has been held that under the British North America act the foreshore, or land between high and low water mark, in Prince Edward's Island is vested in the government of Canada so that the lieutenant governor of that island could not grant a right of it to a private individual. *Holman v. Green*, 6 Can. Sup. Ct. 707.

Right of states.

The law in some of the states has been tinged by Lord Hale's doctrine and the subsequent English law of the text-books, without recognizing the fact that those books contained only a partial statement of the law.

At common law the title of the riparian owner extended only to high-water mark. *Day v. Day*, 22 Md. 537.

By the law of Spain, as well as by the English law, the land between high and low water mark belonged to the public at large, and could be alienated by the Crown in neither country. *Geiger v. Kilor*, 3 Fla. 325.

In many states, however, that rule has been fully adopted, so that private titles are bounded by the high-water mark.

In Connecticut the right to the soil of the proprietors of land on navigable rivers where the tide ebbs and flows extends only to high-water mark. *Chapman v. Kimball*, 9 Conn. 38, 21 Am. Dec. 707; *Lockwood v. New York & N. H. R. Co.* 37 Conn. 301; *Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 46; *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 256; *State v. Sargent*, 45 Conn. 373; *Rowe v. Smith*, 48 Conn. 455; *Farist Steel Co. v. Bridgeport*, 60 Conn. 282, 13 L. R. A. 590; *New Haven S. B. Co. v. Sargent*, 50 Conn. 199, 47 Am. Rep. 682.

In *Hess v. Muir*, 65 Md. 607, Chief Justice Alvey, in his separate opinion, says: It is not open to question that all soil below high-water mark, where the tide ebbs and flows, that is the subject of exclusive propriety and ownership, belongs to the state, subject only to such lawful grants of such soil as may have been heretofore made.

In the absence of evidence to the contrary, it is presumed that the owner of land bordering on the seashore owns only to high-water mark, and that all the seashore fronting his land lying between high and low water mark is the property of the state. *Long Beach Land & W. Co. v. Richardson*, 70 Cal. 206.

In Rhode Island the title to the land between high and low water mark is in the state. *Bailey v. Burges*, 11 R. I. 331.

In New Jersey the title of the riparian owner extends only to high-water mark. *Bell v. Gough*, 23 N. J. L. 624; *State, Roberts, v. Jersey City*, 25 N. J. L. 525; *Stewart v. Fitch*, 31 N. J. L. 17; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Stockham v. Browning*, 18 N. J. Eq. 390; *American Dock & Improv. Co. v. Public Schools*, 39 N. J. Eq. 409.

In *Arnold v. Mundy*, 6 N. J. L. 67, 10 Am. Dec. 356, the rule of the common law that the title of the riparian owner extends only to high-

water mark was recognized. And the same is true of *Gough v. Bell*, 22 N. J. L. 441.

The title between high and low water mark can pass to an individual only by express grant from the sovereign. *Roberts v. Baumgarten*, 19 Jones & S. 482.

In New York the title to the land between high and low water mark is in the state, but under the statutes it may be granted by the commissioners of the land office to the adjoining owner. *People v. Mauran*, 5 Denio, 389.

In *People v. Tibbetts*, 19 N. Y. 523, it is said that it is admitted by the counsel that the state in its sovereign character owns the bed of navigable rivers to high-water mark.

But the cutting of a channel from a fresh-water pond to the sea, so that the water becomes salt, and the tide ebbs and flows in the pond, will not make the rule that the riparian owner owns only to the high-water mark applicable to the pond. *Wheeler v. Spinola*, 54 N. Y. 377.

The land lying between high and low water mark belongs to the state, and may be sold by it. *Parker v. Taylor*, 7 Or. 435.

The shore of the sea and of its bays and inlets between high and low water mark belongs to the state by reason of its sovereignty. *People v. Morrill*, 26 Cal. 336; *Rondell v. Fay*, 32 Cal. 864; *Ward v. Mulford*, 32 Cal. 365; *Chapin v. Bourne*, 8 Cal. 295.

The title to the land between high and low water mark on the seashore is in the state, and it may grant the right to erect wharves there which will cut off the riparian owner from access to the water. *Martin v. O'Brien*, 34 Miss. 21.

The state is the owner of the beds of tidal rivers up to high-water mark. *Mobile v. Es-lava*, 9 Port. (Ala.) 577.

The title to the shore of all tide-water streams resides in the state for the benefit of the public. *Boulo v. New Orleans, M. & T. R. Co.* 55 Ala. 480.

In the absence of a grant of land between high and low water mark the title thereto is in the state. *Case v. Toftus*, 39 Fed. Rep. 730, *Case v. Loftus*, 5 L. R. A. 684.

In Washington a riparian owner has no rights whatever in the tide lands. *Eisenbach v. Hatfield*, 2 Wash. 236, 12 L. R. A. 632; *Harbor Line Comrs. v. State*, *Yealer*, 2 Wash. 530.

The title to the shore between high and low water mark of tidal water is in the state. *Hobson v. Monteith*, 15 Or. 251; *Parker v. West Coast Pkg. Co.* 17 Or. 510, 5 L. R. A. 61.

In Providence Steam-Engine Co. v. Providence & S. S. Co. 12 R. I. 348, 84 Am. Rep. 652, *Potter, J.*, held that the title of the state to the shore was not a fee so that it could sell the shore to the detriment of riparian owners.

The beaches belong to the state, and cannot be let by the towns. *New Shoreham v. Ball*, 14 R. I. 566.

In California the title to tide lands between high and low water mark is in the state except where grants have been made by the Mexican government before the territory was acquired by the United States expressly covering tide lands. *Coburn v. San Mateo County*, 75 Fed. Rep. 520.

In Iowa the title of the proprietor of land bounded on a navigable river extends only to high-water mark, and the shore between high and low water mark is in the state. *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

When the sea or a bay is named as a boundary of land the line of ordinary high-water mark is intended. *United States v. Pacheco*, 2 Wall. 587, 17 L. ed. 865.

A statute authorizing the entry and grant of 45 L. R. A.

land by the state does not extend to land between high and low water mark of tide waters,—at least where the statutes provide that in the public surveys land on navigable water should be surveyed in such manner that the water should form one side of the survey. *Ward v. Willis*, 51 N. C. (6 Jones, L.) 183, 72 Am. Dec. 570.

States which permit individual ownership.

The state may dispose of the land between high and low water mark for the purpose of advancing and promoting the interests of navigation, or of reclaiming from the sea, where it can be done without prejudice to the public right of navigation and applying them to other purposes and uses. *Ward v. Mulford*, 32 Cal. 365.

The state of Florida by statute divested itself of all right, title, and interest to the land between high and low water mark on its tidal waters, and vested the title to the same in the riparian proprietors. *Geiger v. Flor.* 8 Fla. 325; *Axline v. Shaw*, 35 Fla. 305, 28 L. R. A. 391.

Parliament and the state legislatures have the right to dispose of the shore between high and low water mark. *Gough v. Bell*, 22 N. J. L. 441.

Nothing short of a very explicit provision to that effect would justify the court in holding that the legislature intended to permit the shore of the ocean between high and low water mark to be converted into private ownership. *Kimball v. Macpherson*, 46 Cal. 105.

The provincial legislatures had no power to grant any right in the soil between high and low water mark on tidal waters. *Bacon v. Mulford*, 41 N. J. L. 64.

The New Jersey statutes have provided for the obtaining of title to the land between high and low water mark by filling up and making the place solid ground. *Hoboken Land & Improv. Co. v. Hoboken*, 36 N. J. L. 540.

By statute, in Virginia, the title of the owner of land bordering on tide water extends to low-water mark. *Groner v. Foster*, 94 Va. 657; *Garrison v. Hall*, 75 Va. 159; *McDonald v. Whitehurst*, 47 Fed. Rep. 757; *Whitehurst v. McDonald*, 8 U. S. App. 164, 52 Fed. Rep. 633, 3 C. C. A. 214.

The legislatures of the several states may grant the shore between high and low water mark if they use words appropriate for that purpose. *Galveston v. Menard*, 23 Tex. 349.

By the common law of Massachusetts, based upon the ordinance of 1641, the owner of upland has title to low-water mark where the tide does not ebb more than 100 rods. *Storer v. Freeman*, 6 Mass. 439, 4 Am. Dec. 155; *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Wheeler v. Stone*, 1 Cush. 313; *Doane v. Willcutt*, 5 Gray, 328, 66 Am. Dec. 369; *Com. v. Roxbury*, 9 Gray, 451; *Tappan v. Burnham*, 8 Allen, 65; *Wonsom v. Wonsom*, 14 Allen, 71; *Boston v. Richardson*, 105 Mass. 371; *Sewell & D. Cordage Co. v. Boston Water Power Co.* 147 Mass. 61; *Tappan v. Boston Water Power Co.* 157 Mass. 24, 16 L. R. A. 353.

Under the Massachusetts ordinance of 1641, the right of the proprietors abutting on tide waters extended to low-water mark. And this right extended to the city of Boston where it was a riparian owner. *Boston v. Lecraw*, 17 How. 426, 15 L. ed. 118.

The rule of the ordinance of 1641 is the law of every part of the state of Massachusetts. *Barker v. Bates*, 13 Pick. 255, 23 Am. Dec. 678; *Mayhew v. Norton*, 17 Pick. 359, 28 Am. Dec. 300.

The ordinance applies to places bounding on the open sea. *Sale v. Pratt*, 19 Pick. 191.

Under the Massachusetts colonial ordinance, the owner of the upland is entitled to the flats. *Gray v. Deluce*, 5 Cush. 9.

In Massachusetts the proprietor of the upland has title to low-water mark. *Austin v. Carter*, 1 Mass. 281.

The common law of England prevailed in Plymouth Colony prior to the passage of the ordinance of 1641. *Litchfield v. Scituate*, 136 Mass. 89.

The Massachusetts ordinance of 1641, extending the title of riparian proprietors to low-water mark, is part of the common law of Maine. *Lapish v. Bangor Bank*, 8 Me. 85; *Winslow v. Patten*, 84 Me. 25; *Pike v. Munroe*, 36 Me. 309, 58 Am. Dec. 751; *Parsons v. Clark*, 76 Me. 476.

The title of the owner of the upland extends over the flats for 100 rods below high-water mark under the Massachusetts colonial ordinance of 1641. *Abbott v. Treat*, 78 Me. 121.

Under the ordinance of 1641 the title of the shore owner can go no further than 100 rods. *Partridge v. Luca*, 36 Me. 16.

The title of owners of the upland under the Massachusetts ordinance was limited to 100 rods from high-water mark. *Clancey v. Houdlette*, 89 Me. 451.

The owner of land adjoining tide water has, under the Massachusetts ordinance of 1641, the right to the flats to low-water mark, not exceeding a distance of 100 rods. *Duncan v. Sylvestor*, 24 Me. 482, 41 Am. Dec. 400.

The land to which the riparian proprietor is entitled under the colonial ordinance of 1641 is that lying immediately between his upland and the low-water mark, and not to the right or left of the upland. *Thornton v. Foss*, 26 Me. 402.

In *Nudd v. Hobbs*, 17 N. H. 527, it is intimated that the Massachusetts colonial ordinance of 1641 is in force in New Hampshire.

Grants bounded by water.

The Massachusetts act of 1806, chap. 6, giving to the owners of the lands adjoining Acushnet river the right to construct and maintain wharves and docks extending to the channel thereof, operated as a legislative grant of the title to the soil between the lots and the channel. *Hastings v. Grimshaw*, 153 Mass. 497, 12 L. R. A. 617.

A statute permitting the sale of swamp and overflowed lands does not include seashore between high and low water mark. *Taylor v. Underhill*, 40 Cal. 473; *People v. Cowell*, 60 Cal. 400.

But the California act of March 27, 1872, confirmed titles to the seashore which had been acquired under statutes permitting the sale of swamp and overflowed lands. *Upham v. Hosking*, 62 Cal. 250.

In Virginia a grant of land on the seashore will extend to low-water mark. *French v. Bankhead*, 11 Gratt. 136.

In a commissioner's partition which describes the property of one of the parties as running to the shore, and which makes no disposition of the land between high and low water mark in front of the property except to give another of the parties to the partition a right to take seaweed upon a part of it, will extend the property to low-water mark. *Hathaway v. Wilson*, 123 Mass. 359.

A deed of land described as bounded on the beach does not convey the shore below high-water mark unless this boundary is controlled by other parts of the description. *Litchfield v. Ferguson*, 141 Mass. 97.

A grant of a definite portion of salt marsh or flats will not be extended by the ordinance 45 L. R. A.

of 1641 to low-water mark. *Lufkin v. Haskell*, 3 Pick. 356.

A grant of land bounded by high-water mark "including all the shore to low-water mark" will pass title to the shore. *Dillingham v. Roberts*, 75 Me. 469, 46 Am. Rep. 419.

A grant by the state to a municipal corporation, of land bounded by tide water, will not convey the title below high-water mark except by the use of words so unequivocal as to leave no reasonable doubt concerning the meaning; and the use of the words "waters, watercourse, ports, havens, rivers, and fishings" are not sufficient to convey the soil. *East Haven v. Hemlingway*, 7 Conn. 186.

The boundary of a grant by the seashore will carry title only to high-water mark, although by following the courses and distances found in the calls of the grant the line would extend into the water and convey the shore and a portion of the soil below low-water mark. *More v. Massini*, 37 Cal. 432.

A grant bounded on the seashore does not include the shore. *Galveston City Surf Bathing Co. v. Heidenheimer*, 63 Tex. 559.

A grant of land bounded by a beach ordinarily conveys title to high-water mark. *East Hampton v. Kirk*, 68 N. Y. 469, 6 Hun, 257.

A grant from the government of land bounded on tide water will not extend beyond ordinary high-water mark. This rule is founded upon the principle that such grants are construed most favorably for the sovereign, and derives force from the consideration that public grants are made by a trustee for the public, and no alienation should be presumed that is not clearly expressed. *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267.

The title of one whose land borders on a natural pond extends to low-water mark. *Wheeler v. Spinola*, 54 N. Y. 377; *Waterman v. Johnson*, 13 Pick. 265; *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 484.

The title of the owner of land bordering on the great lakes is limited to low-water mark. *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116; *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89; *Union Depot Street R. & Transfer Co. v. Brunswick*, 31 Minn. 297, 47 Am. Rep. 789.

In *Rice v. Ruddiman*, 10 Mich. 125, where the opposite doctrine was laid down, the *locus in quo* was treated as a part of Muskegon river, and not as a part of Lake Michigan.

The state of California by the act of March 26, 1851, conveyed to the city of San Francisco the beach and water-lot property in the bay of San Francisco. *Payne v. English*, 79 Cal. 540.

Private title recognized.

In *Clement v. Burns*, 43 N. H. 609, the court says: From an examination of the adjudged cases it is quite apparent that the principles of the English law have been much modified in the American courts, and that it must now be conceded as an established rule of American law that the owner of uplands adjacent to navigable waters has an interest in the shores of which he cannot be deprived, even by the sovereign power, without compensation. And in considering the right of the adjoining owner to recover for trespasses upon the shore, the court says: The withholding of a remedy in cases of this sort could only be justified on the ground that the title to the shore of navigable waters is exclusively in the sovereign,—a doctrine which we think has never been received in its full sense in the American courts,—and we can see no practical inconvenience in following authorities which give to the riparian owner appropriate remedies for any invasion of his rights.

A riparian proprietor or owner of land fronting on a tide river holds to the low-water mark. *State v. Reybold*, 5 Harr. (Del.) 484; *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435.

In *Ball v. Slack*, 2 Whart. 508, 30 Am. Dec. 278, it seems to be assumed that the riparian proprietor had the title to low-water mark.

In Pennsylvania a grant of lands on tide water extends to low-water mark. *Palmer v. Farrell*, 129 Pa. 162.

Where the owner of the upland is permitted by law to fill up the land between low and high water mark for the erection of wharves and other purposes he has sufficient interest in the soil to enable him to bring ejectment against parties entering upon it without right. *Nichols v. Lewis*, 15 Conn. 143.

The owner of land on an inland tide-water river has an absolute title to the high-water mark qualified to the low-water mark by the public right of navigation. *Philadelphia v. Scott*, 81 Pa. 50, 22 Am. Rep. 738.

Test writers.

The United States, like England, has had some text writers whose books appear to have been written to establish a theory.

Houck on Rivers was written to show that our "great inland rivers are navigable in fact, and the shores of these rivers, their beds and their waters, cannot be private property," regard being had to the reason of the law and giving the land laws of the United States their just and proper weight.

There is no riparian ownership on navigable waters. The owner of land on the verge of the bank or the high-water line has no more rights beyond that line than the owner of land on tide waters. Houck, Rivers, § 83.

The shores and beds of rivers on public lands constitute inalienable property in the hands of the general government, held in trust for the purpose of enabling new states to be formed out of such territory, and perform their trusts and maintain their rights in regard to navigable streams, public highways, made incumbent on those states to perform. Houck, Rivers, § 146.

Where the lines along rivers are meandered the grantees' right will terminate at the meandered line. Id. § 165.

The ruling authority of a country ought to have the control of the land between high and low water mark along the great highways passing through such country, or on the sea bounding it. Id. § 164.

The land between high and low water mark along the great American rivers belongs to the states, and there can be no reason to give the proprietor of the adjoining land the control of this land and so allow him to charge the navigators toll for the use of those shores. Id. § 263.

III. *Conflicting rights of owner and public.*

This question is not as definitely settled as it might be. If the riparian owner has no title below high-water mark, of course he cannot exclude the public from taking fish or seaweed there. But in some instances where the title of the riparian owner to the shore is recognized, such title is made subservient to public use.

In *Salisbury v. Joyn*, 3 Keble, 753, case was brought for taking away the body of a person killed between high and low water mark which deprived the plaintiff of his privilege of deodand. And the court held that because plaintiff could not prove the land between high and low water mark to be his or parcel of the manor, a verdict should be directed for the defendant. 45 L. R. A.

ant; counsel for plaintiff appearing to admit that of common right such lands were the King's.

In *Bagott v. Orr*, 2 Bos. & P. 472, which was a trespass for entering upon plaintiff's close within the ebb and flow of the tide and taking away shell fish, the defendant pleaded that the place was a part of an arm of the sea where all the subjects of the realm had a right to take fish, without denying that the title to the *locus in quo* was in the plaintiff. But the court held that if the plaintiff had it in his power to abridge the common-law right of the subject to take sea fish he should have applied that matter especially, and that not having done so the plaintiff must succeed upon his plea as far as related to his taking of the fish. But that the right did not extend to the taking of the shells.

In *Constable v. Nicholson*, 14 C. B. N. S. 230, 32 L. J. C. P. N. S. 240, 11 Week. Rep. 698, which was trespass for entering plaintiff's close between high and low water mark and taking away gravel, etc., the decision was in favor of plaintiff because the pleas of defendant were defective in alleging a custom to take gravel at that point and a prescription without showing any organized public which could acquire a prescriptive right.

In *Blundell v. Catterall*, 5 Barn. & Ald. 268, which was a suit for trespass for breaking and entering the plaintiff's close, which was between high and low water mark, with bathing machines, it appeared that plaintiff was the lord of the manor bounding on the shore, and that as lord of the manor he was the owner of the shore and had the exclusive right of fishing with stake nets. The court held that the public had no right to cross the shore for the purpose of bathing. Best, J., dissenting, said it is agreed by all that the seashore was at first appropriated to the King from whom the right to it must be derived. Some parts of it were held by the Crown for the purposes of fisheries, harbors, and warehouses, etc. But the greatest part was left open as a common highway between sea and land. From the state of the greatest part has arisen the general rule or common-law right, and the state of the portions exclusively occupied has occasioned exceptions. A person disputing the common right of the public must show that the King had exclusive possession of the shore, and that a right to such exclusive possession has been conveyed by the Crown to such person. The King had the right of soil in the shore in general, but the public had a right of way over it, and the King's grantee can only have it subject to the same right. But Holroyd, J., says that even where the soil remains the King's the public have no general right to use it, but only the right of navigation and fishery in the water. And to this the other judges of the court agreed. So that when the soil had become private property the right could not be held to exist.

The King's grant of his private right to land between high and low water mark in a port must be subject to the public right of easement of passing and repassing over the land and water. *Atty. Gen. v. Burrillidge*, 10 Price, 350.

A grant of a part of the sea coast to be so enjoyed as to interfere with the public right is void. *Atty. Gen. v. Parmeter*, 10 Price, 378, *Affirmed in Parmeter v. Gibbs*, 10 Price, 412.

In *Blundell v. Catterall*, 5 Barn. & Ald. 268, Best, J., says that Bracton, in stating that anyone may fasten vessels with ropes to the trees on the banks to unload cargoes on the banks was speaking of inland streams which were always navigable, and the banks of which had been as open to the public as their waters. This I take to be the law with all inland navigations

in the reign of Henry III. These, like the sea and its shores, were then the property of the public, and the right of the public in them was not acquired by any compromise with the interest of any individual.

The fact that the title to the soil is in the individual does not deprive the public of the right of navigating over the shore between high and low water mark when the state of the water will permit it. *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384, 46 Am. Dec. 568.

Where a public highway leads to the river persons landed from a ferry cannot be stopped by the owner of the shore from crossing the shore from the ferry to the highway. *State v. Wilson*, 42 Me. 9.

Before an adjoining proprietor undertakes to reclaim the land between low and high water mark it is subject to the paramount right of public navigation. But the owner may reclaim it when he sees fit to do so, and exclude the public therefrom. *Richardson v. Boston*, 19 How. 263, 15 L. ed. 639.

Seaweed driven upon the coast belongs to the owner of the soil where it lodges. *Church v. Meeker*, 34 Conn. 421; *Emans v. Turnbull*, 2 Johns. 313, 3 Am. Dec. 427; *Parsons v. Miller*, 15 Wend. 561; *Kenyon v. Nichols*, 1 R. I. 106; *Phillips v. Rhodes*, 7 Met. 322.

But seaweed cast and left upon the shore between ordinary high and low water mark belongs to the public, and may lawfully be appropriated by the first occupant. *Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 46. The court says the right of taking seaweed would seem to stand on the same ground as the right of taking fish. We see no reason for making a distinction between the vegetable and animal products of the ocean. And the court relied also on Bracton's statement: "*Item, locum habet eadem species occupationis in its quæ communia sunt, sicut in mare et littore maris, in lappillis et geminis et osteris in littore maris inventis*," that seaweed was included in *et ceteris*.

Seaweed does not become the property of the owner of the beach until it has become fast on the shore. *Anthony v. Gifford*, 2 Allen, 549.

In *Howe v. Stawell*, 1 Alcock & N. 356, the court approved Lord Hale's doctrine that the King has the soil of the shore from high to low water mark, but held that the right of the public to navigate and fish in the sea did not extend to the taking of seaweed on the shore.

In *Balrd v. Fortune*, 7 Jur. N. S. 926, 4 Macq. H. L. Cas. 127, 5 L. T. N. S. 2, 10 Week. Rep. 2, the owner of an estate bordering on the sea claimed a right to the seaweed under a title which he derived by grant from the Crown, and the question was whether or not the right to share in the weed passed by a conveyance of a part of the estate. The question as to the plaintiff's right does not seem to have been raised.

In *Gifford v. Brownell*, 2 Allen, 535, the right of the owner was recognized to recover damages for taking seaweed from his beach between high and low water mark.

A lessee of the right of a town to the seaweed on the beach belonging to it has no such possession as will permit him to maintain an action for breaking and entering his close against one who may enter on the beach and remove seaweed therefrom. *Parsons v. Smith*, 5 Allen, 578.

The public have no right to take seaweed from the land of a private owner between high and low water mark. *Hill v. Lord*, 48 Me. 83.

It is not a good custom for fishermen to dig in the land of a riparian owner to set stakes to dry their nets. 8 Edw. IV. pl. 30.

Those who are fishers in the sea may justify going on the land adjoining the sea, for a fishery is for the commonwealth and for the suste-

nance of all of the realm, and this is common law. *Ibid*.

But Holroyd explains this, 5 Barn. & Ald. 268, as founded on custom, saying that such a custom may be good where the right to dig is claimed.

Choke said, 8 Edw. IV. pl. 30: If I have land adjoining the sea where the sea ebbs and flows over the land, when it flows, everyone may fish in the water which has flowed on my land, for then it is parcel of the sea, and, in the sea, everyone may fish of common right. So, when the sea has ebbed then in the land which was before flowed by it he may justify his digging, for this land is not much advantage to me. Holroyd says, 5 Barn. & Ald. 268, this doctrine may be true where there is such a custom and such a custom confined to the seashore may be good.

The public right of fishery extends to the taking of shell fish between high and low water mark on the shore of private individuals. *Parker v. Cutler Milldam Co.* 20 Me. 353, 37 Am. Dec. 56; *Moulton v. Libbey*, 37 Me. 493, 59 Am. Dec. 57.

A person may from a boat enter upon and walk along the uninclosed flats of another between high and low water mark for the purpose of fishing in the sea. *Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101.

The public has no right to take mussel bed manure from the land of a private individual situated between high and low water mark. *Moore v. Griffin*, 22 Me. 350; *King v. Young*, 76 Me. 76, 49 Am. Rep. 596.

In *Porter v. Sullivan*, 7 Gray, 441, a recovery was sustained for entering upon land between high and low water mark and digging the soil and carrying away large quantities of mud with mussels mixed therein.

The public have a right to take shell fish from the shore of a private individual between high and low water mark. *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216.

But the right of the public to take shell fish from the shore does not include the right to take the soil or dead shell fish imbedded therein. *Porter v. Sheehan*, 7 Gray, 435.

The public has a right to take shell fish upon the land of a private individual between high and low water mark, although it is necessary to dig the soil in order to obtain them. *Peck v. Lockwood*, 5 Day, 28.

The owner of soil between high and low water mark has the exclusive right to catch fish thereon by means of fixtures attached to the soil. *Matthews v. Treat*, 75 Me. 594.

A person who makes more than a temporary mooring between high and low water mark in a navigable river is a trespasser upon the rights of the riparian owner. *Wall v. Pittsburgh Harbor Co.* 152 Pa. 427.

The owner of land between high and low water mark may maintain an action against one who drives stakes in the soil for the purpose of fastening his boats to fish there. *Whittaker v. Burhans*, 62 Barb. 237.

The Massachusetts colonial ordinance did not give the owner of the upland the right to exclude the public from taking shell fish upon flats until he had actually appropriated them by filling or placing buildings upon them. *Lakeman v. Burnham*, 7 Gray, 437.

The riparian owner cannot use his land between high and low water mark for permanent structures which will interfere with the public right of navigation. *Com., Hensel, v. Young Men's Christian Asso.* 169 Pa. 24.

IV. What is shore?

The shore which belongs to the King is not

that covered by the high spring tide nor that covered by the spring tide, but by the ordinary or neap tide. The shore may belong to the subject in gross or as part of his manor. *Hale, De Jure Maris*, chap. 6.

The right of the Crown to the seashore landwards is *prima facie* limited by the line of the medium high tide between the spring and the neaps. *Atty. Gen. v. Chambers*, 4 De G. M. & G. 206, 27 Eng. L. & Eq. 242, 18 Jur. 779, 23 L. J. Ch. N. S. 662, 2 Eq. Rep. 1195, 2 Week. Rep. 636.

The title of the Crown ceases at ordinary high-water mark, and the land above that will belong to the adjoining proprietor, although it is covered by high spring tides. *Lowe v. Govett*, 3 Barn. & Ad. 863.

In *Parker v. Elliott*, 1 U. C. C. P. 470, the court in discussing the question of rights in navigable waters says there may be rights of public highway upon navigable rivers above the rise of the tide, but the land covered by the water of the river above tide water is held to belong to the riparian proprietor.

In that case *McLean and Sullivan, JJ.*, held that the distinction of high and low water could be drawn only where tide exists, and not in inland waters of a country.

V. Boundary of municipal corporations.

In case of a municipal corporation bounded on tidal water the usual presumption must obtain that the soil between high and low water mark belongs to the Crown, and that therefore the municipality cannot enforce its jurisdiction over that place. *Bridgewater v. Bootle-cum-Linacre Twp.* 86 L. J. Q. B. N. S. 41, L. R. 2 Q. B. 4, 15 L. T. N. S. 351, 15 Week. Rep. 169.

The King may grant to a municipal corporation all the lands between high and low water marks, but the grant must be subject to the public right of the people to the easement of passing and repassing over both the water and the land. *Atty. Gen. v. Burridge*, 10 Price, 350.

In *Linn-Regis v. Taylor*, 3 Lev. 160, the mayor and commonalty of Linn-Regis claimed the shore by grant to them by the Crown of the manor of Linn-Regis, and this claim does not seem to have been disputed in the case.

Township authorities have no power to lay out a towaway between high and low water mark without express authority from the legislature. *Kean v. Stetson*, 5 Pick. 492.

The land between ordinary high and low water mark may be parcel of a vill or parish. *Perrott v. Bryant*, 2 Younge & C. Exch. 61, 6 L. J. Exch. N. S. 26.

H. P. F.

James D. TATE, *Appt.*,
v.

COMMERCIAL BUILDING ASSOCIATION.

(.....Va.....)

1. An agreement by a member of a building and loan association to insure his life and permit the policy to be used as collateral security for a loan to the association is void as against public policy.
2. A building and loan association which receives the benefit of the act of one of its members in taking a policy of insurance on his life and assigning it as collateral to secure a loan to the association, by the credit of the amount of the

NOTE.—As to insurable interest in debtor's life, see also *Exchange Bank v. Loh* (Ga.) 44 L. R. A. 372, and cases there cited. 45 L. R. A.

policy on its debt upon the death of the assured, will be liable to account for the amount to the assignee or representatives of the insured.

3. An agreement between two persons that one shall make a contract with a third for the benefit of the other, which would be unlawful, cannot constitute an estoppel to a claim on behalf of the contractor against the intended beneficiary who has received from such third person the fruits of a lawful contract substituted for the unlawful one.
4. One who agrees to insure his life for the benefit of an association of which he is a member is not *in pari delicto* so that the court will not interfere to compel the association to account in case it receives the benefit of the insurance.
5. A secretary of a building and loan association is not prevented by his relation to the association from acquiring by assignment an insurance policy taken out by a member on his life for the benefit of the association contrary to public policy, so as to prevent his compelling the association to account in case it receives the proceeds of the policy.
6. A member may recover from a building and loan association the amount which he has contributed to it to enable it to pay the interest on its debt and the premium on a policy of insurance taken out on the life of one of its members and assigned as collateral security for such debt.
7. A judgment confessed by a building and loan association otherwise than for a debt contracted or money loaned at the time will, under Code, § 1149, inure ratably to the benefit of all existing creditors.

(April 6, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for the City of Lynchburg in favor of defendant in a proceeding brought to compel defendant to account for the proceeds of a certain policy of life insurance which plaintiff claimed as assignee of the assured but which defendant had applied to its own use. *Reversed.*

The facts are stated in the opinion.

Mr. John H. Lewis, for appellant:

The Commercial Building Association had no title in the policy.

While Wrenn may have lent his policy to the Commercial Building Association for it to use as "additional collateral security" for the \$12,000 loan, it is impossible either for the Commercial Building Association to have taken the policy in its name, or for it to have been the assignee of it, further than to the extent it paid out money in premiums. *Godsall v. Boldero*, 9 East, 72; *Dalby v. India & L. Life Assur. Co.* 15 C. B. 364.

To have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life.

May, Ins. § 102a; 1 Bacon, Ben. Soc. § 251; *United Brethren Mut. Aid Soc. v. McDonald* (Pa.) 1 L. R. A. 238, note; *Ruth v. Katterman*, 112 Pa. 251; *Gilbert v. Moore*, 104 Pa. 74, 49 Am. Rep. 570; *Keystone Mut.*

Ben. Asso. v. Norris, 115 Pa. 446; *Stevens v. Warren*, 101 Mass. 564; *Mutual Ben. Asso. v. Hoyt*, 46 Mich. 473; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116, 13 Am. Rep. 313; *Mayher v. Manhattan L. Ins. Co.* 87 Tex. 169; *Singleton v. St. Louis Mut. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Roller v. Moore*, 86 Va. 512, 6 L. R. A. 136; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189; *Page v. Burnstine*, 102 U. S. 664, 26 L. ed. 268; *Cooper v. Weaver* (Pa.) 11 Atl. 780; *Coon v. Swan*, 30 Vt. 6; *Burbage v. Windley*, 108 N. C. 357, 12 L. R. A. 409; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479.

A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of life a matter of some great interest to him.

Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 462, 24 L. ed. 254; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

In no court, not even those of New York and New Jersey, can a case be found in which it was ever held that if the policy be paid for originally by the claimant who is not a connection nor creditor, it is anything but a bet, and invalid except to the amount of the money paid by such claimant.

Valton v. National Fund Life Assur. Co. 20 N. Y. 32; *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Olsted v. Keyes*, 85 N. Y. 593; *Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566; *Trinity College v. Travelers Ins. Co.* 113 N. C. 244, 22 L. R. A. 291; *Roller v. Moore*, 86 Va. 512, 6 L. R. A. 136.

The burden of showing insurable interest in the life of Wrenn is on the Commercial Building Association.

Singleton v. St. Louis Mut. Ins. Co. 66 Mo. 63, 27 Am. Rep. 321; *Crotty v. Union Mut. L. Ins. Co.* 144 U. S. 621, 36 L. ed. 566.

There are no rights of the Commercial Building Association to which Tate's rights could be "antagonistic."

Tate was not "interested for" the association except to the extent that it should receive what by law it was entitled to.

Smith v. Lansing, 22 N. Y. 520.

Messrs. Caskie & Coleman also for appellant.

Messrs. Lee & Howard and Harrison & Long, for appellee:

The agreement if illegal has been fully executed so far as the policy in question is concerned.

The illegality of the contract must be disclosed as the groundwork of plaintiff's claim, and in such a case the court will not relieve him from the effect of his own agreement.

Clark, Contr. 493, 494.

Riely, J., delivered the opinion of the court:

In the year 1891 the Commercial Building Association (a corporation) applied to the Maryland Life Insurance Company for a loan of \$12,000, which the latter agreed to make upon certain conditions. It required that the association execute its bond for the amount of the loan, and that the same be signed by its stockholders as sureties. It also required that the association secure the bond by deed of trust on 94 of its lots, and, as a further security for the loan, that it insure the lives of three of its youngest members in the sum of \$20,000. The evidence establishes that the association, in compliance with this last requirement, entered into a verbal agreement with W. H. Wrenn, B. E. Hughes, and J. D. Tate, the appellant, that they take out policies if insurance upon their lives for its benefit in the Maryland Life Insurance Company, aggregating the required amount, upon which the association would pay the premiums.

The evidence further shows that Wrenn, Hughes, and Tate insured their lives for the specified sum, but that, in doing so, they did not take out the insurance for the benefit of the association, but each for his own benefit, and then assigned the policies to the insurance company as additional collateral security for the said loan. This variance from the agreement did not become known to the association, or to any of the other members, until after the death of Wrenn, when the appellant claimed to be entitled, as assignee of Wrenn, to the proceeds of his policy, subject, however, to the right of the insurance company under the prior assignment of the policy to it by Wrenn as collateral security for the loan to the Commercial Building Association.

The insurance company paid the policy by applying its proceeds as a credit on the debt to it of the association. This suit was brought by Tate to recover from the association the amount of the policy, less the indebtedness of Wrenn to it for premiums paid, upon the ground that the proceeds of the policy had been applied by the insurance company, by virtue of the assignment from Wrenn, to its debt against the association, and also to recover the amount of contributions by Tate to pay his proportionate part of assessments made by the association against the members to meet the premiums on the policies and the interest on the debt to the insurance company. Tate was the secretary of the association, and apportioned the assessments among the members, including himself, and paid his proportionate part of them up to the death of Wrenn, but thereafter refused to do so.

When the agreement was made that Wrenn should take out the insurance on his life for the benefit of the association, he was not indebted to it, as a stockholder or otherwise, and did not thereafter become indebted to it, except for the premiums paid by it on his policy. The association clearly had no insurable interest in his life.

In *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924, Mr. Justice Field said: "It is not easy to define with precision what will in all cases constitute an insurable interest, so

as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." See also *Richards, Ins. § 27*; *1 May, Ins. § 102a*; *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800; and *Roller v. Moore*, 86 Va. 512, 6 L. R. A. 136.

If the agreement had been complied with by Wrenn, and he had taken out the insurance on his life for the benefit of the association, the policy would have been invalid. The association could not have recovered from the insurance company upon the policy certainly not beyond the premiums paid, if, indeed, at all. An assignee of a policy, having no insurable interest in the life of the insured, can only retain so much of the proceeds, where the insurance was lawfully effected, as is necessary to reimburse him for premiums paid, expenses incurred, and interest thereon. *Roller v. Moore*, 86 Va. 512, 6 L. R. A. 136; *Long v. Meriden Britannia Co.* 94 Va. 594; *Beaty v. Downing*, 96 Va. 451; and *New York L. Ins. Co. v. Davis*, 96 Va. 737, 44 L. R. A. 305; *a fortiori*, the association, having no insurable interest in the life of Wrenn, could not occupy any better position if he had carried out the unlawful agreement, and insured his life for its benefit, instead of his own.

The agreement that the insurance should be effected by Wrenn for the benefit of the association was contrary to public policy, and invalid. Wrenn did not keep the unlawful agreement, but took out the insurance for his own benefit, which was wholly lawful. He then assigned the policy to the insurance company as collateral security for the debt due to it by the association. Upon the death of Wrenn the insurance company paid the policy by crediting the amount on the debt the association owed it, and for which it held the policy by assignment as collateral security. The association received and accepted the benefit of the policy. It would, therefore, have become liable to Wrenn's estate for the amount of the policy, if he had not assigned it in his lifetime to Tate. The latter, as assignee of Wrenn, is clothed with all his rights. The association can make no defense against Tate that it could not have made against Wrenn. It would have had no lawful ground of complaint against Wrenn for not taking out the policy for its benefit, and can have none against Tate. An agreement between two persons that one of them shall make a contract with a third person for the benefit of the other, which contract would be unlawful, cannot constitute an estoppel to a claim against the intended beneficiary, who has received from such third person the fruits of a lawful contract, substituted for that which would have been unlawful. An unlawful agreement cannot defeat a lawful right. A contract which is void, as being against public policy, cannot 45 L. R. A.

create an estoppel, if, indeed, it has vitality for any purpose.

The maxim *In pari delicto potior est conditio defendentis* was also invoked by the appellee to defeat a recovery by the complainant. Wrenn, as we have seen, did not carry out the unlawful agreement and insure his life for the benefit of the association, but took out the policy for his own benefit. The insurance effected was in all respects a valid contract, and he cannot be considered to be *in pari delicto*; but if he had performed the agreement, and taken out the policy for the benefit of the association, the agreement was not of that kind with respect to which courts fold their hands and refuse to interfere. *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

The agreement was not intrinsically immoral or evil. No fraud or deception upon anyone was designed by the agreement. Its execution involved no moral turpitude. It was simply condemned by the law, because contrary to the interests of society. In such case, the maxim *In pari delicto* is not inflexibly applied, but the court will consider whether public policy will be promoted, and like agreements be discouraged, by enforcing or avoiding the agreement, and, if the policy of the law will be advanced by granting relief, it will be given. *Pom. Eq. Jur. §§ 403, 941*; *1 Story, Eq. Jur. § 298*; *Starke v. Littlepage*, 4 Rand. (Va.) 368; and *Cardwell v. Kelly*, 95 Va. 570, 40 L. R. A. 240.

To allow anyone to retain the proceeds of a policy of insurance, if the insurance company chose voluntarily to pay it, which was effected for his benefit upon the life of another, in which life he had no insurable interest, whether the policy was issued upon the life of the insured directly for such beneficiary, or for the benefit of the insured and then assigned by him to the beneficiary, would encourage speculation upon the chances of human life, with a direct interest in its early termination, contrary to the public interest and in contravention of the policy of the law. The denial of all right in the beneficiary to retain in such case more of the proceeds of the policy of insurance than is necessary to reimburse him for premiums paid and expenses incurred dissipates all hope of profit, and removes the temptation to speculate in insurance upon human life.

In *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244, Lewis procured, at Cammack's suggestion, a policy of insurance on his life for \$3,000. Cammack paid the premium, and, immediately after the policy was issued, Lewis executed his note to Cammack for \$3,000, for which there was no consideration, and assigned the policy to him in absolute terms. Lewis at the time owed Cammack only \$70. He died seven months after taking out the policy, and Cammack collected it. In an action against him by Lewis's administratrix, it was held that she was entitled to recover the proceeds of the policy, subject, only, to the extent of Lewis's indebtedness to Cammack, including the amount of the premium he had paid on the policy.

In *Warnock v. Davis*, 104 U. S. 775, 26 L.

ed. 924, the plaintiff's intestate, on applying for a policy of insurance on his life, entered into an agreement with a trust association whereby the latter was to pay all fees and assessments on the policy, and receive nine tenths of the amount due thereon at the death of the insured. On receipt of the policy, he assigned it to the trust association, but reserving a one-tenth interest, which he directed should be paid to his wife. Upon the death of the insured, the association collected the policy, paid to his widow one tenth thereof, less certain sums due under the agreement, and retained the residue. Suit was brought against the association by the administrator of the insured to recover the residue of the money it had received on the policy. It was held, the case of *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244, being cited and approved, that the plaintiff was entitled to recover from the association the money it had collected on the policy, with interest thereon, less the sums advanced by it in payment of fees and assessments.

Tate, by the assignment, acquired the policy of Wrenn, subject to the rights of the insurance company to apply the proceeds of the policy to the debt of the association, but with the right, if so applied, to claim the amount from the association, less such sum as might be due to it for premiums paid for Wrenn on the policy. If the policy had been taken out by Wrenn directly for the benefit of the association, according to the agreement, it would not have had any right to the proceeds beyond the amount of the premiums it had paid, if, indeed, to that extent; and it has, as is conceded, the right to claim out of the proceeds, as against Tate, the amount of the premiums so paid. So that Tate, in taking from Wrenn an assignment of his policy, has not deprived the association of any lawful right or interest, pecuniary or otherwise. Notwithstanding any relation he may have borne to the association, he has done it no injury in acquiring Wrenn's policy. He is therefore entitled to recover from it the amount of the policy, subject to a deduction of the amount for premiums paid by it on the policy; and he is also entitled to recover the amount contributed by him to enable it, along with like contributions from other members, to pay the interest on its debt and the premiums on the policies assigned to the insurance company as collateral security for the said debt.

On April 15, 1896, a judgment was confessed by the Commercial Building Association in the circuit court of Lynchburg, in favor of the Commercial Bank of Lynchburg, for the sum of \$734.94, and it constitutes a lien on the property of the association. The issue was made by the bill that the judgment created an illegal preference in favor of one of the creditors of the association, and is within the provisions of § 1149 of the Code. The evidence proves that the judgment was not for a debt contracted or money borrowed at the time of the creation of the lien, but for an antecedent debt.

Any lien or encumbrance created by the voluntary act of such company—that is, a 45 L. R. A.

company chartered by a court—for the purpose of giving a preference to one creditor over another creditor, except to secure a debt contracted or money borrowed at the time, is within the provisions of the statute, and by the express terms thereof inures to the benefit, ratably, of all its creditors. A confession of judgment is not a passive, but an active, act on the part of the debtor. Such a company may suffer a judgment to be recovered against it by default, where it has no defense to the debt; but it cannot confess a judgment for an antecedent debt, and thus voluntarily and actively create a lien on its property, without the lien inuring ratably to the benefit of all its existing creditors. Such an act is within the spirit, as well as the very letter, of the statute. The judgment was confessed by the president of the association, in pursuance of a resolution adopted that day by the association, and he testified that it was done "to secure the Commercial Bank in preference to securing ourselves;" Tate being confessedly one of "ourselves." It follows that the lien created by the judgment confessed in favor of the Commercial Bank inures to the benefit, ratably, of all the creditors of the company then existing.

The decree of the Circuit Court must be reversed, and the cause remanded to it for further proceedings, to be had therein in accordance with the views expressed in this opinion.

PORTSMOUTH GAS COMPANY, *Piff. in Err.*,

J. B. SANFORD *et al.*

(.....Va.....)

A city may be garnished for money in its hands due to a nonresident contractor, if the city itself makes no objections.

(June 15, 1899.)

ERROR to the Circuit Court for the City of Portsmouth to review a judgment quashing an attachment of funds in the hands of the City of Portsmouth which were alleged to belong to plaintiff's debtor. *Reversed.*

The facts are stated in the opinion.

Messrs. Crocker & Crocker and Murchough & Marshall, for plaintiff in error:

A municipal corporation is exempt from liability of this character with respect to its revenues and the salaries of its officers, but where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and of private corporations.

1 Dill. Mun. Corp. 4th ed. § 101.

Section 5 of the Code provides the word

NOTE.—For creditors' bill against municipal corporation, see *Addyston Pipe & Steel Co. v. Chicago* (Ill.) 44 L. R. A. 405.

"person" may extend and be applied to bodies politic and corporate as well as individuals.

This statutory construction of the word "person" is according to the rule at common law.

Baltimore & O. R. Co. v. Gallahue, 12 Gratt. 663, 65 Am. Dec. 254; *Beaston v. Farmers' Bank*, 12 Pet. 102, 9 L. ed. 1017; *Bank of United States v. Merchants' Bank*, 1 Rob. (Va.) 573.

The city in paying over performs no public duty—exercises no act of sovereignty. It does it in its ministerial and private capacity as contradistinguished from its public capacity. In such a case there can be no real question of public policy.

De Voas v. Richmond, 18 Gratt. 338; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 401.

There is a well-defined distinction between the public and private capacity of municipal corporations.

Bailey v. New York, 3 Hill, 531, 38 Am. Dec. 669; *Richmond v. Long*, 17 Gratt. 376, 94 Am. Dec. 461; *Petersburg v. Applegarth*, 28 Gratt. 321, 26 Am. Rep. 557; *Orme v. Richmond*, 79 Va. 86; 2 Dill. Mun. Corp. 4th ed. § 906.

A municipal corporation is liable to garnishment.

Hicks v. Roanoke Brick Co. 94 Va. 741; *Rood, Garnishment*, 1896, § 18; *Rodman v. Musselman*, 12 Bush, 354, 23 Am. Rep. 724; *Newark v. Funk*, 15 Ohio St. 462; *Wales v. Muscatine*, 4 Iowa, 302; *Clapp v. Walker*, 25 Iowa, 315; *Adams v. Tyler*, 121 Mass. 380; *Wilson v. Lewis*, 10 R. I. 285; *State, Jersey City, v. Horton*, 38 N. J. L. 88; *Laredo v. Nalle*, 65 Tex. 359; *Denver v. Brown*, 11 Colo. 337; *Sauer v. Nevadaville*, 14 Colo. 54.

Even where an exemption exists it is a privilege which may be waived.

Rood, Garnishment, § 23; *Las Anamas County Comrs. v. Bond*, 3 Colo. 411; *Burton v. Warren Dist. Twp.* 11 Iowa, 166; *Clapp v. Walker*, 25 Iowa, 315; *Dollman v. Moore*, 70 Miss. 267, 19 L. R. A. 222; *Skelly v. Westminster School Dist.* 103 Cal. 652.

If the city of Portsmouth had a right of exemption from garnishment process she has waived it, being ready and willing to pay over the money. And the defendants have no right to interpose an objection to the city doing this.

Messrs. Watts & Hatton, for defendants in error:

A municipal corporation in Virginia is not liable to garnishment proceedings.

This question has never been directly passed upon by this court.

Rollo v. Andes Ins. Co. 23 Gratt. 515, 14 Am. Rep. 147.

A case directly analogous to this is *Leake v. Lacey*, 95 Ga. 747.

Municipal corporations are never liable to process of garnishment, and if summoned as garnishee, they may properly be discharged on motion without first making answer.

Mervin v. Chicago, 45 Ill. 133, 92 Am. 45 L. R. A.

Dec. 204; *Porter & B. Hardware Co. v. Perdue*, 105 Ala. 293; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *State, Summerfield, v. Tyler*, 14 Wash. 495, 37 L. R. A. 207; *Burnham v. Fond du Lac*, 15 Wis. 193, 82 Am. Dec. 668; *Merrell v. Campbell*, 49 Wis. 535, 35 Am. Rep. 785; *Baltimore v. Root, Armstrong*, 8 Md. 95, 63 Am. Dec. 692; *Memphis v. Laski*, 9 Heisk. 511, 24 Am. Rep. 327; *Switzer v. Wellington*, 40 Kan. 250; *First Nat. Bank v. Ottawa*, 43 Kan. 294; *Riggin v. Hillard*, 56 Ark. 476; *Van Cott v. Pratt*, 11 Utah, 209; *Sheppard v. Cape Girardeau County* (Mo.) 1 S.W. 305; *School Dist. No. 4 v. Gage*, 39 Mich. 484, 33 Am. Rep. 421; *Skelly v. Westminster School Dist.* 103 Cal. 652; *Pottier & S. Mfg. Co. v. Taylor*, 3 MacArth. 4; *Columbia Brick Co. v. District of Columbia*, 1 App. D. C. 351; *Dollman v. Moore*, 70 Miss. 267, 19 L. R. A. 222; *Erie v. Knapp*, 29 Pa. 173; *Kneeland, Attachm.* § 140; *Mecham, Pub. Off.* §§ 875, 876; *Drake, Attachm.* 7th ed. § 509 b, 6th ed. § 576; *Waples, Attachm.* 2d ed. p. 315; 2 Beach, Pub. Corp. 1595.

It cannot be permitted that a city shall waive considerations of public policy by answering garnishee process in favor of one party and insisting on the observance of these considerations by refusing to answer the attempted garnishment of another party.

First Nat. Bank v. Ottawa, 43 Kan. 294; *Porter & B. Hardware Co. v. Perdue*, 105 Ala. 293.

Buchanan, J., delivered the opinion of the court:

The plaintiff in error brought an action on the case against the defendants in error to recover damages for injuries alleged to have been done to the mains and sewer pipes of the plaintiff. The defendants, who were contractors with the city of Portsmouth to construct a system of sewerage, were nonresidents of the state, and, the city being indebted to them on that account, an attachment was sued out and levied by serving a copy thereof on the city, which was designated as owing and having estate of the defendants in its possession.

When the case, which had been regularly matured by order of publication, was called, the defendants appeared specially, and moved the court to quash the attachment, on the ground that the city of Portsmouth was not liable to garnishment. The court sustained the motion, quashed the attachment, and dismissed the action. To that judgment this writ of error was awarded.

The only question involved is the right of the plaintiff to subject the debt due from the city of Portsmouth to the defendants under the provisions of our attachment law, which authorizes garnishment proceedings against persons indebted to nonresident defendants.

Section 2967 of the Code provides, among other things, how the estate of a nonresident defendant may be levied upon under attachment proceedings, and how any person indebted to or having in his hands effects of

such defendant may be summoned as a garnishee.

The words "any person," used in that section, include corporations, as well as natural persons. In *Baltimore & O. R. Co. v. Gal-lahue*, 12 Gratt. 655, 663, 65 Am. Dec. 254, it was held that when the word "person" is used in a statute, corporations, as well as natural persons, are included for civil purposes. This was the rule at common law. 2 Inst. 697, 703. They are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes.

Section 5, subsec. 13, of the Code provides that the word "person" may extend and be applied to bodies politic and corporate, as well as individuals.

Judge Allen, in delivering the opinion of the court in *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. (at pages 663, 664), said: "The general words, as to what effects, debts, or estate of the defendant may be attached, would seem to embrace his whole estate. without respect to the character of the person, natural or artificial, in whose hands the effects were, or by whom the debt was due. The corporation stands in precisely the same position, in regard to such effects or debts, as a natural person. If it owes the debt or holds the effects of another, it, like an individual, is liable to be sued by its creditor or the owner of the property; and the statute merely substitutes the plaintiff in the attachment to the rights of the creditor or owner, as against the garnishee. No change is made in its contract, or additional obligation imposed on it, by being proceeded against as garnishee."

The reasoning of Judge Allen is applicable to all corporations, and all, it would seem, should be held to be within the statute, unless there be some rule of public policy which would exclude municipal corporations.

It is well settled that the officers of the state are not liable to such proceedings without its consent (*Rollo v. Andes Ins. Co.* 23 Gratt. 509, 14 Am. Rep. 147; 2 Wade, Attachm. § 346; Drake, Attachm. 7th ed. § 516); and it is claimed that, upon similar grounds, municipal corporations should not be. In the courts of many of the states this view prevails, and the reason upon which it is based is thus stated by a learned writer upon the subject:

"The foundation of the doctrine that municipal corporations cannot be called upon to answer as garnishees is purely a question of public policy. They are regarded as integral branches of the government, exercising only public functions, and intended to guard public interests. To permit them to be subjected to actions, and possible judgments and expense, in relation to matters in which they have no interest, it is claimed would be an intolerable burden in view of the large number of persons who necessarily stand toward them as creditors. To turn them into mere instruments for the collection of private debts, it is thought, would detract from their

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dignity, and be subversive of the public interest. To place the debts owing by large cities, towns, or other municipal governments within the reach of this facile process, it is feared might endanger the working capacity of the government, by driving away the employees upon whom its executive duties devolve, thus endangering the peace and good order of the community; and much more to the same general purport, which is not, however, universally convincing." 2 Wade, Attachm. § 345.

Mr. Dillon, in his work on Municipal Corporations, while conceding that the weight of authority is in favor of the nonliability of municipal corporations to garnishment, expresses the opinion that, where the question is left entirely open by statute, on principle a municipal corporation is exempt from liability of this character with respect to its revenues and the salaries of its officers, but that, where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives creditors of natural persons and private corporations. 1 Dill. Mun. Corp. 4th ed. § 101.

By an act approved February 19, 1898 (Acts Assem. 1897-98, chap. 410, p. 445), express authority is given to subject the wages and salaries of the officials, clerks, and employees of a municipal corporation by garnishment, where a judgment has been rendered against any such official, clerk, or employee. If it be the policy of the state, as shown from this act, to make a municipal corporation liable to garnishment upon debts due its officials, there would seem to be no good reason for holding that it should not be liable to proceeding where it owes an ordinary debt to a third person, unless a contrary rule has been established in this state. We have no decision of this court upon the precise point. In the case of *Hicks v. Roanoke Brick Co.* 94 Va. 741, it was held that a writ of fieri facias against a contractor was a lien upon the amount due him by the city of Roanoke for work done. In order to subject that fund in the hands of the city, and make the lien available, the execution creditor would have the right, it would seem, from the very necessity of the case, to implead the city, and bring it before the court. If the city can be brought before the court, in order to subject the fund in its hands to the satisfaction of the lien, there is no reason why it cannot be done by garnishment; for in that proceeding its rights can be as fully protected as in any other. Besides, the objection to holding municipal corporations liable to garnishment is not based upon the form of the proceeding, but upon the ground that such corporations should not be impleaded at all in controversies in which they have no interest, and where the object of bringing them before the court is merely to subject funds in their hands, due to one of the litigating parties, to the payment of a debt due the other.

If a municipal corporation is liable to garnishment in the ordinary case, where both the

execution debtor and the garnishee are residents of the state, it is clearly so where the principal debtor is a nonresident of the state.

In that class of cases another rule of public policy is to be considered, and that is that the state owes it to its own citizens to provide appropriate remedies by which home creditors may subject the assets or effects of nonresident debtors to the payment of their debts. The general rule is that a foreign personal representative or guardian cannot be sued out of the jurisdiction in which he qualified, because his duties are considered as strictly local; yet, under special circumstances, in order to protect home creditors, the general rule gives way, and our courts take jurisdiction of suits against them, as was done in *Tunstall v. Pollard*, 11 Leigh, 1, and in *Clendenning v. Conrad*, 91 Va. 410. The ground upon which our courts take jurisdiction in such cases is that it is the duty of every sovereignty to provide for the security of its own people. Our attachment laws against nonresident debtors having assets or effects in this state are based upon the same principle, and give creditors the right to subject such assets or effects to the

payment of their debts in suits upon constructive notice, in violation of the general rule that all parties sued are entitled to personal notice.

Upon the facts of this case little inconvenience and no prejudice can result to the city of Portsmouth by holding it liable to garnishment. The work undertaken by the defendants for the city has been completed. The city has retained, upon notice of the plaintiff's claim, a sum sufficient to meet its demand. The city is making no objection, so far as the record shows, to the proceeding against it. The only objection made is by the defendants, and, if that objection prevails, its effect will be to enable the defendants to withdraw their effects from the state, and compel the plaintiff to abandon its claim, or bring suit in a foreign jurisdiction, remote from the place where the cause of action arose.

We are of opinion that the city of Portsmouth was liable to garnishment, and that the judgment complained of must therefore be reversed and set aside, and the cause remanded to the circuit court for further proceedings.

SOUTH CAROLINA SUPREME COURT.

City of LAURENS, *Appt.*,

v.

C. R. ELMORE, *Respt.*

(.....S. C.....)

An ordinance imposing a license tax on occupations is invalid as against a person selling picture frames, when he sells them only on pictures made in another state pursuant to orders theretofore given.

(*Jones, J., dissents.*)

(July 6, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Laurens County reversing a judgment of the Mayor's Court for the City of Laurens convicting defendant of violation of an ordinance fixing a special license tax upon occupations. *Affirmed.*

The facts are stated in the opinions.

Messrs. F. P. McGowan and W. R. Richey, for appellant:

The ordinance in question is a business order under the city's charter, and it applies to all persons doing business in the city of Laurens without discrimination against any person or corporation, or their agents, of another state.

The sole question is, Is the ordinance in question null and void as against nonresi-

dents under the interstate commerce law of the United States?

We submit not, because the ordinance applied to all persons alike, and there is no discrimination against nonresidents.

Howe Mach. Co. v. Gage, 100 U. S. 876, 25 L. ed. 764; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79.

Messrs. Ball, Simpkins, & Ball and P. H. Nelson for respondent.

Pope, J., delivered the opinion of the court:

This is an appeal from the judgment of the circuit court, which reversed the judgment of the mayor's court of the city of Laurens, wherein the defendant was adjudged guilty of the violation of an ordinance of such city, fixing a special license tax for all occupations carried on within said city of Laurens, South Carolina. It seems that the Chicago Portrait Company, of Chicago, in the state of Illinois, is engaged in the business of enlarging pictures or photographs, and selling frames to such pictures. This company carries on this work through agents, who deliver such work, when completed, under a contract previously made between the customer and said company. To purchase the frames is entirely voluntary, but the company only sends frames to its customers in contracts for enlarging pictures or photographs. Of course, it is lawful for the city of Laurens to exact a license from persons doing business within the limits of such city, unless the same contravenes the laws of the United States. The circuit

NOTE.—For a similar decision under an ordinance as to peddling, see *State v. Coop* (S. C.) 41 L. R. A. 501; see also cases there referred to on the right to take orders in interstate business.

45 L. R. A.

judge held that the proposed special license was in contravention of the clause of the United States Constitution which confides to Congress the power to regulate interstate commerce. This court, in the recent case of *State v. Coop*, 52 S. C. 508, 41 L. R. A. 501, held that one who delivers a portrait already sold in a frame, with option to the purchaser to buy a frame, as set out in the contract of sale of the portrait, is not a hawker and peddler, under Code Crim. Proc. § 294, in selling the frame to the purchaser of the portrait. This decision was bottomed upon the two prior cases of *State v. Moorehead*, 42 S. C. 211, 28 L. R. A. 585, and *Alexander Bros. v. Greenville County*, 49 S. C. 527, and all these cases are decided in view of § 8, art. 1, of the Constitution of the United States. If Congress has had confided to it, under the terms of the Federal Constitution, the duty of regulating commerce between the states, its jurisdiction is exclusive; and the states can only exercise any interference with such commerce by special power given therefor by Congress. No power has been confided by Congress to the states of this Union, except in a few cases; and the present instance is not one of them. Hence the ordinance of the city council of Laurens now in question is unlawful, and therefore the circuit judge committed no error in the ruling appealed from. See *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658. *It is the judgment of this court that the judgment of the Circuit Court be affirmed.*

Gary, A. J., concurs in result.

Jones, J., dissenting:

I concur in the opinion by Mr. Justice Pope in so far as it is held therein that the ordinance in question and the sentence thereunder are void as an interference with interstate commerce, as applied to the act of the defendant in reference to the delivery of enlarged pictures or photographs as the agent of the Chicago Portrait Company, a resident of Chicago, Illinois, pursuant to orders theretofore given. To this extent the ruling is in perfect accord with the decisions of the United States Supreme Court, a number of which were cited in the case of *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, referred to in the opinion by Mr. Justice Pope. But I am unable to agree in so far as the opinion holds the ordinance requiring a license to sell picture frames within the city of Laurens is void as applied to the act of the defendant in this case. The record, or brief, to which alone we may look for the facts of this case, shows that defendant "delivered the enlarged pictures or photographs pursuant to orders theretofore given, and that he only sold picture frames to persons who had given orders for enlarged photographs." Here, then, is the distinct fact that the picture frames were not sold and delivered pursuant to any interstate order or contract therefor. I admit that, if the picture frames had been sold and delivered pursuant to the contract for delivery of the enlarged pictures, such 45 L. R. A.

sales and delivery would constitute interstate commerce, and would come under the principle announced in reference to delivery of the enlarged pictures. But in this case it does not even appear that the picture frames were manufactured abroad and imported into this state; much less, imported pursuant to an order therefor. Nor does it appear that the business of selling picture frames to a particular class of purchasers is so directly connected with the primary business of enlarging pictures as to be a necessary incident thereto. If the sale of picture frames is not merely convenient and advantageous, but is essential, to the business of enlarging pictures, such sale would doubtless be protected as interstate commerce, along with the interstate business of which it is a necessary part. But the contract for the enlargement of the picture, not providing, as it might have done, for the sale and delivery of the frame, shows that the parties did not contemplate the sale of frame as a part of or essential to the transaction for enlarging the picture. Even if it should be imagined that, owing to the delicate nature of the work, the pictures were delivered in frame, with option to the customers to purchase the frame, if they desired, that would not make the sale of the frames while in this state an interstate transaction. Such commerce is domestic, and subject to the tax or license laws of the state, which do not discriminate against the citizens and products of other states. It is not contended that the ordinance discriminates. Nor is it intimated that the picture frames were sold in the original packages in which they were imported, if imported at all.

In the case of *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, the Supreme Court of the United States held that a state tax on peddlers of sewing machines, which applies alike to sewing machines manufactured in the state and out of it, is not repugnant to the Federal Constitution. In that case the machines sold were with the salesmen at the time of the sale, thus distinguishing from cases in which the sales were made by order or sample of goods not in the state at the time of the contract of sale. In the case of *State v. Emert*, 103 Mo. 241, 11 L. R. A. 219, 3 Inters. Com. Rep. 527, the supreme court of Missouri, in a very able opinion, held that the sale of goods which are in another state at the time of sale, for the purpose of introducing them into the state in which a regulation concerning their sale is made, is interstate commerce; and a tax upon them before they are brought into the state is a tax on interstate commerce. The imposition of a license tax on the person making sale of them is also, in effect, a tax upon the goods, and illegal, because a state cannot tax goods beyond its jurisdiction; but as soon as the goods are brought into the state, and have become a part of its general mass of property, they become taxable the same as other similar property within the state. This was the case of a peddler selling a sewing machine as the agent of a nonresident manufacturer after the introduction there-

of into the state of Missouri. On appeal to the Supreme Court of the United States, that tribunal affirmed the judgment of the Missouri court. *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68. The distinction is clearly drawn between attempts by state laws to tax property, or impose a license tax for selling the same, so as to burden interstate commerce therein, before introduction into the state and incorporation as a part of the property of the state, and such attempts after the property is so introduced; the former being in conflict with the commercial clause of the Federal Constitution, and the latter not, if not discriminatory. *Brennan's Case*, cited by Mr. Justice Pope, does not conflict with this view. In that the admitted fact was that Brennan, as the agent of the manufacturer of picture frames and maker of portraits, residing in Chicago, Illinois, solicited orders in Pennsylvania for pictures and picture frames, exhibiting samples of his pictures and frames, and, upon receiving orders for pictures and picture frames, the manufacturers forwarded the same direct to the purchaser. In such case the sale and delivery of the frames, as well as the pictures, was clearly an interstate transaction, and, as such, exempt from the direct burden placed thereon by the state law. I do not regard the case of *State v. Coop*, 52 S. C. 508, 41 L. R. A. 501, as decisive of this case. That case merely decides that one who delivers a portrait already sold, in a frame, with option to the purchaser to buy a frame, as set out

in the contract of sale of the portrait, is not a hawker and peddler, under our statutes. The case was rested on the principle announced in *State v. Moorehead*, 42 S. C. 211, 26 L. R. A. 585, and *Alexander Bros. v. Greenville County*, 49 S. C. 527, wherein it was held that a traveling salesman of an established agency in this state for the sale of a machine, who solicited orders, sold by sample, and occasionally sold the sample itself, was not a hawker or peddler, within the meaning of our statute. The court was careful to say: "This court does not undertake to say that the agent might not have sold the frames in such manner as to have violated the said statute, but the language herein used must be construed as applicable alone to the facts of this case, which show that the sale of the frames was a mere incident to the regular employment of the agent."

As the conviction and sentence by the mayor's court was for delivering enlarged photographs and selling frames for said pictures without a license, it is proper to affirm the judgment of the circuit court, reversing the judgment of the mayor's court; but, under my view as to the validity of the ordinance forbidding the selling of picture frames in the city of Laurens without a license, as applied to the facts appearing in the case now before us, the case, as it seems to me, should be remanded for a new trial before the mayor's court for the alleged violation of that ordinance.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE of New Jersey, Charles BOTT *et al.*,
Prosecutors, *Pliffs. in Err.*,
v.

George WURTS.

(.....N. J.....)

- *1. The judicial department of the government has the right to consider whether the legislative department and its agencies have observed constitutional injunctions in attempting to amend the Constitution, and to annul their acts in case they have not done so.
 2. The statute which provided for submitting proposed constitutional amendments to the people empowered the governor of the state to appoint a commission to ascertain the result of the popular vote, and authorized him to proclaim that result. *Held*, that, at the instance of a citizen of the state, the supreme court had power to review by certiorari the determination of the commission, notwithstanding the proclamation of the governor.
 3. In determining whether a proposed constitutional amendment was approved and ratified by "a majority of the
- *Headnotes by Dixon, J.

electors qualified to vote for members of the legislature voting thereon," only those electors who lawfully vote for or against the amendment are to be considered.

4. *Quære*, whether the Constitution directs that, when several proposed amendments are submitted to the people, they shall be so submitted that the electors may vote for or against any amendment without voting upon any other amendment. But, assuming that it does, it is too late to question the election, because of ambiguity on this point in the submitting statute when the election has proceeded throughout the state without objection on the part of any person, and every qualified elector who desired to exercise his franchise has done so without seeking to vote on some of the amendments, while refraining from voting on the rest.

(*Magie, Ch. J., and Gummere and Lippincott, JJ., dissent.*)

(June 19, 1899.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Board of State Canvassers that a certain

NOTE.—As to decision respecting the adoption of a Constitution by the state, or an amendment thereto, see also *Miller v. Johnson* 45 L. R. A.

(Ky.) 15 L. R. A. 524; *State, Wineman, v. Dahl* (N. D.) 34 L. R. A. 97; and *Worman v. Hagan* (Md.) 21 L. R. A. 716.

proposed constitutional amendment had been adopted. *Affirmed.*

The facts are stated in the opinion.

Mr. Allan L. McDermott, for plaintiffs in error:

The act of 1897, providing for the submission of the proposed amendments, is unconstitutional.

If the amendments were not submitted in accordance with the provisions of article 9 of the state Constitution, it is not only within the power of this court to set aside the action of the board of canvassers, but it is a duty to be performed regardless of consequences.

Kochler v. Hill, 60 Iowa, 543.

When more than one amendment is submitted to the people they shall be submitted in such form that voters may vote for or against each amendment separately.

Messrs. William B. Edwards and **John P. Stockton** also for plaintiffs in error.

Mr. S. H. Grey, Attorney General, for defendant in error:

Whether in any case a certiorari is a proper mode for testing the validity or determining the result of a popular election may well be doubted.

State, Gledhill, v. Passaic County, 25 N. J. L. 354; *State v. Anderson*, 1 N. J. L. 36.

Ministerial duties are those in the performance of which there is no discretion.

People v. Oakland Bd. of Edu. 54 Cal. 375.

The ministerial duties of election officers cannot be reviewed by certiorari.

People, Corwin, v. Walter, 68 N. Y. 403; *People, Onderdonk, v. Queens County Supers.* 1 Hill, 195; *People, Van Voast, v. Van Slyck*, 4 Cow. 323.

If the board of canvassers computed correctly the votes which they found on the statements from the different election precincts, this court could afford no measure of relief, and this court will not give a judgment which would be ineffectual for any purpose.

People, Gray, v. Phillips, 67 N. Y. 582; *People, Corwin, v. Walter*, 68 N. Y. 408.

The canvassing board exercises merely ministerial powers, and when its duties have been discharged and the board has adjourned it is *functus officii*, and the court cannot compel them to reassemble, or give them any powers if they do so.

Clark v. Buchanan, 2 Minn. 346; *McCrary, Elections*, 4th ed. § 268; *State, Stokes, v. Camden County Freeholders*, 35 N. J. L. 217.

It is only by a writ of quo warranto that an investigation can be had as to how the votes were cast, and as to the intention of the voters who cast them.

State, Gledhill, v. Passaic County, 25 N. J. L. 355; *State, Love, v. Hudson County Freeholders*, 35 N. J. L. 269.

The allowance of a certiorari when the public is concerned is purely discretionary.

State v. Middletown, 24 N. J. L. 124; *State, Zabriskie, v. Hudson City*, 29 N. J. L. 115; *State v. French*, 24 N. J. L. 736; *People, Agnew, v. New York*, 2 Hill, 9; *People, Church, v. Allegany County Supers.* 15 Wend. 199; *People, Davis, v. Hill*, 53 N. Y. 547; *Keys v. Marin County Supers.* 42 Cal. 252.

This writ should have been applied for, if it was intended to make any such application, before the governor's proclamation was made declaring the result of the voting at the special election, and during the week in which the governor withheld his proclamation, at the request of counsel for the prosecutors, to enable them to take steps to review the action of the election officers and the state canvassers.

Where parties stand by until the act intended to be challenged has been completed before applying for certiorari, the writ will not be allowed, and if allowed will be dismissed.

State, Wilkinson, v. Trenton, 36 N. J. L. 500; *State, Zabriskie, v. Hudson City*, 29 N. J. L. 116; *State v. Everitt*, 23 N. J. L. 378; *State, Malone, v. Jersey City Water Comrs.* 30 N. J. L. 249; *State, Hampson, v. Paterson*, 36 N. J. L. 159; *State, Ropes, v. Essex Public Road Board*, 37 N. J. L. 335; *State, Meday, v. Rutherford*, 52 N. J. L. 499.

The court of errors has declared that a "certiorari to review the action of a public official will not lie in favor of prosecutors who have no personal or property interest to be specially and immediately affected."

Jersey City v. State, Traphagen, 53 N. J. L. 434; *State, West Jersey Traction Co., v. Camden Bd. of Public Works*, 58 N. J. L. 362; *State, Tallon, v. Hoboken*, 59 N. J. L. 383; *State, VanDerbeek, v. Jersey City*, 13 N. J. L. J. 346.

This court is asked to examine into the evidence upon which the canvassers acted, for the purpose of determining whether it was sufficient to justify the conclusion reached by the canvassers. The question thus presented is not a judicial one. It is purely political.

Brittle v. People, 2 Neb. 198; *White v. Hart*, 13 Wall. 649, 20 L. ed. 686; *Texas v. White*, 7 Wall. 700, 19 L. ed. 227; *Calhoun v. Calhoun*, 2 S. C. N. S. 294; 2 Story, Const. 567, note.

The ballot must contain some expression of choice, otherwise, in the very nature of things, it would cease to be a ballot.

Cushing, *Legislative Assemblies*, § 103; Cooley, *Const. Lim.* 761; 6 Am. & Eng. Enc. Law, title *Election*, subdiv. 12, p. 342, note. *Behrensmeyer v. Kreitz*, 135 Ill. 595.

If a ballot expresses the intention of the voter without a reasonable doubt it is sufficient, although technically inaccurate.

Hawes v. Miller, 56 Iowa, 395.

Unless there be a legal ballot there could be no vote, which is "a formal expression of will, of a preference, wish, or choice."

Century Dict. p. 6790.

What is needed in New Jersey in order to make a vote effective is, first, a lawful ballot, which is so framed as to express a choice and which is cast by a qualified elector in accordance with the law regulating elections.

Chandless v. State Day, 56 N. J. L. 682.

Dixon, J., delivered the opinion of the court:

Article 9 of the Constitution of New Jersey, ratified by the people August 13, 1844, is as follows: "Any specific amendment or amendments to the Constitution may be proposed in the senate or general assembly, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months previous to making such choice, in at least one newspaper of each county, if any be published therein; and if, in the legislature next chosen as aforesaid, such proposed amendment or amendments, or any of them, shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments, or such of them as may have been agreed to as aforesaid by the two legislatures, to the people, in such manner and at such times, at least four months after the adjournment of the legislature, as the legislature shall prescribe; and if the people, at a special election to be held for that purpose only, shall approve and ratify such amendment or amendments, or any of them, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments so approved and ratified shall become part of the Constitution; provided, that if more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly; but no amendment or amendments shall be submitted to the people by the legislature oftener than once in five years." The legislature of 1896 and 1897 having regularly agreed to three proposed amendments, one of which related to lotteries, another to appointment to office, and the third to woman suffrage, an act was passed and approved May 25, 1897, for submitting these amendments to the people of the state. This act after providing for the transmission to the secretary of state of certificates showing the results of the voting in the several election precincts throughout the state, enacts as follows: "It shall be the duty of the governor to summon to attend him, on the nineteenth day of October next, four or more of the members of the senate, who shall meet on said day of October in the senate chamber, in the city of Trenton, at the hour of two o'clock P. M., and they, with the governor, shall constitute a board of state canvassers to canvass and estimate the votes given for and against each of said amendments; and the said board of state canvassers shall proceed to organize and determine the result according to the provisions of the act entitled 'An Act to Regulate Elections,' approved April 18, 1876, so far as they are applicable. . . . The said board of state canvassers shall determine and declare which of said proposed amendments have

been adopted, and shall forthwith deliver a statement of the result as to each amendment to the secretary of state of this state, to be filed in his office as an official paper, and any proposed amendment which by said certificate and determination of the board of state canvassers shall appear to have received in its favor a majority of all the votes cast in the state for and against said proposed amendment shall from the time of filing such certificate be and become an amendment to and part of the Constitution of this state; and it shall be the duty of the governor of this state forthwith after such determination to issue a proclamation declaring which of said proposed amendments have been adopted by the people." Laws 1897, p. 466, § 12. The board of state canvassers, provided for as above, having, on October 19, 1897, filed in the office of the secretary of state a statement of the result of the election, and its determination and declaration that the proposed amendments relating to lotteries and to appointment to office were adopted, and that the proposed amendment relating to woman suffrage was rejected, and the governor, on October 25, 1897, having issued a proclamation declaring that the said amendments relating to lotteries and to appointment to office had been adopted by the people, and become part of the Constitution of the state, the supreme court, on December 3, 1897, at the instance of Charles Bott and others, citizens and taxpayers of the state, who voted upon said proposed amendments, allowed a writ of certiorari to remove into that court for review the statement of the result of the election, made by the state board of canvassers, touching the proposed amendment relating to lotteries, in order that it might be judicially decided whether, on the facts shown in that statement, the board of canvassers had legally determined that the said proposed amendment was adopted. Upon proper return to that writ and due proceedings and argument the supreme court considered the reasons urged by the prosecutors against the legality of the determination of the board of state canvassers, and decided (1) that their determination was legal, and (2) that the concurrence of the board of state canvassers and the executive department of the government, in their respective official functions, placed the subject-matter of complaint beyond the cognizance of the judicial department of the government, and upon each of these grounds adjudged that the writ should be dismissed. This judgment is now before us on writ of error.

The question naturally arising first in this case concerns the legitimate scope of our inquiry: Have we authority to consider and decide whether the determination of the board of state canvassers, that the proposed amendment had been adopted, was lawful, or did that determination, followed by the proclamation of the governor, preclude judicial cognizance of the subject? In dealing with this question it is well to note its real character: First. The objections urged by the prosecutors against the legality of the determination of the board rest upon the ex-

press provisions of the Constitution; they being that the act by which the proposed amendments were submitted to the people did not submit them "in such manner and form that the people might vote for or against each amendment separately and distinctly," as the Constitution directs, and that the lottery amendment, according to the statement of the result of the election made by the board, and brought before the court by the writ of certiorari, was not approved and ratified by a majority of the electors qualified to vote for members of the legislature voting thereon, as likewise the Constitution requires. Secondly. It should be observed that neither the board of canvassers nor the governor was exercising a function devolved upon them by the Constitution. Each derived authority wholly from the statute. The powers conferred upon them might as well, if the legislature had so willed, have been cast upon any other body. Thus, by act of Congress under the Federal Constitution, which is no more inexplicit on this topic than ours, substantially the same functions of determination and promulgation are to be performed by the Secretary of State. U. S. Rev. Stat. 1873-74, § 205. Thirdly. The present proceeding is one of direct, not collateral, review. Even if it be conceded that, whenever the validity of this proposed amendment as a part of the Constitution was incidentally assailed, conclusive effect would be given to the action of these statutory authorities, so far as that action had not been overturned, yet it would by no means follow that their action could not in this proceeding be questioned and annulled. The determination of every legal tribunal appearing to be within its jurisdiction, though impregnable by collateral attack, is subject to reversal by appeal. Fourthly. The subject for consideration was brought by legal process before that tribunal (the supreme court), which in our system of government possesses the judicial power, if it resides anywhere, of reviewing and setting aside, when illegal, the conclusions of statutory tribunals. It thus becomes manifest that there was present in the supreme court, and is now present in this court, every element tending to maintain jurisdiction over the subject-matter, unless it be true, as insisted, that the judicial department of the government has not the right to consider whether the legislative department and its agencies have observed constitutional injunctions in attempting to amend the Constitution, and to annul their acts in case they have not done so. That such a proposition is not true seems to be indicated by the whole history of jurisprudence in this country.

In New Jersey the judicial authority was thus declared by Chief Justice Beasley, in *State, Werts, v. Rogers*, 56 N. J. L. 480, 816, 23 L. R. A. 354, and on this point he was delivering the opinion of every justice of the supreme court: "When the inquiry is whether the legislature or any other body or officer has violated the regulations of the Constitution, it is entirely plain that the decision of that subject must rest exclusively

with the judicial department of the government." In that case the right of the court to determine which body of men constitutionally composed the senate of the state was vindicated. On the same principle the supreme court in *State, Jersey City Police Comrs., v. Pritchard*, 36 N. J. L. 101, maintained its right to annul an act of the executive, who, under an erroneous view of the law, had decided that a vacancy existed in certain offices which, in case of vacancy, he had the constitutional power to fill. These precedents, and the frequently exercised power of our courts to defeat unconstitutional statutes, illustrated the wide extent of judicial authority in New Jersey in guarding and enforcing constitutional mandates. For the exercise of that authority with regard to an attempted amendment of the Constitution, in conformity with the express provisions of that instrument, no occasion has heretofore arisen in this state; but we perceive no good reason for excluding such a case from the general principle. If a legislative enactment, which may be repealed in a year, or an executive act, which affects only a single individual, cannot be allowed to stand, if it contravenes the Constitution, *a fortiori* a change in the fundamental law, which is much more permanent, and affects the whole community, should not be permitted to take place, in violation of constitutional mandates.

In other states of the Union the decisions on this special phase of the doctrine are numerous and substantially to the same purport. In *State v. McBride* (1836) 4 Mo. 303, 29 Am. Dec. 636, which arose on quo warranto to determine whether the defendant's office had not been vacated by an amendment of the Constitution, the state insisted that, as the amendment had been promulgated by the general assembly as one duly adopted, the court was bound to receive it as such; but the court held otherwise, and ascertained for itself whether the supposed amendment had been properly adopted. In *Collier v. Frierson* (1854) 24 Ala. 100, a suit upon the bond of the state treasurer, where the question was whether the state Constitution had been amended so as to enlarge the treasurer's official term, the court said (p. 109): "We entertain no doubt that, to change the Constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The Constitution is the supreme and paramount law,—the mode by which amendments are to be made under it is clearly defined. It has said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required or these requisitions enjoined, if the legislature or any other department of the government can dispense with them. To do so would be to violate the instrument which they are sworn to support; and every principle of public law and sound constitutional policy

requires the court to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." Likewise in *University of North Carolina v. McIver* (1875) 72 N. C. 76, the court said: "If it can be shown that these amendments, or any of them, have not been made in accordance with the rules prescribed by the fundamental law, every principle of public law and sound policy requires the court to pronounce against them." In *Westinghausen v. People* (1880) 44 Mich. 265, on indictment for violating a statute passed in 1879, the validity of which depended on an amendment of the Constitution adopted in 1876, the question was whether the legislature had submitted the proposed amendment to the people at the next general election after it had been agreed to by the legislature, as the Constitution directed. Although this question had, of course, been decided by the legislature in the resolution submitting the amendment, the court considered and decided it as a judicial one. In *State v. Swift* (1880) 69 Ind. 505, the majority of the judges expressed the opinion that when, in pursuance of a statute, the governor and secretary of state had proclaimed that a proposed amendment was duly ratified, the matter became *res judicata*; that is, conclusive against collateral attack. But they decided that, when there was no statutory provision for declaring the result of the election, the matter was open for judicial inquiry on trial of an indictment; and, notwithstanding a proclamation by the governor to the contrary, they held that the proposed amendment had not been adopted, because it had not been approved by a majority of all the electors of the state. Niblack and Scott, JJ., dissenting, thought that in any case the proclamation of the governor made no difference, and that approval by a majority of those voting had given validity to the amendment. In *State, Hudd, v. Timme* (1882) 54 Wis. 318, the court considered, as a subject for judicial inquiry, the question whether the legislature had exercised a legal discretion in determining what were distinct amendments for separate submission to the people. In *Koehler v. Hill* (1883) 60 Iowa, 543, an action to recover the price of beer sold, which turned on an alleged amendment of the Constitution, the matter received very elaborate consideration; and after a reargument of the cause, in which counsel for the appellant contended (page 604, 60 Iowa) that "the judicial department of the state has no jurisdiction over political questions, and cannot review the action of the nineteenth general assembly and of the people in the matter of the adoption or amendment of the Constitution of the state." Chief Justice Day delivered the judgment of the court in these words: "The authority opposed to the view advanced by appellant's counsel is most satisfactory and conclusive, and, so far as we have been able to discover, is without conflict. Not only must a Constitution be amended in the manner prescribed in the existing Constitution, but it is competent for

the courts, when the amendment does not relate to their own powers or functions, to inquire whether, in the adoption of the amendment, the provisions of the existing Constitution have been observed." In *Oakland Paving Co. v. Hilton*, 69 Cal. 479 (A. D. 1880), the court held that a proposed amendment of the Constitution had not been legally adopted, because it had not been entered on the journals of the houses, as the Constitution required; and in *Livermore v. Waite* (1894) 102 Cal. 113, 25 L. R. A. 312, the same court, at the instance of a citizen and taxpayer of the state, restrained the secretary of state from taking steps to submit to the people a proposed amendment agreed to by the legislature, on the grounds that the legislature had not acted in conformity with the Constitution and that the proposed amendment was of such a character that it could not properly become part of the Constitution.

Other consistent decisions may be found cited in 6 Am. & Eng. Enc. Law, pp. 901 *et seq.*, but the foregoing will suffice to indicate the various circumstances in which the principle of judicial authority has been maintained and applied. The examination made supports the assertion of Chief Justice Day that the decisions, so far as they deal with the existence of the principle, are not in conflict. The only case found in which the jurisdiction of the court was denied is *Worman v. Hagan* (1893) 78 Md. 152, 21 L. R. A. 716, and that denial was based on a provision of the existing Constitution to the effect that the votes cast for and against a proposed amendment should be returned to the governor of the state, and, if it should appear to him that a majority had voted in favor of the amendment, he was directed to declare by his proclamation that it had been adopted by the people, and thenceforth it became a part of the Constitution. Thus, the Constitution, said the court, confided to the governor exclusively, and without appeal to any other authority, the power and duty of ascertaining the result of the vote from an examination of the returns made to him. Therefore the court declined to investigate the result of the voting. Nevertheless it considered and passed upon other objections made against the constitutional adoption of the amendment.

The cases cited in denial of the principle are those which grew out of the Dorr rebellion in Rhode Island in 1841-42. The question there presented was whether, on trial of an indictment or of civil actions between private parties, it might legally be shown that the old Constitution of Rhode Island, under which the actual government of the state, including the courts, existed at the time of trial, had been supplanted by a new Constitution, under which no government had ever existed, and according to which the existing government was a usurpation. The courts decided in the negative, and it is impossible to find a sensible ground for the opposite decision. But the difference between a court's investigation into the legality of the government of which the court is a

branch, and its investigation into the legality of a procedure which in no way involves the legality of the government or of itself, is too plain to require elucidation. The cases referred to, and others supposed to be even remotely relevant, were fully discussed by Chief Justice Day in *Koehler v. Hill* (1883) 60 Iowa, 543. Further discussion would be supererogatory.

Having thus reached the conclusion that the subject-matter of this litigation is within the range of judicial cognizance, it remains to consider whether it has been brought into court by parties having such interest therein as rendered them legally competent to present it. In *State, Ferry, v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219, the writer of this opinion endeavored to deduce from the prior cases the rule on which the supreme court had acted in its discretionary allowance of prerogative writs for the redress or prevention of public wrongs at the instance of private suitors, and formulated that rule in these words: "This court may, in its discretion, at the instance of private persons, act by mandamus, certiorari, or quo warranto, for the redress or prevention of public wrongs by public bodies and officers whose official sphere is confined to some political division of the state, whenever the applicant is one of the class of persons to be most directly affected in their enjoyment of public rights, and the public convenience will be subserved by the remedy desired." Subsequent cases have been thought to require some modification of that statement, but very recently the supreme court, speaking through Mr. Justice Van Syckel, in *State, Oliver, v. Jersey City* (N. J.) 42 Atl. 782, has pointed out that only when the subject to be reviewed by certiorari is void, so that it could not be successfully pleaded against an indictment for a public wrong, or a civil action for a private wrong, is the rule as stated inapplicable. No narrower rule than this will cover the adjudications in New Jersey. The action of the board now under review is plainly not void. The Constitution being silent as to the mode of ascertaining the result of the voting, and of determining whether the proposed amendments had been adopted, it was within the ordinary functions of the legislature to create a tribunal for those purposes, and to clothe it with appropriate powers. The determination of that tribunal became *quasi res adjudicata*, and, until reversed in due course of law, would conclude the matter. Only by the supervising authority of the supreme court would it be subject to review. It is therefore necessary to consider merely whether the rule which holds in case of public bodies and officers, whose official sphere is confined to some political division of the state, should be extended to this board, whose official action affects the whole state equally. We think, on principle, it should. The interest of every citizen of the state in upholding and protecting the Constitution is of the same quality as the interest of the citizen of a municipality in upholding and protecting the municipal

charter, and certainly is not less in degree. The same means, therefore, should be afforded by law for its maintenance. No means adequate to the present circumstances can be suggested, other than that employed by the prosecutors. In our opinion, the objections now to be examined are lawfully before us for adjudication.

The first claim of the prosecutors deserving attention is that, according to the statement of the result of the voting made by the board of state canvassers, the lottery amendment was not approved and ratified by the requisite majority of electors, and therefore the board's determination that it had been adopted was illegal. By that statement it appears that the number of names on the poll lists was 141,672, that the number of ballots rejected was 961, that the number of votes given for the lottery amendment was 70,443, and the number of votes given against it was 69,642. The prosecutors insist that a majority of all the votes, as shown by the names on the poll lists, or at least a majority of all those who cast ballots, whether the ballots were for or against any amendment, or were rejected, was necessary for adoption. We do not so interpret the Constitution. Its words are, "a majority of the electors qualified to vote for members of the legislature voting thereon," and in the following clause it speaks of those voting "for or against each amendment." Evidently only those voting for or against an amendment are to be deemed those voting thereon. By the words "electors voting thereon" are intended the electors who exercise the right of suffrage in such manner that their votes should, under the law, be counted for or against the proposition submitted; and although the number of names on the poll lists may represent the number of qualified electors who attempted to vote, and the rejected ballots may all have been official ballots cast by some of these qualified electors, still it may be that not all of those qualified electors voted, in the constitutional sense, and that the rejected ballots were not votes. If, for example, an elector presented to the election officer, and the officer deposited in the ballot box, two or more official ballots, rolled or folded together, and in canvassing the votes the ballots were so found, those ballots would, under the law, be null and void, and the elector would not have voted on any of the amendments. Now, in the absence of evidence to the contrary, the presumption is that the election officers acted rightly, and therefore that the rejected ballots were rejected for legal cause and were not votes for or against any amendment, that all the votes legally capable of being counted for or against the lottery amendment were 140,085, and that only so many qualified electors voted thereon, of whom a majority approved and ratified it. It is deemed useless to refer to decisions elsewhere enforcing a different method of computation, because they turn on different language in the Constitution. The meaning of our own Constitution seems plain.

The other objection urged by the prosecu-

tors is that the act providing for the submission of the amendments to the people prescribed such a method of voting that while every voter was at liberty to vote for any amendment, and against the others, or *vice versa*, no elector could vote on any amendment unless he voted on all. This, it is contended, was not submitting the amendments "in such manner and form that the people might vote for or against each amendment separately and distinctly." Assuming the effect of the statute to be as alleged, it is not clear that it would antagonize the Constitution. There is, indeed, a sense in which, under such a law, the people could not vote for or against each amendment separately and distinctly; that is, they would be required to determine how they would vote on any amendment, in conjunction with a determination as to how they would vote on each of the others. But in another and an important sense they could vote for or against each separately and distinctly; that is, a determination to vote for or against any one left them entirely free to determine how they would vote on each of the others. In which of these senses the Constitution should be taken is doubtful, and the members of the court are not at one about it; and under the established rule that courts will not condemn a statute as unconstitutional unless its repugnancy to the Constitution be clear, we would hesitate to adjudge this enactment invalid. But there is another reason to withhold us from such a judgment. Under the statute the election proceeded throughout the state without objection on the part of any person, and, so far as appears, every qualified voter who desired to exercise his franchise has done so in a mode satisfactory to himself, without seeking to vote on some of the amendments while refraining from voting on the rest. So that no right has been denied; no will competent to influence

the election has been thwarted, and the discrepancy between the statute and the Constitution, if there be any, has proved to be of no practical moment. Under these circumstances, we think the same public policy which permitted the prosecutors to present the supposed public grievances now requires us to declare that this is not such a grievance, and the theoretical objection has been waived.

The other matters mentioned in the reasons for reversal filed by the prosecutors do not appear on the statement of the result of the election and the determination of the board thereon, which alone are brought into court for adjudication, and therefore they cannot be considered.

We find no error in the determination of the board that the lottery amendment was adopted, and consequently the judgment of the Supreme Court maintaining it should, on the grounds above stated, be affirmed.

Gammere, J., dissenting (Filed July 17, 1899):

When the plaintiff in error first applied to the supreme court for the writ of certiorari in this case, its allowance was opposed by Mr. Justice Van Syckel upon the ground that the question whether or not an amendment had been adopted into our state Constitution was a political, not a judicial, one. *State, Bott, v. Wurts*, 61 N. J. L. 163. I concur in the views expressed in the opinion delivered by him. On the merits of the case, I concur in the opinion of Mr. Justice Depue, delivered in the supreme court on the final hearing of the cause. 62 N. J. L. 107. I shall therefore vote to affirm the judgment under review, for the reasons contained in those opinions. I am authorized to state that Magie, Ch. J., and Lippincott, J., vote to affirm the judgment for the same reasons.

NORTH CAROLINA SUPREME COURT.

B. BALK, Appt.,

v.

Isaac H. HARRIS.

(122 N. C. 64; 124 N. C. 467.)

1. That a debt represents a loan of the proceeds of a sale of exempt personal property will not prevent its garnishment in another state.
2. A judgment subjecting a debt due to a nonresident to the payment of a claim against him is subject to collateral attack if no personal service of process was obtained upon the principal defendant and the af-

idavit for garnishment did not state that he had any property in the state.

3. A debtor garnished in a suit against his creditor when out of the state of his residence is not protected from a suit in favor of such creditor by paying the debt to a representative of the foreign plaintiff after returning to his domicile and the entry of a judgment against him, where he had given no obligation to secure the payment and he shows nothing which would have made the payment compulsory.

On rehearing.

4. A debt does not follow the person of the debtor out of the state of his domicile

NOTE.—For garnishment of debts to nonresidents in general, see note to *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577; also *Louisville & N. R. Co. v. Nash* (Ala.) 41 L. R. A. 831, and cases cited in footnote thereto; *Swedish American Nat. Bank v. Bleecker* (Minn.) 42 L. R. A. 283; and *National Bank v. Furtick* (Del.) 44 L. R. A. 115.

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so as to permit garnishment there in a suit against the creditor.

(May 24, 1898.)

A PPEAL by plaintiff from a judgment of the Superior Court for Beaufort County in favor of defendant in an action brought to recover the amount alleged to be due by defendant to plaintiff on account which defendant claimed to have paid under garnishment proceedings to plaintiff's creditor. *Reversed.*

The facts are stated in the opinion.

Mr. John H. Small for appellant.

Mr. Charles F. Warren, for appellee:

No judgment has been rendered against *Balk in personam*, nor could there be such a judgment rendered against him in the case upon the existing state of the pleadings.

The very gist of the action of foreign or nonresident attachment is the fact that the defendant resides without the jurisdiction wherein the action is instituted, and therefore cannot be personally served with process by any possible means.

Personal service of process is absolutely essential in order to confer sufficient jurisdiction upon any court to enable it to enter a judgment *in personam* in any case.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338.

The defendant must have property within the jurisdiction, otherwise it would be idle to issue an attachment; but it is not always necessary to allege that he has such property within such jurisdiction.

Hodge & McLane, Attachment, § 11.

The proceeding by attachment is process to compel the appearance of a party whose person cannot be reached by the process of the court, and is not a proceeding in derogation of the common law, but rather in mitigation of the severity of the common law in favor of the defendant.

Barney v. Patterson, 6 Harr. & J. 182.

When money or credits are attached the inchoate lien arises when the attachment is laid in the hands of the garnishee, and the judgment is a personal judgment against him.

Buschman v. Hanna, 72 Md. 1.

A garnishee has the right to appear to the action, confess judgment to the amount in his hands, and have his costs allowed.

Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588.

Judgments *in personam* are binding upon persons living beyond the limits of the state of Maryland, where they voluntarily appear and answer the suit, or have been duly served with process.

Garner v. Garner, 56 Md. 127; *Harryman v. Roberts*, 52 Md. 64; *Weaver v. Boggs*, 38 Md. 255.

If Harris shows a valid judgment against himself in the original attachment proceedings, the claim of *Balk* is discharged.

8 Am. & Eng. Enc. Law, pp. 1251, 1252.

Harris, when he paid the money to Epstein's attorney, satisfied the judgment as far as it lay in his power so to do.

Black, Judgm. § 593.

If the judgment rendered against the garnishee is valid, and he has paid it to the satisfaction of the plaintiff in garnishment, it is difficult to see how the manner of payment can be of any importance.

Mills v. Stewart, 12 Ala. 90; *Duncan v. Ware*, 5 Stew. & P. (Ala.) 119, 24 Am. Dec. 772; *Montgomery Gaslight Co. v. Merrick*, 61 Ala. 534; *People, Griffin, v. Potter*, 27 Mich. 106; *Somers v. Losey*, 48 Mich. 294; *Dodd v. Brott*, 1 Minn. 270, 66 Am. Dec. 541; *Barber v. Howd*, 85 Mich. 221; *Troyer v. Schweitzer*, 15 Minn. 241.

A judgment by default would have been just as damaging to Harris had he not answered the attachment.

Deno v. Thomas, 64 Vt. 358; *Randall v. Way*, 111 Mass. 506; *Gildersleeve v. Caraway*, 19 Ala. 246.

Even if the judgment is erroneous, so it might be reversed on appeal, yet, if it is not done, it is a judgment and entitled to the same respect as if perfectly regular, and the garnishee will be protected by payment under it.

Gildersleeve v. Caraway, 19 Ala. 246; *Moore v. Chicago, R. I. & P. R. Co.* 43 Iowa, 385; *Dole v. Boutwell*, 1 Allen, 286; *Cornwell v. Hungate*, 1 Ind. 156; *Asman v. Dueker*, 45 Kan. 745; *Tubb v. Madding*, Minor (Ala.) 129; *Webster v. Lovell*, 2 Allen, 123; *Rasmussen v. McCabe*, 43 Wis. 471; *Bigalow v. Barre*, 30 Mich. 1; *Atcheson v. Smith*, 3 B. Mon. 502; *Telles v. Lynde*, 47 Fed. Rep. 912.

A garnishee is protected in payment of such judgment, even after the same has been reversed.

8 Am. & Eng. Enc. Law, p. 1252; *Richardson v. Hickman*, 22 Ind. 244; *Allen v. Seaver*, 38 Vt. 673; *Montgomery Gaslight Co. v. Merrick*, 61 Ala. 534.

It is not necessary for the garnishee to wait until coerced by execution.

Sessions v. Stevens, 1 Fla. 269, 46 Am. Dec. 341; *Baltimore & O. R. Co. v. May*, 25 Ohio St. 347; *Burton v. Warren Dist. Twp.* 11 Iowa, 166.

For most purposes—taxation, etc.—it has long been a recognized and established fiction of law that their situs is at the domicile of the owner. It is impossible, from the nature of things, for tangible property to have an actual location.

This fiction does not apply to debts, when they are sought to be reached by garnishment, when the owner does not reside in the jurisdiction where the action is.

Embree v. Hanna, 5 Johns. 101; *Moore v. Speed*, 55 Mich. 84; *First Nat. Bank v. Burch*, 80 Mich. 242; *Newland v. Reilly*, 85 Mich. 151; *Broadstreet v. Clark*, 65 Iowa, 670; *Holmes v. Remsen*, 4 Johns. Ch. 460, 8 Am. Dec. 581, 20 Johns. 229, 11 Am. Dec. 269; *Barrow v. West*, 23 Pick. 270; *Mattingly v. Boyd*, 20 How. 128, 15 L. ed. 845; *Fuller v. Foote*, 56 Conn. 341; *Lewis v. Bush*, 30 Minn. 244; *Mooney v. Union P. R. Co.* 60

Iowa, 346; *Tingley v. Bateman*, 10 Mass. 343; *Burlington & M. R. Co. v. Thompson*, 31 Kan. 180, 47 Am. Rep. 497; *Ward v. Morrison*, 25 Vt. 593; *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468; *Commercial Nat. Bank v. Chicago, M. & St. P. R. Co.* 45 Wis. 172; *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161; *Berry Bros. v. Davis*, 77 Tex. 191; *Cochran v. Fitch*, 1 Sandf. Ch. 142; *Plimpton v. Bigelow*, 93 N. Y. 596; *Douglass v. Phoenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118; *East Tennessee, V. & G. R. Co. v. Kennedy*, 43 Ala. 462; *Connor v. Hanover Ins. Co.* 28 Fed. Rep. 549; *Neufelder v. German American Ins. Co.* 6 Wash. 336, 22 L. R. A. 287; *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395; *Fithian v. New York & E. R. Co.* 31 Pa. 114.

Even though the place of payment of the debt is expressly stated, this is no objection to charging the debtor for it elsewhere.

American Cent. Ins. Co. v. Hettler, 37 Neb. 849; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122; *Continental Ins. Co. v. Chase* (Tex. Civ. App.) 33 S. W. 602; *Baylies v. Houghton*, 15 Vt. 626; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Commercial Nat. Bank v. Chicago, M. & St. P. R. Co.* 45 Wis. 172.

Wherever the garnishee could be sued by the defendant for the demand, he may be charged as garnishee on account of it. Other states must recognize this right, if they recognize garnishment at all.

Wyeth Hardware & Mfg. Co. v. Lang, 127 Mo. 242, 27 L. R. A. 651; *German Bank v. American Ins. Co.* 83 Iowa, 491; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Cross v. Brown*, 19 R. I. 220; *Pomeroy v. Rand, McN. & Co.* 157 Ill. 176; *Mason v. Beebe*, 44 Fed. Rep. 556; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 8 L. R. A. 385.

The situs of property for the purpose of jurisdiction is one thing, and its situs for the purpose of determining the rights of the parties thereto is another, and the two are not necessarily the same.

Mason v. Beebe, 44 Fed. Rep. 563; *Cross v. Brown*, 19 R. I. 220; *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629. See also *Connor v. Hanover*, 28 Fed. Rep. 549; *Wyatt v. Rambo*, 29 Ala. 510; *Gunn v. Howell*, 35 Ala. 148, 73 Am. Dec. 484.

Clark, J., delivered the opinion of the court:

The plaintiff and defendant resided in North Carolina, and the latter was indebted to the former in the sum of \$180 for borrowed money, presumptively payable here. Harris, while on a visit to Baltimore, was served with notice of garnishment by Jacob Epstein, in a proceeding instituted by said Epstein against Balk in the superior court of Baltimore city. No service of the summons was made upon Balk. Harris testifies that he gave no bond to appear or pay the money, and employed no lawyer, though the record shows that counsel, assuming to appear for him, joined Epstein's counsel in asking that 45 L. R. A.

judgment be entered up. After his return home, hearing that judgment had been taken against him in Baltimore, no execution being issued, he paid the \$180 to Epstein's lawyer here, to be remitted to Baltimore.

In this action the plaintiff excepted on the ground that, (1) the court in Baltimore not having acquired jurisdiction against him by service of process or attachment of property, the garnishment against Harris was a nullity; (2) that Harris, having paid voluntarily and not under compulsion, was not discharged from his liability to the plaintiff; (3) that the money loaned defendant was proceeds of sale of his personal property exemptions; (4) that the court here erred in admitting as evidence the printed volume purporting to be the Public General Laws of Maryland, and to be published by authority of the said state.

The last exception cannot be sustained, for Code, § 1338, makes such book, purporting to be published by the authority of another state, evidence of its statute law. *Copeland v. Collins* (at this term) 122 N. C. 619.

The third exception has no force, for our exemption laws can have no extraterritorial force. *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85; *Story, Conf. L. § 539*. They are merely exemptions from executions issued by the courts of this state, and, by virtue of congressional enactment, are also protected as to executions issued by the United States court in this state.

But, as to the first two exceptions: In the proceedings instituted by Epstein in the superior court of Baltimore against Balk, a nonresident, the latter could only be brought into court by service of process personally or by attachment of his property in that state (*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Bernhardt v. Brown*, 118 N. C. 700, 36 L. R. A. 402; *Long v. Home Ins. Co.* 114 N. C. 466); and it must appear affirmatively by affidavit, as the basis of such proceeding, when the defendant is a nonresident, that he has property in said state (*Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338; *Bacon v. Johnson*, 110 N. C. 114). An examination of the certified transcript from the superior court of Baltimore shows that Epstein's affidavit does not aver that Balk had any property of any description in Maryland, but merely that he was a nonresident of said state. The Maryland court, therefore, acquired no jurisdiction upon which an order affecting Balk could be issued, and, this being a jurisdictional defect, the judgment of the Maryland court can be collaterally attacked in this proceeding. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Springer v. Shavender*, 118 N. C. 33.

Furthermore, the payment by Harris was not made under compulsion, but voluntarily, by paying the amount to Epstein's lawyer in North Carolina after his return to this state. Such payment by a garnishee cannot protect him against the claim of his creditor. *Drake, Attachm.* 5th ed. § 711 (3). It is true Harris says that he feared that the judgment in Maryland would prevent his

goods being shipped to him, but he did not show that he had any goods, nor that any execution issued, nor that they were levied on. He himself was under no bond or obligation to appear at court in Baltimore or to pay the judgment. His voluntary payment, remitted to Epstein, will not discharge his legal liability to the plaintiff to pay the money he borrowed of him.

The plaintiff further raised the point that, the situs of the debt being with the creditor in North Carolina, where both Balk and Harris resided, and where the debt was payable, Balk had no property in Maryland liable to attachment by reason of the mere fact that his debtor (Harris) was transiently in that city. This is a very interesting question, and there is a great weight of authority to sustain that view, but not without some decisions looking the other way, many of which, on both sides, are collected in the notes to *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577. It is unnecessary, however, in this case, that we discuss it.

Error.

A petition for rehearing having been filed, Clark, J., on April 18, 1899, handed down the following response:

This is a petition to rehear the decision reported in 122 N. C. 64. The judgment of another state, condemning the debt due by Harris to Balk, can only be recognized as valid here when that court acquired jurisdiction. It was not founded on personal service, but it is contended that the Maryland court acquired jurisdiction by attaching the debt due Balk by serving notice upon Harris, who was transiently in the city of Baltimore. The situs of the debt for purposes of taxation, and usually for all purposes, is with the creditor. But there are many states whose courts hold that, for the purposes of attachment, the situs of the debt is at the residence or domicile of the debtor. The conflicting authorities are summed up and arrayed in the notes to *Illinois C. R. Co. v. Smith* (Miss.) 19 L. R. A. 577, whose accomplished editor sums up a careful review of the authorities, as follows: "The true doctrine seems to us to be that no jurisdiction can be obtained to condemn a debt due to a nonresident unless jurisdiction of his person is obtained; that is, that the situs of the debt, for the purpose of garnishment, is at the residence of the creditor. To hold that such situs is with the debtor seems against reason, because he has no property in the debt, and because it allows a proceeding to condemn one's property to be prosecuted without notice to him, or representation by anyone who cares for the protection of his interests. Such a proceeding seems unworthy to be called due process of law." There is logic and force in these views, if it were an open question with us; but North Carolina is one of the states whose courts have held that, for purposes of an attachment, the situs of a debt is where the debtor resides. *Cooper v. Adel Security Co.* 122 N. C. 463; *Winfree v. Bagley*, 102 N. C. 515. 45 L. R. A.

The apparent inconsistency or hardship of such ruling is much lessened by the uniform holding by courts of that line of thought that the attachment of the debt can only be made where the debtor resides, and can have no validity if levied upon him when only passing through, or transiently in, another state. It is thus stated in 8 Am. & Eng. Enc. Law, pp. 1129, 1130: "Choses in action upon which the garnishee is liable . . . are not to be considered as following the former wherever he may be transiently found, to be there taken, at the will of a third person, within a jurisdiction where neither such debtor nor his creditor resides. As a general rule, therefore, the courts of a state cannot, by the service of their process upon an inhabitant of another state transiently within their jurisdiction, charge such person as garnishee. But if, when so served, the garnishee have in his possession, within the state, money or property of the defendant, or has contracted to pay money or deliver property within such jurisdiction, he may be charged." This is sustained by uniform decisions (many of which are there stated in the notes), among many others: *Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746; *Lovejoy v. Albee*, 33 Ma. 415, 54 Am. Dec. 630; *Sawyer v. Thompson*, 24 N. H. 510; *Baxter v. Vincent*, 6 Vt. 614; *Roy v. Underwood*, 3 Pick. 302; *Hart v. Anthony*, 15 Pick. 445; *Cronin v. Foster*, 13 R. I. 196. In the last case it is said: "When a person transiently in another state is sued for his own debt, it is a different case. But if a person by garnishment is compelled, in order to satisfy a debt not his own, but due from one of his creditors, to pay his own debt, in a mode very different from that in which he would otherwise have paid it, . . . it . . . [would] be a hardship." The court, proceeding, admits the recognized exceptions above stated, that the foreign court could acquire jurisdiction by service upon a garnishee transiently within the state, (1) when the garnishee has personal chattels of the debtor with him (which usually could be attached without garnishment), and (2) when the debt due by the garnishee is contracted to be paid within the state. Among other cases to same effect: *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747, in which it is said (p. 182, 19 Neb.): "The rule is well settled that . . . garnishment served upon a nonresident of the state, but temporarily within it, is not effectual as an attachment,"—citing, to same purport, *Green v. Farmers' & C. Bank*, 25 Conn. 452; *Casey v. Davis*, 100 Mass. 124; *Sawyer v. Thompson*, 24 N. H. 510; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Nye v. Liscombe*, 21 Pick. 263; *Tingley v. Bateman*, 10 Mass. 343; *Jones v. Winchester*, 6 N. H. 497; *Mathews v. Smith*, 13 Neb. 190; *Danforth v. Penny*, 3 Met. 564; *Gold v. Housatonic R. Co.* 1 Gray, 424. In *Bush v. Nanco*, 61 Miss. 237, it is said that, unless the debt of the nonresident garnishee was payable in the state where garnished, "he was not subject to garnishment in that state, and that the

writ served on him there was a nullity, and that this is the law seems settled by the authorities. The reason is that the court entertaining a garnishment must have some jurisdiction over the thing garnished, and where the garnishee is a nonresident, has in his hands no property belonging to the principal debtor, and owes him nothing payable within that state, the jurisdiction is defeated. Such is the well-settled law. *Drake, Attachm.* 5th ed. §§ 474, 475, and cases there cited." This is sustained by reference to the citation from *Drake* on Attachment, and also by *Waples, Attachm.* 228. There are many other cases to same effect, among them *Squair v. Shea*, 26 Ohio St. 645; *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395; *Commercial Nat. Bank v. Chicago, M. & St. P. R. Co.* 45 Wis. 172. The defect being jurisdictional, the garnishee cannot waive it, because it is not with him a personal matter, and he has no right to prejudice the defendant. *Rindge v. Green*, 52 Vt. 204; *Waples, Attachm.* 228; *Drake, Attachm.* § 476.

Inasmuch as an attachment is, in effect, a proceeding by the principal debtor (the de-

fendant in the action), in the name of the plaintiff against the garnishee, it is thus properly held, even in those courts which hold that the situs of a debt for this purpose is with the debtor (garnishee), that the action must be brought where he "resides" or "has his domicile," since it is there that his creditor must have sued him. One or two cases unguardedly say the action may be brought "wherever the debtor [garnishee] may be found," but the context and the facts in those cases show that they mean where he may be found "resident" or "domiciled," as it is expressly held in all cases where the point is made. As upon the uniform authorities above cited, and others not necessary to cite, the Maryland court acquired no jurisdiction, as against *Balk*, by service of notice upon his debtor, *Harris*, who had no tangible property of *Balk* in his possession, and was not resident in that state, we reaffirm our former decision, but, after the benefit of the able and exhaustive argument upon the rehearing, for an entirely different reason from that given on the first hearing.

Petition dismissed.

PENNSYLVANIA SUPREME COURT.

William Kirk BETTS

v.

LEHIGH VALLEY RAILROAD COMPANY, *Appt.*

(191 Pa. 575.)

A person approaching a railroad crossing at which a train is standing on a side track to receive or discharge passengers is not guilty of contributory negligence in failing to stop, look, and listen before attempting to cross the main track, when he knows of a rule of the carrier requiring a train to stop before reaching a station where another train is receiving or discharging passengers.

(May 23, 1899.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Bradford County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Davies & Davies and *Henry Streeter*, for appellant:

The duty to stop, look, and listen is clear and certain, and a departure from it is more than evidence of negligence; it is negligence *per se*.

Greenwood v. Philadelphia, W. & B. R. Co. 124 Pa. 572, 3 L. R. A. 44.

NOTE.—For right of traveler to rely on railroad's compliance with its rule as to signals at crossing, see *Lyman v. Boston & M. R. Co.* (N. H.) 11 L. R. A. 364; and *Hendrickson v. Great Northern R. Co.* (Minn.) 16 L. R. A. 261.

For reliance on railroad watchman or gates 45 L. R. A.

Even at a station the plaintiff is not relieved from the duty to stop, look, and listen, much less at a public highway crossing.

Irey v. Pennsylvania R. Co. 132 Pa. 563; *Carroll v. Pennsylvania R. Co.* 12 W. N. C. 348; *Pennsylvania R. Co. v. Bell*, 122 Pa. 58; *Hovenden v. Pennsylvania R. Co.* 180 Pa. 244.

Due and ordinary care is to be used in crossing public streets, as in all other transactions in life. Even upon the sidewalks a man is bound to look where he is going.

Barnes v. Snowden, 119 Pa. 53; *Schmidt v. McGill*, 120 Pa. 412; *Buzby v. Philadelphia Traction Co.* 126 Pa. 559.

Plaintiff freely admits that, heedless of the shouts of the bystanders, he ran directly in front of the moving locomotive, and therefore the case should have been withdrawn from the jury.

Baker v. Pennsylvania R. Co. 182 Pa. 336.

It was negligence to attempt to board a moving train.

Bacon v. Delaware, L. & W. R. Co. 143 Pa. 14.

There is nothing in the evidence that relieved the plaintiff from taking the ordinary precautions before attempting to cross the public highway.

Lehigh Valley R. Co. v. Greiner, 113 Pa. 600; *Buzby v. Philadelphia Traction Co.* 126 Pa. 559.

at crossing, see *Louisville & N. R. Co. v. Webb* (Ala.) 11 L. R. A. 674; *Feeney v. Long Island R. Co.* (N. Y.) 5 L. R. A. 544; and *Evans v. Lake Shore & M. S. R. Co.* (Mich.) 14 L. R. A. 223.

Messrs. William Maxwell and Edward Overton, for appellee:

What is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care.

West Chester & P. R. Co. v. McElhoo, 67 Pa. 315.

No presumption of negligence arises from the crossing of a track at a railway station, in order to get to and take passage upon a train on another track, when that is the only way by which such train can be reached; nor is it necessarily negligent to start across before the train which the passenger intends to take has come to a full stop.

Kohler v. Pennsylvania R. Co. 135 Pa. 346; *Pennsylvania R. Co. v. White*, 88 Pa. 327; *Flanagan v. Philadelphia, W. & B. R. Co.* 181 Pa. 242; *Shutt v. Cumberland Valley R. Co.* 149 Pa. 266.

A passenger who is obliged to pass over an intervening track to reach his train need neither look nor listen, but may assume the way to be safe.

Baltimore & O. R. Co. v. State, Hauer, 60 Md. 449; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96; *Warren v. Fitchburg R. Co.* 8 Allen, 227, 85 Am. Dec. 700; *Klein v. Jewett*, 26 N. J. Eq. 474; *Weeks v. New Orleans, S. F. & L. R. Co.* 40 La. Ann. 800; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L. R. A. 673.

To run a train at a high rate of speed past another discharging passengers likely to step right into its path would be, not only neglect of common care, but reckless and gross negligence.

Robostelli v. New York, N. H. & H. R. Co. 33 Fed. Rep. 799.

When it is necessary to cross a railroad track to reach the train, a passenger has the right to rely to some extent upon the giving of the proper signals of danger; the fact that he did not look to see if a train was approaching is not conclusive of a want of care on his part.

Sonier v. Boston & A. R. Co. 141 Mass. 10; *Terry v. Jewett*, 78 N. Y. 338; *Parsons v. New York C. & H. R. R. Co.* 113 N. Y. 355, 3 L. R. A. 683; *Warner v. Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491; *Jewett v. Klein*, 27 N. J. Eq. 550.

STERRETT, Ch. J., delivered the opinion of the court:

In 1894 the plaintiff, whose home was in the borough of Towanda, was regularly employed at Ulster, about 8 miles north of the Lehigh Valley Railroad. In reaching his place of business he daily took a local train starting at 6:25 o'clock A. M. from Washington Street Station on the Bernice Branch in said borough, about $\frac{1}{4}$ of a mile from his home. He usually left home about 6:15 A. M., and walked south down Main street to Washington street, and then turned east at Washington street and went about 170 feet down this street to the station. Washington Street Station is the freight station of 45 L. R. A.

the Lehigh Valley Railroad Company at Towanda, and is located on the Bernice Branch, at the eastern end of Washington street, in close proximity to the Susquehanna river. There were no buildings beyond the station on Washington street, and no bridge across the river, so that the street crossing was practically limited in its use to a means of access to and from the station for teams and foot passengers. The sidewalk, which was of stone from Main street to the railroad tracks at Washington street crossing, was continued across the railroad by means of planks laid between the rails. This walk led to the platform steps at the north end of the station, where the ticket office was located. South of this walk, for the distance of about 100 feet, the tracks were filled in with earth and red shale, forming a level strip of ground where passengers were received and discharged by passing trains. Passengers on the main line necessarily used this earth platform, as it extended on both sides of this track. Plaintiff's train, popularly known as the "Geneva Train," was made up at and started from this station. It occupied the side track next to and in front of the station for the reception of passengers, and the engine stood facing or upon the Washington street crossing. In order to go aboard this train, passengers were required to enter from the earth platform, or to pass around in front of the engine, ascend the platform steps, and walk south along the platform until the cars could be conveniently entered. The following rule, given in evidence, was shown to be in force at the time of the accident: "Any train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the station, and must not proceed until the passenger train moves away, or a signal has been given to come on, except where proper safeguards are provided between the tracks." It is admitted that there were no safeguards in this case. The morning before the accident, the Williamsport & North Branch Railroad Company commenced running a train to Towanda station, about a mile and a half north of the Washington Street Station and the junction of the Bernice Branch with the main line, to Williamsport, leaving Towanda at 6:15 o'clock A. M., and scheduled to arrive at Washington street at 6:20 A. M., where it was to meet and pass the Geneva train, and leaving there at 6:30 A. M. On the morning of the accident it was several minutes late. It was at this point, and from the time of starting, in charge of employees of the Lehigh Valley Railroad Company. According to plaintiff's testimony, he came down Washington street, on the morning of the accident, to take his train, as usual. His attention was attracted to it by the ringing of the bell. He passed a two-seated top carriage or hack standing on the edge of the street and sidewalk, near the railroad track, and between him and the street to the north, and crossed over the first rail of the main track, when he was struck and injured by the train coming rapidly down on the main track,

from the north. He also testified that, knowing the rule of the company above quoted, and seeing his train still standing at the station, he did not stop, look, or listen for an approaching train; that a car was standing on a siding just south of the southern sidewalk of Washington street. This siding crossed Washington street to a coal shed, which extended for some distance along the main track, and partially obstructed the view to the north. His witnesses testified positively that plaintiff's train was not in motion at the time of the accident and defendant's witnesses testified just as positively that it was. The learned trial judge refused defendant company's requests for binding instructions, and submitted the case to the jury in a full, fair, and adequate charge, in which the propositions of law involved were amply discussed. The care with which the case was submitted is shown in the following brief summary of the questions submitted to the jury in his charge: "You are to apply the principles which I have laid down to you as governing the case to the facts as you shall find them from the evidence. Determine, first, whether the company was negligent in running the train, called the 'Williamsport Train,' over the track at the time they did. If they obeyed the rule, as they claim they did, then they would not be guilty of such negligence as would make them chargeable with this accident, under the testimony of the plaintiff. Next, inquire whether the plaintiff was guilty of any contributory negligence. If, when he approached the track upon which this train was coming from the north, the train which he intended to take was standing there it would excuse him from stopping to look and listen; but it would not excuse him from exercising the care which an ordinarily prudent man would exercise under like circumstances. It is for you to determine, as I said first, whether the train was standing still, and he was excused from stopping and looking and listening. If you should find he was, then, secondly, did he otherwise exercise the care in going across that track that an ordinarily prudent man would? If he did, and was struck by the train, then he would not be guilty of any negligence which would excuse the company from the negligence which they had committed in crossing that street while the Geneva train, as it is called, was standing upon the track at its station."

The real contention in the case is whether the failure to stop, look, and listen was contributory negligence, to be declared by the court as matter of law. Our cases recognize an exception to the general rule. In the recent case of *Flanagan v. Philadelphia, W. & B. R. Co.* 181 Pa. 242, our Brother Fell said: "It is true that the duty of a person about to cross a railroad track to stop, look, and listen for an approaching train is not always applicable to a passenger at a station going to or from his train. The obligation upon him may be totally different from that of a person at a public crossing. *Pennsylvania R.* 45 L. R. A.

Co. v. White, 88 Pa. 327; *Kohler v. Pennsylvania R. Co.* 135 Pa. 346. If the way provided is across a track, he may rely upon the performance by the company of the duty to keep the track clear while passengers are in the act of passing between the train and the station. But this is when a way is provided, and the passenger is impliedly invited to take it." That case was ruled against the passenger on the ground that "he was not invited to get off where he did, and the invitation was to alight on the other side, and in disregarding it he violated a reasonable rule, which it was his duty to observe. The same considerations controlled the decision in *Morgan v. Camden & A. R. Co.* (Pa.) 23 W. N. C. 189, under somewhat different facts. *Pennsylvania R. Co. v. White*, 88 Pa. 327, is more nearly like the case at bar. There the train came to a stop at a point opposite to a station, and the order of the company was very similar to the order here. It was there said: "This rule [to stop, look, and listen] is not always applicable to passengers leaving a train and crossing the track to reach the depot at the point of destination. There are duties which spring from the relations existing between the carrier and its passengers. It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance, not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so. *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147, 62 Am. Dec. 323. Ordinary prudence and due regard for the safety of passengers alike require that special care should be exercised at public crossings and depots by passing trains." It was further said, in discussing the plaintiff's case: "He had a right to rely on the observance of the company's rule forbidding another train to pass the station while his train remained there." In *Werner v. Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491, the facts and the rule of the company closely resembled this case and also *Pennsylvania R. Co. v. White*, 88 Pa. 327. In the former the principles enunciated in the latter were adopted on the authority of that and similar cases from other states. Indeed, the doctrine of these cases may be considered as firmly established by a uniform line of decisions.

In the case under consideration the rule adopted by the defendant company was notice to the public that the tracks on Washington street would be kept clear while the train was at the station receiving or discharging passengers. As was said by the learned trial judge in his charge: "Whether that is a public street or not, they had used the ground there for the purposes of a platform, not only where the platform was, adjoining the station, but also the ground east of the main track of defendant company. If it had been their custom to so use that ground, then, as far as the purpose of this suit is concerned, or as far as the people of that community are concerned, who had knowledge of that custom, they had

made the street their platform for the purpose of receiving and discharging passengers." The jury has found that plaintiff knew of the rule prohibiting other trains from passing, and that he relied upon it, as he had a right to do. The object of stopping, looking, and listening was to avoid the dangers incident to a railroad. But the rule of the company gave notice that, as long as the train remained at the station, the tracks would be free from passing trains. This was equivalent to saying to approaching passengers, "You need not stop, look, and listen, as there will be nothing for you to see." It was, in effect, an invitation to passengers to cross the tracks. Under such circumstances, the mere failure to stop, look, and listen, without more, cannot be pronounced contributory negligence by the court.

It will be observed that the learned trial judge did not undertake to pronounce on the question of contributory negligence, otherwise than as to the rule, "Stop, look, and listen." He was careful to say that the rule of the company did not relieve the plaintiff from the exercise of ordinary care under the circumstances. It is not pretended that if he saw the approaching train, and deliberately went in front of it, he could recover. But, in view of all the facts and the evidence as to location of the trains, the obstructions on the sidings and the street, and the very material question as to whether plaintiff's train was standing still or in motion,—as to which the evidence was conflicting,—the case was necessarily for the jury. It was submitted with instructions in which the rights of both parties were carefully guarded. We find no substantial error in the record. Neither of the specifications of error is sustained.

Judgment affirmed.

Mary A. BARNES

v.

FIDELITY MUTUAL LIFE ASSOCIATION, *Appt.*

(191 Pa. 618.)

1. The question whether or not a person is in good health, within the meaning of an insurance policy, is for the jury, when the evidence is conflicting on the material questions of fact.
2. A man who has a cold, on account of which he is in bed, may be nevertheless "in good health," within the meaning of a clause in a life-insurance policy which requires the premium to be paid while he is in good health, although pneumonia sets in a day or two after the premium is paid and proves fatal.

(May 23, 1899.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Luzerne

NOTE.—For similar questions as to what constitutes disease or health, see *Manufacturers' Acci. Indemnity Co. v. Dorgan* (C. C. A. 6th C.) 22 L. R. A. 620; *Mutual Ben. L. Ins. Co. v. Robison* (C. C. A. 8th C.) 22 L. R. A. 325; 45 L. R. A.

County in favor of plaintiff in an action brought to enforce payment of a life-insurance policy. *Affirmed.*

The facts are stated in the opinion.

Mr. H. W. Palmer, for appellant:

A representation is a continuous statement from the time it is made, during the progress of the negotiations, and down to the completion of the contract; so that if in point of fact the representations be true when actually made, yet if by some change intervening between the time of completion of the contract it then becomes untrue, it will avoid the contract if the change be material and to the prejudice of the insurers, or be such as might probably influence their opinion as to the advisability of accepting the risk.

May, Ins. § 190; Cooke, Life Ins. § 24; *Whitley v. Peidmont & A. L. Ins. Co.* 71 N. C. 480; *Calvert v. Hamilton Mut. Ins. Co.* 1 Allen, 308, 79 Am. Dec. 744; *Blumer v. Phoenix Ins. Co.* 45 Wis. 622; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. R. A. 610; *De Camp v. New Jersey Mut. L. Ins. Co.* 3 Ins. L. J. 89; *Ormond v. Fidelity Life Assn.* 96 N. C. 158.

In all cases where the assured has notice of any limitation upon the agent's power, or where there is anything about the transaction to put him on inquiry as to the actual authority of the agent, acts done by him in excess of his authority are not binding.

Bacon, Ben. Soc. § 153; Wood, Ins. § 411; May, Ins. § 137A; *First Nat. Bank v. Lancashire Ins. Co.* 62 Tex. 461; *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen, 332; *Schwartz v. Germania L. Ins. Co.* 18 Minn. 448; *Ripley v. Merchants' Nat. Bank*, 41 Conn. 188; *Bouton v. American Mut. L. Ins. Co.* 25 Conn. 542; *Koelges v. Guardian L. Ins. Co.* 2 Lans. 480; *Accey v. Fernie*, 7 Mees. & W. 151; *Wall v. Home Ins. Co.* 8 Bosw. 597; *Hoffman v. John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 23 L. ed. 539; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Mercerau v. Phoenix Mut. L. Ins. Co.* 66 N. Y. 274; *How v. Union Mut. L. Ins. Co.* 80 N. Y. 32; *Hardie v. St. Louis Mut. L. Ins. Co.* 26 La. Ann. 242; *Schaffer v. Mutual F. Ins. Co.* 89 Pa. 296; *Giddings v. Northwestern Mut. L. Ins. Co.* 102 U. S. 108, 26 L. ed. 92; *Heiman v. Phoenix Mut. L. Ins. Co.* 17 Minn. 153, 10 Am. Rep. 154; *Whiting v. Massachusetts Mut. L. Ins. Co.* 129 Mass. 240, 37 Am. Rep. 317; *Armstrong v. State Ins. Co.* 61 Iowa, 212; *Galbraith v. Arlington Mut. L. Ins. Co.* 12 Bush, 29; *Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. Rep. 670; *Morse v. St. Paul F. & M. Ins. Co.* 21 Minn. 407; *Reynolds v. Continental Ins. Co.* 36 Mich. 131.

The company, like any other principal, could limit the authority of its agents, and

White v. Providence Sav. Life Assur. Soc. (Mass.) 27 L. R. A. 398; *Mutual L. Ins. Co. v. Simpson* (Tex.) 28 L. R. A. 765; and *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* (C. C. A. 6th C.) 38 L. R. A. 33.

thus bind all parties dealing with them with knowledge of the limitation.

Globe Mut. L. Ins. Co. v. Wolff, 95 U. S. 329, 24 L. ed. 388; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 239, 24 L. ed. 691.

Having no authority to deliver the policy without payment of the premium, Thompson's willingness to do so, or to give credit, can create no contract with his principals.

Marland v. Royal Ins. Co. 71 Pa. 396; *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. 384, 42 Am. Rep. 618; *Greene v. Lycoming F. Ins. Co.* 91 Pa. 389; *Pottsville Mut. F. Ins. Co. v. Minnequa Springs Improv. Co.* 100 Pa. 142.

Where a principal conducts business through a general agent, and the latter's authority is expressly limited, to the knowledge of the party dealing with him, the principal cannot be held liable for any act of the agent within the limitation.

Marvin v. Universal L. Ins. Co. 85 N. Y. 278, 39 Am. Rep. 657; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Catoir v. American L. Ins. & T. Co.* 33 N. J. L. 487; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64; *Merserau v. Phenix Mut. L. Ins. Co.* 66 N. Y. 274; *Brown v. Massachusetts Mut. L. Ins. Co.* 59 N. H. 298, 47 Am. Rep. 205; *Davis v. Massachusetts Mut. L. Ins. Co.* 13 Blatchf. 462; *Ormond v. Fidelity Life Asso.* 96 N. C. 158; *Enos v. Sun Ins. Co.* 67 Cal. 621; *Hankins v. Rockford Ins. Co.* 70 Wis. 1; *Shoup v. Dwelling-House F. Ins. Co.* 51 Mo. App. 286; *Holloway v. Dwelling-House Ins. Co.* 48 Mo. App. 1; *Maier v. Fidelity Mut. Life Asso.* 47 U. S. App. 322, 78 Fed. Rep. 570, 24 C. C. A. 239; *Hamilton v. Fidelity Mut. Life Asso.* 27 App. Div. 480; *Imbrie v. Manhattan L. Ins. Co.* 178 Pa. 12.

Agent's knowledge is neither waiver nor estoppel.

Continental Ins. Co. v. Insurance Co. of Pennsylvania, 1 U. S. App. 201, 51 Fed. Rep. 884, 2 C. C. A. 535; *State Mut. F. Ins. Co. v. Arthur*, 30 Pa. 333; *Cooper v. Farmers' Mut. F. Ins. Co.* 50 Pa. 307; *Marland v. Royal Ins. Co.* 71 Pa. 393; *Foot v. Aetna L. Ins. Co.* 61 N. Y. 576; *Barteau v. Phenix Mut. L. Ins. Co.* 67 N. Y. 595; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Clennans v. Supreme Assembly Royal Soc. of G. F.* 131 N. Y. 485, 16 L. R. A. 33; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 536, 29 L. ed. 940; *Maier v. Fidelity Mut. Life Asso.* 47 U. S. App. 322, 78 Fed. Rep. 570, 24 C. C. A. 239; *Hamilton v. Fidelity Mut. Life Asso.* 27 App. Div. 480.

If Evans knew that Barnes was sick, and if Mrs. Barnes also knew it and told Evans at the time the policy was delivered, then delivery of policy and action of plaintiff was a fraud on the company.

8 Am. & Eng. Enc. Law, p. 644; *Bishop, Contr.* § 660; *Continental Ins. Co. v. Insurance Co. of Pennsylvania*, 1 U. S. App. 201, 51 Fed. Rep. 884, 2 C. C. A. 535; *Mitchell v. Smith*, 1 Binn. 110, 2 Am. Dec. 417; *Ather-* 45 L. R. A.

ton v. City, 3 Kulp, 402; *Swan v. Scott*, 11 Serg. & R. 163; *Columbia Bank & Bridge Co. v. Haldeman*, 7 Watts & S. 233; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 9 Am. Rep. 159.

A right of action cannot arise out of a fraudulent contract, or out of the fraudulent performance of a condition of the contract.

Fisher v. Saylor, 78 Pa. 84; *Lansdale v. Richardson*, 1 W. N. C. 413; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682.

The agreement of the parties was that the policy should not become binding unless delivered during the lifetime and good health of the applicant, and having been delivered by the company's agent when the applicant was sick, it never became operative and binding upon the company.

Bacon, Ben. Soc. § 272; *Kohen v. Mutual Reserve Fund Life Asso.* 28 Fed. Rep. 705; *Misselhorn v. Mutual Reserve Fund Life Asso.* 30 Fed. Rep. 545; *Joyce, Ins.* § 70; *Kendall v. Pacific Mut. L. Ins. Co.* 10 U. S. App. 256; *Paine v. Pacific Mut. L. Ins. Co.* 51 Fed. Rep. 689, 2 C. C. A. 459; *Bidwell v. St. Louis Floating Dock & Ins. Co.* 40 Mo. 42; *Bliss, Life Ins.* 134, 155; *St. Louis Mut. L. Ins. Co. v. Kennedy*, 6 Bush, 450.

The consummation of a contract of insurance is postponed until performance of a stipulated condition.

Cooke, Life Ins. § 24; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Rogers v. Charter Oak L. Ins. Co.* 41 Conn. 107; *Misselhorn v. Mutual Reserve Fund Life Asso.* 30 Mo. App. 589, 30 Fed. Rep. 545; *Whitley v. Piedmont & A. L. Ins. Co.* 71 N. C. 480; *Ormond v. Fidelity Life Asso.* 96 N. C. 158; *De Camp v. New Jersey Mut. L. Ins. Co.* 3 Ins. L. J. 89.

Messrs. John T. Lenahan and Edward A. Lynch, for appellee:

Health is a relative term, for probably no one is altogether free from ailments. To violate a warranty of good health it must appear that the sickness was one having a tendency to shorten life or permanently impair health; in fact, that it amounted to a vice in the constitution.

Richards, Ins. § 173; *Diets v. Metropolitan L. Ins. Co.* 168 Pa. 504; 2 Parsons, Contr. 5th ed. 466; *Miles v. Connecticut Mut. L. Ins. Co.* 3 Gray, 580.

The term "good health" does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity or from all the ills to which the flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and, to ordinary observation, and to outward appearance, his health is reasonably such that he may with ordinary safety be insured and upon ordinary terms, the requirement of good health is satisfied.

3 Joyce, Ins. § 2004; *Cushman v. United States L. Ins. Co.* 70 N. Y. 77; *Peacock v. New York L. Ins. Co.* 20 N. Y. 296; *Metro-*

politan L. Ins. Co. v. McTague, 49 N. J. L. 587, 60 Am. Rep. 661; *Smith v. Metropolitan L. Ins. Co.* 183 Pa. 504; *Schwartz v. Metropolitan L. Ins. Co.* 40 W. N. C. 573; *Home Mut Life Asso. v. Gillespie*, 110 Pa. 84.

While it is true that declarations may be received in evidence as admissions, still where the admission, whether oral or written, contains matters stated as mere hearsay, it has been made a question whether such matters of hearsay are to be received in evidence.

1 Greenl. Ev. § 202.

There is no magic in a proof of loss which prevents a correction of errors contained therein. Nor is it an estoppel. It was perfectly proper to show, as was done in this case, the circumstances under which the proofs of loss were made out, and the rest was for the jury.

Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. 34; *Home Benefit Asso. v. Sergeant*, 142 U. S. 691, 35 L. ed. 1160; *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 24 L. ed. 499; *Fisher v. Fidelity Mut. Life Asso.* 188 Pa. 1; *Biddle, Ins. §§ 1013, 1014*; *Mo-Masters v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 239; *Eilenberger v. Protective Mut. F. Ins. Co.* 89 Pa. 468; *Kister v. Lebanon Mut. Ins. Co.* 128 Pa. 565, 5 L. R. A. 646; *Meyers v. Lebanon Mut. Ins. Co.* 156 Pa. 420; *Richards, Ins.* 488; *Cushman v. United States L. Ins. Co.* 70 N. Y. 72; *Manhattan L. Ins. Co. v. Francisco*, 17 Wall. 672, 21 L. ed. 698.

Good health is not inconsistent with a slight attack of cold or temporary indisposition.

Home Mut. Life Asso. v. Gillespie, 110 Pa. 89.

A physician's certificate of death, when made *ex parte*, is not proof of the cause of death as against the opposite party; but when explained and affirmed at the trial as to its statements by the physician who made it, it may be considered as a part of the evidence.

Davey v. Aetna L. Ins. Co. 38 Fed. Rep. 650; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. 28; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793.

Sterrett, Ch. J., delivered the opinion of the court:

This appeal, from the judgment entered in an action on a life insurance policy issued by the defendant association, and dated November 14, 1893, presents the single question whether there was sufficient evidence of "good health" of the insured at the time the policy was delivered to go to the jury. On October 30, 1893, plaintiff's husband made application to defendant association for insurance on his life in the sum of \$5,000, payable upon his death to his wife, the plaintiff in this suit. Among other representations, the application contains the following: "That I am in good health, and free from any and all diseases, sickness, ailments, or complaints, trivial or otherwise." It is conceded that plaintiff's husband was in good

health at the time his application was presented to, and acted on by, the defendant association. The policy was issued and sent to the local agent, Lewis L. Evans, for delivery upon payment of the premium. The latter was not paid until November 28, 1893, at which time the policy was delivered to plaintiff. At the foot of the policy is printed the following provision: "The policy issued hereon shall not become binding until the first payment due thereon has been actually received by the association or its authorized agent during my lifetime and good health." It was admitted that the insured contracted an ordinary cold on November 25, 1893, and that he died of pneumonia six days thereafter; but it was claimed by the plaintiff, and the evidence tended to prove, that pneumonia, the disease of which Mr. Barnes died, did not "set in" until the day after the premium was paid and policy delivered. As stated in the learned trial judge's charge, the questions in dispute were: "The real contention here on the part of the plaintiff is that while Mr. Barnes was sick and in bed from Saturday, the 25th of November, until the night of Thursday, the 30th of November, when he died, still the sickness, up to and including the time when the policy was issued and the money paid by Mrs. Barnes, was simply trivial or temporary, as they believed, and that the serious illness which took Mr. Barnes's life set in the next day, or Wednesday evening, when he had a severe chill. The contention of the defendant is that Mr. Barnes was taken down on Saturday with a severe cold, which steadily grew worse, and that, at the time the premium was paid to Mr. Evans, Mrs. Barnes either knew or ought to have known her husband was a very sick man, and it was a fraud upon the company to have him insured." In a fair and impartial charge these and subordinate questions were submitted to the jury by the learned trial judge, who, among other things, said: "A temporary or slight cold, in a man of usual good health . . . would not constitute unsound health." In view of the instructions under which the case was submitted to the jury on all the evidence, their verdict in plaintiff's favor necessarily implies that they found as a fact that when the premium was paid and the policy delivered, on November 28, 1893, Mr. Barnes was, according to the true intent and meaning of the policy, in "good health." That finding of fact definitely settled the controlling question in the case. The jury were correctly instructed as to the meaning of the words "good health." As stated by a learned text writer, the term "good health" does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity or from all the ills to which flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward ap-

pearance his health is reasonably such that he may with ordinary safety be insured, and upon ordinary terms, the requirement of "good health" is satisfied. Slight troubles, temporary and light illness, infrequent and light attacks of sickness, not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health. In other words, the term "good health," when used in a policy of life insurance, means that the applicant has no grave, important, or serious disease, and is free from any ailment that seriously affects the general soundness and healthfulness of the system. A mere temporary indisposition, which does not tend to weaken or undermine the constitution at the time of taking membership, does not render the policy void. 3 Joyce, Ins. § 2004. "Colds are generally accompanied with more or less congestion of

the lungs, and yet in such a case there is no disease of the lungs which an applicant for insurance would be bound to state." *Cushman v. United States L. Ins. Co.* 70 N. Y. 77. It is unnecessary to refer in detail to the evidence. It was clearly sufficient to warrant the submission of the case to the jury on the question of the "good health" of the insured at the time the premium was paid, and the policy delivered to plaintiff, and other subordinate questions of fact in dispute. This is especially so in view of the fact that the evidence was more or less conflicting on all material questions of fact. The case was clearly for the jury. *Smith v. Metropolitan L. Ins. Co.* 183 Pa. 504; *Keatley v. Travelers' Ins. Co.* 187 Pa. 197.

There is nothing in either of the specifications of error that requires discussion. Neither of them is sustained.

Judgment affirmed.

RHODE ISLAND SUPREME COURT.

James MORAN
v.

CORLISS STEAM-ENGINE COMPANY.

(.....R. I.....)

1. An employer, knowing of the defective insulation of a crane operated by an electric motor, whereby there is a leakage of electricity from the motor to the hauling chain, although the current used is not dangerous, must be held liable for negligence in permitting employees to use the crane in that condition, when an employee is injured in consequence thereof by a dangerous current of electricity communicated to the chain by reason of some contact, outside the employer's premises, of the wire used for the motor and some other wire carrying a dangerous current.

2. The delegation to an independent contractor of the duty of keeping a crane operated by electricity in safe condition for use by employees does not relieve the master from liability for injury to a servant resulting from neglect of the duty.

(*Stines, J., dissents.*)

(July 8, 1899.)

PETITION by defendant for a new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Denied.*

The facts are stated in the opinions.

Messrs. James Tillingham, Henry W. Hayes, and Patrick F. Hallock for defendant.

Messrs. David S. Baker, Dennis H. Sheahan, and Lewis A. Waterman, for plaintiff:

The happening of the accident was *prima facie* evidence of negligence.

The cause or instrumentality was under the defendant's control, and such an accident would not ordinarily occur if due precautions were taken.

Coa v. Providence Gas Co. 17 R. I. 199; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 33; *Mulcairns v. Janesville*, 67 Wis. 25.

The defendant was using a dangerous appliance, and consequently the utmost care should have been taken to see that no harm resulted therefrom to its employees.

McLaughlin v. Louisville Electric Light Co. 100 Ky. 173, 34 L. R. A. 812.

Evidence as to how a thing is built after the accident had occurred is admissible as tending to show how it might have been built before.

Mulcairns v. Janesville, 67 Wis. 25.

The fact that some other company might have been negligent in permitting its wires to come into contact with the power wire of the Corliss Steam-Engine Company does not affect the liability of the Corliss Steam-Engine Company.

City Electric Street R. Co. v. Conery, 61 Ark. 381, 31 L. R. A. 570.

The master owes the servant the duty of providing a reasonably safe place to work in and reasonably safe appliances with which to do the work, and the delegation of this duty to an agent or independent contractor will not relieve the master from his responsibility for an injury to the servant resulting from its neglect.

2 Bailey, Personal Injuries Relating to Master and Servant, §§ 2561, 2571, 2895; *Trainor v. Philadelphia & R. R. Co.* 137 Pa. 148.

NOTE.—For negligence as to insulation of electric wires, see *Clements v. Louisiana Electric Light Co.* (La.) 16 L. R. A. 43; *Griffin v. United Electric Light Co.* (Mass.) 32 L. R. A. 45 L. R. A.

400; *McLaughlin v. Louisville Electric Light Co.* (Ky.) 34 L. R. A. 812; *Perham v. Portland General Electric Co.* (Or.) 40 L. R. A. 799.

Matteson, Ch. J., delivered the opinion of the court:

We think that the testimony shows that the crane at which the accident occurred was defectively constructed, either in that there was a metallic connection between the hauling chain and the motor, or at least that the insulation between them was not sufficient to prevent a leakage of electricity from the motor to the hauling chain, and that, though the leakage of electricity from the motor to the lifting chain and hauling chain was probably insufficient to be dangerous with no greater current than that designed to be used to operate the crane, yet it was liable to become dangerous from the presence of a more powerful current. The testimony shows that at the time of the accident, February 6, 1896, at a little after 5 o'clock in the afternoon, the wind was blowing at the rate of 40 miles an hour, with puffs at the rate of 60 miles—conditions favorable to the intermittent crossing or contact of electric wires. We think the jury would have been warranted in finding that the accident was due to the contact, outside of the defendant's premises, between the wire supplying electricity to the motor of the crane and some more heavily charged wire, whereby, by reason of defective insulation, possibly occasioned by the rubbing together of the wires, a current much exceeding the usual current was transmitted over the wire to the motor of the crane, and thence, by reason of the faulty construction of the crane, to the hauling chain. In so far, therefore, as the petition rests on the ground that the verdict is against the evidence, the question resolves itself into this: Was the defendant reasonably bound to have anticipated the influx to its premises of a current of electricity sufficiently powerful to dangerously charge the metallic portions of its crane, and did it take reasonable precautions for the protection of its servants employed in the handling of the crane? In view of the subtle and dangerous nature of electricity, the defendant, making use of it, was bound to the exercise of a very high degree of care for the protection of its employees against injury from such use. The accidental crossing or contact of wires, caused by their sagging or breaking, or by high winds and other causes, and the consequent charging of the wire carrying a light current with a dangerous current from a more heavily charged wire, is, in our opinion, of sufficiently frequent occurrence to have suggested to the defendant the liability to accident from that cause, and to have required it to take precautions against injury to its employees thereby. The testimony shows that light shocks had been received from time to time by the men from the lifting chain, and the defendant had supplied rubber gloves to be used by the pourers on that account. These shocks were notice to the defendant of the leakage of electricity from the motor to the chain, and were also notice that if, from any cause, a sufficient current of electricity was brought to the motor, the leakage might be sufficient, not

only to charge the lifting chain, but also the hauling chain, or other metallic portions of the crane, unless properly insulated, with a dangerous current. Having this notice, we think the defendant was bound to have made the insulation between the motor and the hauling chain so complete that the use of the hauling chain would have involved no risk of injury by electricity. Our opinion is, therefore, that the verdict was not against the evidence on the issue of defendant's negligence.

The testimony with reference to shocks received by Houghton and Mahoney subsequent to that received by the plaintiff, to which exception was taken, was, we think, admissible, as tending to show the condition of the chain, as to insulation, at the time of the accident.

The defendant also took the point that, as at the time of the accident to the plaintiff the cranes were, as it contends, in the possession of the General Electric Company, an independent contractor, and were not delivered to it until some time in March, 1896, the defendant, not having control of the cranes, was not responsible. The court refused to so charge, and the defendant excepted. We think the request was properly refused. The master owes to servants the duty of supplying reasonably safe appliances for them to do the work required of them; and the delegation of this duty to another, though an independent contractor, will not relieve the master from liability for an injury to a servant resulting from a neglect of the duty. *Trainor v. Philadelphia & R. R. Co.* 137 Pa. 148; 2 Bailey, *Personal Injuries Relating to Master & Servant*, §§ 2561, 2571.

Petition for new trial denied, and case remitted to the common pleas division, with direction to enter judgment on the verdict.

Stiness, J., dissenting:

On account of the somewhat peculiar features of this case, I think it is proper to state the grounds upon which I differ from the opinion of the court. I fully agree with the rule that in dealing with a dangerous element the highest degree of care is required. Applying this rule, however, I fail to see that the defendant was guilty of negligence. Up to the time of the accident the insulation of the machine, though not perfect, was such that it was not dangerous. No harm had come from it, and the leakage of electricity was slight. The current in use was not dangerous in itself. The court finds that the accident was due to a more powerful current from the contact of wires outside the defendant's premises, probably caused by a violent storm, and holds that the defendant was bound to have anticipated such a possibility. This is the statement to which I am unable to agree. There is nothing to show that the defendant knew that such a contact had ever occurred before, or was likely to occur, except, as everybody may know, that in a violent storm poles may be blown down. True, this is a possibility. So it is a possibility that freshets may occur. Yet railroad

companies, which are held to the highest degree of care, are not held liable for damage caused by extraordinary and unexpected floods and storms. Reasonable foresight is not held to go to the limit of bare possibilities. In the absence of anything to show the defendant's knowledge or control of outside wires, or any insecurity of the poles on which they were strung, or their adjacency to the wires leading to its factory, or a reasonable expectation that its wires were liable to become charged by other wires, it seems to me that the principle which applies to railroads under similar conditions is analogous and proper. I do not think that a duty should be charged upon a mere possibility, which is all that appears in this case. Except for the electrical current from outside, there is nothing to show negligence.

STATE of Rhode Island
v.

Horace P. BECK.

(.....R. I.)

Authority to practise medicine and surgery under Gen. Laws, chap. 165, includes the right to practise dentistry as a branch of surgery, without having complied with the requirements specially provided by Gen. Laws, chap. 155, as amended by Pub. Laws, chap. 470, as a condition for practising dentistry.

(May 8, 1898.)

ON DEMURRER to a plea to an indictment charging defendant with unlawfully practising dentistry without having first obtained a certificate from the board of registration. *Demurrer overruled.*

Mr. Willard B. Tanner, Attorney General, for the State.

Mr. Frank F. Nolan for defendant.

Tillinghast, J., delivered the opinion of the court:

The indictment charges, in substance, that the defendant did unlawfully practise dentistry in Newport, on the 1st day of August, 1898, without first having obtained a certificate from the board of registration in dentistry, and without first having caused his name and place of business to be registered with said board. The defendant has filed a special plea in bar to said indictment, in which he sets up, in brief, that, at the time aforesaid, he held a certificate in due form, from the state board of health, that he was qualified to practise medicine and surgery, by reason of the possession by him of a diploma from a reputable and legally chartered college, indorsed by said board of health, by virtue of which he was qualified to practise medicine and surgery in all its branches upon all parts of the human body,

NOTE.—That a dentist is not exempt from jury duty as a "practitioner of medicine," see *State, Flickinger, v. Fisher* (Mo.) 22 L. R. A. 799.

45 L. R. A.

including the teeth. To this plea the attorney general has demurred, on the ground that a certificate from the state board of health, authorizing the defendant to practise medicine and surgery, as provided in R. I. Gen. Laws, chap. 165, does not authorize him to practise dentistry, without having first obtained a certificate from the board of registration in dentistry, and otherwise qualifying himself to practise dentistry, in accordance with the provisions of R. I. Gen. Laws, chap. 155, as amended by R. I. Pub. Laws, chap. 470.

The question presented for our decision, under the pleadings, therefore, is whether the defendant had the right, by virtue of his authority to practise medicine and surgery, to practise dentistry. The answer to this question depends upon the construction to be given to the statute regulating the practice of dentistry, taken in connection with that regulating the practice of medicine, as independent of these statutes, there can be no doubt of the right of the defendant to practise dentistry.

The first law regulating the practice of dentistry in this state was passed on June 1, 1888. See R. I. Pub. Laws, chap. 712. At that time there was no law regulating the practice of medicine. R. I. Gen. Laws, chap. 155, § 4, as amended by R. I. Pub. Laws, chap. 470, § 1, passed May 21, 1897, which is the same, in effect, as § 4 in the original act, provides that "all persons who hereafter intend to enter the practice of dentistry in this state shall appear before said board and be examined with reference to their knowledge and skill in dentistry; and to such as pass a satisfactory examination, certificates to that effect, signed by the president and secretary of the board, shall be issued; and thereupon the names of such persons receiving certificates as aforesaid shall be registered with said board." Section 6, as amended by R. I. Pub. Laws, chap. 470, § 3, prescribes a penalty for practising, or attempting to practise, dentistry in violation of the provisions of the act. On May 16, 1895, the general assembly passed an act regulating the practice of medicine (see R. I. Pub. Laws, chap. 1353), said act now constituting R. I. Gen. Laws, chap. 165. This act makes it unlawful for any person to practise medicine or surgery, in any of its branches, without first exhibiting and registering under oath, in the town or city clerk's office in the town or city where he resides, his authority for so practising medicine, as prescribed in the act, together with his age, address, place of birth, and the school of medicine to which he proposes to belong. The authority to practise medicine and surgery, under said act, is a certificate from the state board of health, in the passage of the act relating to the practice of dentistry, was to protect the public from being imposed upon by persons who, while holding themselves out as competent to extract, clean, or repair teeth, or replace them by artificial ones, yet, from want of instruction and skill in the art, were

wholly unfit to perform such a delicate and highly important function. See *State v. Mylod*, 20 R. I. pt. 3, 238, 41 L. R. A. 428, as to the object of said chapter 165. It is matter of common knowledge that, before the passage of said act, the merest novice in the art was frequently employed to extract and operate upon the teeth, to the unnecessary discomfort, and sometimes to the permanent injury, of his patient. These persons were not physicians, and, as a rule, had little or no scientific knowledge of the human body, and the only knowledge which they possessed of the art of dentistry was that which they had acquired by a meager and haphazard practice. Such knowledge, while it might have been considered sufficient in the days of our grandfathers, is wholly inadequate for present demands; for while dentistry, as an independent vocation, may have had a humble and comparatively recent origin, yet it has now become a very important branch of medical science. See Rehfuess, *Dental Jur.* 34, 42. As said by Brace, J., in *State v. Fisher*, 119 Mo. 356, 22 L. R. A. 799: "The fact that this branch of the medical profession has grown to such proportions as to have its own independent colleges, and to confer its own degrees, and that it has become necessary that its practice should be regulated by statute, . . . indicates the importance of the exercise of its functions to the public welfare." See Rehfuess, *Dental Jur.* title *History of Dental Legislation*, 205.

From what we have thus said it would seem clear that the reason for the passage of said chapter 155, and the amendments thereto, does not apply to the practice of dentistry by regular physicians. A "physician" is one who practises the art of healing disease and of preserving health; a prescriber of remedies for sickness and disease. See 4 *Century Dict.* He is presumed to be familiar with the anatomy of the human body in its entirety; to understand the science of physiology and the laws of hygiene; and to be able to minister, as far as may be, to the relief of pain, disease, and physical ailments of all sorts and kinds whatsoever. And while it is true that many physicians devote themselves entirely to some branch of the medical profession for which they have made special preparation, yet the fact that they have first qualified themselves generally for the practice of medicine and surgery in all its branches, and obtained a license to pursue such practice, must be held to entitle them to operate upon the teeth and jaw, as well as upon other parts of the human organism, unless the statute now under consideration prohibits them. By the strict terms of said statute, taken by itself, it doubtless does prohibit physicians, as well as all other persons, from practising dentistry without first obtaining the required certificate, as the inhibition is general, and no exception is made in favor of physicians. Said statute, however, should not, in our judgment, be taken by itself, but should be construed in connection with said chapter 165, which,

while perhaps not strictly *in pari materia*, yet deals with the general subject of the practice of medicine and surgery, and prescribes the qualifications requisite therefor.

A familiar rule in the construction of statutes is that a statute must be construed with reference to the whole system of which it forms a part, and that statutes upon cognate subjects may be referred to though not strictly *in pari materia*. Sutherland, *Stat. Constr.* 284. Another rule is that a penal statute must be strictly construed, and that the act constituting the offense must be within both the letter and the spirit of the statute. *Lair v. Killmer*, 25 N. J. L. 522; *Western U. Teleg. Co. v. Axtell*, 69 Ind. 199. And in the construction of such statutes it sometimes becomes the duty of courts, in giving effect to the manifest intention of the legislature, to restrain, enlarge, or qualify the ordinary and literal meaning of the language used. *Noble v. State*, 1 G. Greene, 325. Now, by the express terms of said chapter 165, a person holding a certificate, in accordance with the provisions thereof, is authorized to practise medicine and surgery in all its branches. Dentistry is now a well-recognized branch of surgery. A dentist is a dental surgeon. He performs surgical operations upon the teeth and jaw, and, as incidental thereto, upon the flesh connected therewith. His sphere of operations, then, as before intimated, is included in the larger one of the physician and surgeon. A fair and reasonable construction of the two statutes, taken together, therefore, comes to this: That the general assembly, by the use of the broad and general language used in said chapter 165 relating to the authority to practise medicine and surgery, must be held to have intended to except physicians and surgeons from the restrictions imposed upon other persons regarding the practice of dentistry by said chapter 155 and the amendments thereto. This view is strengthened by the fact, which is common knowledge, that it has always been the custom in this state, and probably everywhere else, for physicians to treat ailing teeth, to extract teeth, and to perform various other professional services which technically come within the purview of dentistry. Physicians who reside in the country towns especially have always been called upon, to a greater or less extent, for the performance of such services. And to now prohibit them from thus treating their patients would be a source of great inconvenience, and in many cases of extreme hardship and suffering to the latter, as well as an interference with the proper and legitimate functions of the former. And, as said by defendant's counsel, "any construction of the law that prevents the general practitioner from treating any part of the human body, or restricts him in the discharge of his professional duties, would be a menace to the public health, and would deprive the physician of the right to practise a branch of his profession that is as old as the history of medicine itself." In defining the term "medicine," in the case of *Re Medico-Chirurg-*

gical College, decided Feb. 27, 1899, 190 Pa. 121, Judge Dean says: "We take the word 'medicine' in this common signification, which, in the beginning, and yet, with most of us, includes all learning having for its object the care of the health and the cure of the ills of the human body. Even within the recollection of some of us, the practising physician or family doctor kept in his own office his drugs, compounded them himself, and, not seldom, maintained a dental chair, wherein he seated his patients and dosed or extracted their ailing teeth. He had not only been taught dental surgery and pharmacy, but practised both, under his degree from a college of medicine." By the express exemption of physicians and surgeons from the operation of similar laws in several other states the principle that dentistry is a branch of medical science has been recognized, as is shown in the following instances: Section 1, Connecticut law, approved March 31, 1887 (Laws 1887, p. 687), provides that "nothing in this act shall interfere with physicians in the discharge of their professional duties." Section 7, Louisiana law, approved March 10, 1880 (Acts 1880, No. 32, p. 33), provides that "nothing in this act shall apply to regular physicians and surgeons." Section 8, Maine law, approved March 4, 1891 (Laws 1891, p. 33), provides that "nothing in this act shall be so construed as to restrict or interfere with physicians and surgeons in the discharge of their professional duties." Section 8, Maryland act, approved April 7, 1886 (Laws 1886, p. 600), provides that "nothing shall be so construed as to interfere with the rights and privileges of resident physicians and surgeons in the discharge of their professional duties." Section 12, Michigan act of September 9, 1883 (Acts 1883, No. 140, p. 146), provides that "nothing in this act shall be construed so as to interfere with physicians and surgeons in their practices as such." Section 1, Mississippi act, approved February 25, 1882 (Laws 1882, p. 41), provides that "the provisions of this act shall not apply to any person holding the diploma of doctor of medicine from any reputable medical college." Section 3, New Hampshire law (Gen. Laws, p. 319), provides that "it shall not be lawful for any person, who is not duly

authorized to practise medicine or surgery, to practise dentistry, unless," etc. Section 1, North Carolina law (Laws 1879, p. 265), provides that "it shall be unlawful for any person excepting regularly authorized physicians and surgeons to commence the practice of dentistry," unless, etc. And, as well stated in the brief of defendant's counsel, in connection with the above citations, "the fact that in so many instances the physicians and surgeons are expressly exempt from the provisions of the dental laws shows that from the beginning they have been recognized as competent to practise dentistry, and that it is a part of their professional duties, and no doubt the provision exempting them was incorporated for the sole purpose of giving expression in the law to what is a recognized fact, and to foil any attempt to prevent them from practising all branches of their profession through any narrow interpretation of the law." In *State v. Vander-sluis*, 42 Minn. 129, 6 L. R. A. 119, the court, in speaking of a similar law, says: "The act before us could hardly be so construed as to limit the right of the surgeon under his license."

Again it is to be borne in mind that the statutes under consideration are highly penal in their nature; and it is a familiar rule that, in the construction of such statutes, if there is a reasonable doubt as to whether the acts done are within the meaning of the statute, the person accused of the violation thereof is entitled to the benefit of that doubt. Endlich, *Interpretation of Statutes*, §§ 329, 330; *State v. Mylod*, 20 R. I. pt. 3, 238, 41 L. R. A. 428; *Com. v. Standard Oil Co.* 101 Pa. 150; *The Enterprise*, 1 Paine, 32; *Hines v. Wilmington & W. R. Co.* 95 N. C. 435; *State v. Droune*, 20 R. I. 302.

For the reasons above given, we are of opinion that it was not the intention of the general assembly, in the passage of said chapter 155 and the amendments thereto, to preclude physicians and surgeons from practising dentistry, or at any rate, that there is a reasonable doubt whether they were intended to be thus precluded; and hence the demurrer must be overruled, and the plea sustained.

Demurrer overruled, plea in bar sustained, and indictment quashed.

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* C. B. NOLAN,
Attorney General,
v.

MONTANA RAILWAY COMPANY *et al.*

(21 Mont. 221.)

1. A statute regulating the consolidation

NOTE.—Restrictions on consolidation of parallel or competing railroads.

After the railroad system of the country became somewhat established so parallel and competing lines began to appear a tendency was manifested on the part of the railroads to con-

solidate or unite the interests of these parallel roads for the purpose of lessening the effect of the competition. At the same time the people adopted a policy antagonistic to such consolidation, represented sometimes in constitutional provisions, sometimes in statutes, and sometimes in decisions.

2. Parallel railroads are those which

solidate or unite the interests of these parallel roads for the purpose of lessening the effect of the competition. At the same time the people adopted a policy antagonistic to such consolidation, represented sometimes in constitutional provisions, sometimes in statutes, and sometimes in decisions.

run in one general direction, traversing the same section of country, and running within a few miles of one another throughout their respective routes.

3. **Competing railroads within the meaning of Const. art. 15, § 6,** comprehend, not only railroads which run between the same two principal points on their own lines, but those which, having one common terminus, are yet actually connected with other railroads, and which by arrangements with them are so related to one another in fact as to give them the opportunity, by geographical situation, directly to cut rates to principal or terminal points.
4. **The consolidation of corporations is a merger, a union, or amalgamation,** by which the stock of the two is made one, their property and franchises combined into one, their powers become the powers of one, their names merged into one, and the identity of the two practically, if not actually, runs into one.
5. **A lease of a railroad, fair in its terms, for ten years, does not involve**

Against public policy.

In some instances the courts have declared such attempted consolidation to be against public policy or beyond the power of the railroads to accomplish, although no statute expressly forbade it.

The courts have declared that the purchase by a railroad company of stock in parallel and competing lines is contrary to public policy and void. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849.

It is contrary to the public policy of the state of Georgia for one of the parallel lines of railroad which have been authorized between the seaboard and the interior to attempt to secure a controlling interest in another line. *Central R. Co. v. Collins*, 40 Ga. 582.

Where a Constitution has provided that the legislature shall have no power to authorize consolidation between parallel and competing railroads the courts will hold such consolidation void in the absence of legislation. *Hamilton v. Savannah, F. & W. R. Co.* 49 Fed. Rep. 412.

This question is somewhat different from that of the power of one corporation to own stock in another without express permission. Some cases have denied such power, and they might be regarded as authority on this question; but since they involve the broader question of the right to purchase such stock at all they have not been mentioned in this note.

One case, however, may be mentioned which held that the purchase by one railroad of another with a view to extinguish competition is *ultra vires* unless the power is expressly given by statute. *Elkins v. Camden & A. R. Co.* 36 N. J. Bq. 5.

Whenever the legislature authorizes the consolidation the courts cannot declare the act to be against public policy.

So, if the legislature has authorized the leasing of one parallel road by another the courts cannot declare the lease void as against public policy. *Gere v. New York C. & H. R. R. Co.* 10 Abb. N. C. 193.

Furthermore, all courts have not found public policy to be all on one side of this question. In one case it was held that a contract between rival railroad companies which prevents competition is not necessarily contrary to public policy and therefore illegal in itself. The court says: The theory which formerly obtained that the public is benefited by unrestricted competi-

an abandonment of the railroad enterprise or come within the prohibition of Const. art. 15, § 6, against consolidation of parallel or competing railroads or the uniting of their business or earnings.

(June 20, 1898.)

PROCEEDING by the attorney general to have a lease entered into between defendants declared invalid and to enjoin defendants from carrying out its terms. *Denied.*

The facts are stated in the opinion.

Mr. C. B. Nolan, Attorney General, *in propria persona*:

The Constitution has application to a leasing, and "consolidation of stock, property, or franchise" includes the leasing in question.

Beach, Railways, § 535; *State, Leese, v. Atchison & N. R. Co.* 24 Neb. 143; *Langdon v. Branch*, 37 Fed. Rep. 463, 2 L. R. A. 120.

Messrs. W. W. Dixon, William Sealmon, and William H. DeWitt, for defendants:

tion between railroads has been so manifestly disapproved by the results which have generally followed its adoption and practise that the hope of any permanent relief from excessive rates through the competition of parallel or rival roads may, as a rule, be characterised as illusory and fallacious. *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 310.

This ruling is based upon remarks to similar effect in *Hare v. London & N. W. R. Co.* 2 Johns. & H. 80.

Power of legislature to prevent consolidation.

The legislature has power to prevent the consolidation of parallel and competing lines of railway. *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849.

A state Constitution prohibiting the consolidation of competing lines does not violate the commerce clause of the United States Constitution. *Louisville & N. R. Co. v. Com.* 97 Ky. 675.

So, the assumption of the right by a state legislature to forbid the consolidation of parallel and competing lines of railroad does not interfere with the power of Congress to regulate commerce. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849.

Statutory provisions forbidding consolidation.

The Missouri act of March 24, 1874, providing that it shall not be lawful for railroads to consolidate when by so doing they will deprive the public of the benefit of competition, forbids only the consolidation of such roads as do not form, when consolidated, one continuous line, but may be made up of parallel and competing lines. *Leavenworth County Comrs. v. Chicago, R. I. & P. R. Co.* 134 U. S. 699, 33 L. ed. 1070.

A statutory provision against the consolidation of parallel and competing lines of railway will apply to a consolidation the unavoidable result of which will be to give one company a monopoly of all traffic in one half of a state, as well as of all transcontinental traffic north of a certain other distant line. *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, *Reversing* 73 Fed. Rep. 933, which held that the statute did not apply because passed after the charter of the road permitting it to consolidate with other roads had taken effect, so that to enforce the statute would impair the obligation of a contract.

If § 923 is in conflict with §§ 911 and 912, § 923 prevails over §§ 911 and 912.

Steele v. Gilpatrick, 18 Mont. 453.

There may be a consolidation which is constitutional under art. 16, § 6; that is to say, railroads may consolidate if their lines are not parallel or competing.

If one construction of a law is constitutional and another is unconstitutional, it is presumed that the legislature intended to do that which was constitutional, and not the contrary.

Cooley, Const. Lim. 6th ed. 218, 219; *Grenada County Supers. v. Brogden*, 112 U. S. 261, 28 L. ed. 704; *United States v. Sanges*, 48 Fed. Rep. 78; *Newland v. Marsh*, 19 Ill. 376; *Atty. Gen. v. Eau Claire*, 37 Wis. 438.

Even if the "consolidation" portion of § 923 is unconstitutional, still it may be severed from the "leasing" portion of that section, and, if two provisions in a law are

If from reasons of public policy the legislature declares that a railway company shall not become the purchaser of a parallel or competing line the purchase is not the less unlawful because of a proposition to make it take the form of a judicial sale. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849.

Railroad companies owning competing lines will not be permitted to appoint a common governing committee to fix the rates to be charged between certain points, especially where the state Constitution provides that no railroad shall consolidate the stock, property, or franchises with or in any way control any railroad company having under its control a parallel or competing line. *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335.

A constitutional provision prohibiting contracts between railroads which will tend to lessen competition will be violated by a proceeding by which the stock of a projected corporation is turned over to another corporation under contract to construct the road, and by the latter to a railroad corporation having a line already in operation, where the projected line would when completed compete with it. *Langdon v. Branch*, 37 Fed. Rep. 449, 2 L. R. A. 120.

The Missouri statute (Rev. Stat. § 2569), which prohibits a railroad company within the state from owning, operating, or managing any other parallel or competing railroad within the state, applies only where both the roads are situated within the state, and to roads that are substantially competitors for business. It refers to such competition as is liable to have an appreciable effect upon rates. *Kimball v. Atchison, T. & S. F. R. Co.* 46 Fed. Rep. 888.

That for 10 miles two diverging lines approaching a common center become parallel and competing does not bring them within the provisions of a Constitution prohibiting the consolidation of parallel and competing lines. *State v. Atchison & N. R. Co.* 88 Neb. 437.

An act prohibiting the consolidation of parallel and competing lines does not prevent such lines from making traffic contracts for the partial use of their respective lines beyond the line of parallelism. *People v. O'Brien*, 111 N. Y. 1, 2 L. R. A. 255. This was said concerning street railway companies.

The mere fact that it is possible to transfer cars from one road to another does not bring them within the provisions of the statute permitting consolidation of roads which are so connected as to permit passage of cars over them 45 L. R. A.

separable, and one is unconstitutional, it does not affect the other which is constitutional.

Dunn v. Great Falls, 13 Mont. 61.

Section 923 is a direct legislative authority granting the power to make the lease, and meets the decisions in the cases which hold that such power must be granted by statute.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 684, 692, 40 L. ed. 849, 853, 856; *East Line & R. River R. Co. v. State*, 75 Tex. 434; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 395, 402, 36 L. ed. 738, 749, 752; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 45, 54, 33 L. ed. 55, 63, 66; *Reese, Ultra Vires*, § 137, and cases cited.

continuously if they are in fact parallel and competing roads. *State v. Vanderbilt*, 37 Ohio St. 590.

A prohibition against one railroad company's gaining control over another railroad company owning or having under its control a parallel and competing line applies to a railroad company which attempts to acquire another railroad which competes with some of its leased branches. *Pennsylvania R. Co. v. Com. (Pa.)* 4 Cent. Rep. 501, Affirmed in *Com. v. Beech Creek C. & S. W. R. Co.* 1 Pa. Co. Ct. 223.

The lease of a road is not within the terms of a constitutional provision against consolidation of competing lines by building a line to compete with the leased road. *Catawissa R. Co. v. Philadelphia & R. R. Co.* 3 Pa. Dist. R. 111.

Under the Nebraska statutes two railroads cannot be consolidated unless they will form a continuous line without break of gauge or interruption. *State, Leese, v. Atchison & N. R. Co.* 24 Neb. 148.

The New Hampshire act of December 27, 1860, prohibited traffic arrangement between competing railroads entered into to modify the disastrous effects of competition between them. *Manchester & L. R. Co. v. Concord R. Corp.* 69 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319.

The prohibition in the Pennsylvania Constitution of the consolidation of parallel and competing lines of railway does not apply to street railways. *Shipley v. Continental R. Co.* 13 Phila. 128; *Gyger v. Philadelphia City Pass R. Co.* 136 Pa. 96, 9 L. R. A. 869.

Permission to consolidate.

A clause in a railroad charter permitting it to purchase and hold any road constructed by another corporation will be restricted to roads forming a continuous line with it, and will not be extended to include parallel and competing lines, so that a subsequent constitutional provision against the consolidation of competing roads will be inapplicable as impairing the obligation of a contract. *Louisville & N. R. Co. v. Com.* 97 Ky. 675.

The mere fact that railroad lines are connected does not in the statutory sense cause them to form continuous lines. The two form a continuous line of railroad with each other when they form a line or route extending or continuing in substantially the same general direction connecting two principal points. *Peo-*

After the Constitution was adopted, the legislature enacted an elaborate statute,—§ 911, Civil Code,—defining the method of consolidating stock, franchises, and property of railroad companies. This practically contemporaneous construction by the legislature is of some value.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 690, 40 L. ed. 855; *Gere v. New York C. & H. R. R. Co.* 19 Abb. N. C. 202; *Mills v. Central R. Co.* 41 N. J. Eq. 1; *Mackintosh v. Flint & P. M. R. Co.* 34 Fed. Rep. 582; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5; *Tippecanoe County Comrs. v. Lafayette, M. & B. R. Co.* 50 Ind. 110; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 404, 38 L. ed. 738, 753; *Archer v. Terre Haute & I. R. Co.* 102 Ill. 493; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U.

S. 290, 312, 30 L. ed. 83, 93, 118 U. S. 630, 30 L. ed. 284; 5 Thomp. Corp. 5891.

It is, in nearly all, if not all, cases treated as a question of fact; and in some cases it has been held to be a fact of which the court will take judicial notice from the geographical situation.

Gulf, O. & S. F. R. Co. v. State, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335; *Cumberland Valley R. Co. v. Gettysburg & H. R. Co.* 177 Pa. 519; *Hafer v. Cincinnati, H. & D. R. Co.* 29 Ohio L. J. 68; *Kimball v. Atchison, T. & S. F. R. Co.* 46 Fed. Rep. 889; 6 Am. & Eng. Enc. Law, 2d ed. p. 826; *State v. Vanderbilt*, 37 Ohio St. 590; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 691, 40 L. ed. 849, 856.

It is enough that by the lease the connected roads form a continuous line, and it is not

ple v. Boston, H. T. & W. R. Co. 12 Abb. N. C. 230.

The fact that in certain cases the legislature has seen fit to sanction the consolidation of parallel and competing roads does not militate against the general principle that the consolidation of competing lines is contrary to public policy. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849.

Where by a railroad charter a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads which has remained unexecuted, it is within the power of the legislature to declare by subsequent acts that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines. *Pearshall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838.

Leases.

A lease of a parallel and competing railroad where prohibited by the Constitution is void *ab initio* so that no action can be maintained on a covenant therein notwithstanding the lessee has had the benefit of the lease. *East St. Louis Connecting R. Co. v. Jarvis*, 92 Fed. Rep. 735. A foreign corporation is within the prohibition of a state Constitution against the leasing of a railroad to a competing line. *Von Steuben v. Central R. Co.* 4 Pa. Dist. R. 153.

Belt lines of railroad which are designed to connect the terminal of railroads reaching a certain city with the ferries on the river front, although not on the same streets, are, in case they compete for the principal business transacted, both parallel and competing lines within the meaning of a constitutional provision forbidding such lines to consolidate. *East St. Louis Connecting R. Co. v. Jarvis*, 92 Fed. Rep. 735.

Under a statute permitting one road to lease another provided the road so leased should be so connected as to form a continuous line, it is enough that by the lease the connecting roads form a continuous line, and it is not essential that the leased line be an extension from either terminus of the lessee's road. It is immaterial that the leased road connects with the lessee at an intermediate station. The evil which was intended to be guarded against was the placing of parallel and competing lines under one management, and the control by one company of the general railroad affairs of the state through the leasing of roads remote from its own and with which it had no physical or direct business connection. It was not intended to prevent a company with a long road from leasing branches or lines with which it establishes continuous lines from their several termini to 45 L. R. A.

each of its own. *Hancock v. Louisville & N. R. Co.* 145 U. S. 409, 36 L. ed. 755.

In New York there is no statutory prohibition of the uniting of parallel and competing lines of railroad by means of a lease. *Gere v. New York C. & H. R. R. Co.* 19 Abb. N. C. 193.

Under a statute permitting a railroad company to take a lease of another railroad that may be connected with it a lease may be taken of a competing road providing that when united the two roads are capable of forming continuous lines. And it is not essential that the connection of the roads should be at their termini. It is sufficient if one unites with the other. And this power is not affected by the provisions of a statute permitting the merger of railroads which do not form parallel or competing lines. *Wallace v. Long Island R. Co.* 12 Hun, 460.

What are competing lines.

Where the termini at one end of the two roads are different they can hardly be called competing lines so that acquiescence by the state in their consolidation will show that the state interprets the charter of the dominant road as giving it power to acquire parallel and competing lines. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849.

Lines are parallel and competing which connect two important cities constituting their termini and which are natural competitors for the traffic between certain sections of the country, and the object of which is to enable one of the roads to obtain a monopoly of all traffic through one half of the state. *Ibid.*

Two railroads which have each a through and separate line of communication between two given points are competing roads for the traffic between such points. *Texas & P. R. Co. v. Southern P. R. Co.* 41 La. Ann. 970.

It is not necessary that lines shall be parallel in a mathematical sense in order to bring them within the prohibition of a statute forbidding the consolidation of parallel lines. *People v. Boston, H. T. & W. R. Co.* 12 Abb. N. C. 230.

A constitutional prohibition of consolidation of parallel and competing lines applies to lines which are in fact parallel and competing, although one of them reaches the common terminus only by means of a third line with which it has a traffic arrangement, and it also applies to lines which are only projected and not completed. *Pennsylvania R. Co. v. Com. (Pa.)* 4 Cent. Rep. 495. Affirmed in *Com. v. South Pennsylvania R. Co.* 1 Pa. Co. Ct. 214.

The fact that railroads cross each other does not necessarily establish the fact that they are competing lines, and the question whether they are or not is a matter of fact to be found by

essential that the leased line be an extension from either terminus of the lessee's road.

Shelby R. Co. v. Louisville & N. R. Co. 145 U. S. 409, 38 L. ed. 755.

The language as to leasing or purchasing competing lines, which is found in some Constitutions, is omitted in our own.

To give the clause as to uniting business or earnings full effect, consistently with the others, and with the evident intention, it would seem that it would necessarily have to be construed to apply only to "pooling" contracts, for the pooling of business or earnings between corporations, controlling competing lines of railroad, where such contracts would have the effect to destroy competition.

That was the evil apparently aimed at, and it was doubtless thought it would settle the vexed question as to the legality of such con-

the jury. *East Line & R. River R. Co. v. Rushing*, 69 Tex. 306.

Railway companies by reason of their relations with or control or management of lines other than their own may become, within the meaning of the law, competing lines, although the railways owned by them may not in fact reach the same termini. *East Line & R. River R. Co. v. State*, 75 Tex. 434.

Lines which are not in their general features competing do not become so merely because there is incidental competition between them by reason of their crossing and intersecting other lines that serve as feeders. *Burke v. Cleveland, C. C. & I. R. Co.* 22 Ohio L. J. 11.

The word "parallel" is used in the sense of two roads conforming in their general direction. *Louisville & N. R. Co. v. Com.* 97 Ky. 675.

Roads are competing if they are constructed to reach and connect the business centers on two waterways for the traffic on which there will be natural competition, although they are not actually engaged in cutting rates, and a portion of the distance between the destination is covered by traffic arrangements with other roads. *Hafer v. Cincinnati, H. & D. R. Co.* 29 Ohio L. J. 68.

Railroads which approach the connecting point at right angles and which could not compete for the business seeking either, are not parallel or competing lines within the meaning of a provision in the Constitution prohibiting such lines to consolidate. *Cumberland Valley R. Co. v. Gettysburg & H. R. Co.* 177 Pa. 519.

That lines run in the same direction, in the same general section of the state, does not constitute them parallel or competing lines within the meaning of a constitutional provision prohibiting the consolidation of such lines, if they have not the same termini and cannot compete for the same business; and the fact that one intersects with another line which might on occasions shorten a haul reached by a longer haul on one of the consolidated roads is not such competition as concerns the public. *Rogers v. Nashville, C. & St. L. R. Co.* 91 Fed. Rep. 299, 33 C. C. A. 517.

Roads which do not touch any two common points, and between which for more than 40 miles another road is interposed, while not more than 1 per cent of the traffic of one, which is at most a local road, would in any event pass over the other, are not competing lines. *Kimball v. Atchison, T. & S. F. R. Co.* 46 Fed. Rep. 888.

The Michigan statute provides merely that the roads which may consolidate shall not have the same terminal points. *Dewey v. Toledo, A. A. & N. M. R. Co.* 91 Mich. 351. 45 L. R. A.

tracts by absolutely prohibiting them by constitutional enactment.

That such an evil is not thought by some to be so great as that of a wholesale prohibition of pooling contracts, see—

Manchester & L. R. Co. v. Concord R. Corp. 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319.

Many of the states, as well as this, have passed statutes offering every advantage to railroads, to unite by lease, sale, or consolidation.

2 Stimson, Am. Stat. §§ 8721, 8722, 8730. See *United States v. Western U. Teleg. Co.* 50 Fed. Rep. 28.

Hunt, J., delivered the opinion of the court:

The attorney general has instituted this

The court will take judicial notice of the fact that two railroads touching the same points are competing roads. *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 2 Inters. Com. Rep. 335.

Enforcement of law.

The performance of contracts in violation of the state Constitution prohibiting the consolidation of competing lines will be enjoined. *Clarke v. Central R. & Bkg. Co.* 50 Fed. Rep. 338, 15 L. R. A. 683.

The Georgia Constitution provides that the general assembly shall have no power to authorize a railroad company to buy shares in another company which shall have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses or to encourage monopoly, and the court will enjoin a corporation which attempts to exercise such right. *George v. Central R. & Bkg. Co.* 101 Ala. 607.

The state may maintain an action to prevent railroad companies from violating the constitutional provision against consolidation of competing lines. *Louisville & N. R. Co. v. Com.* 97 Ky. 675.

In a suit by citizens to prevent consolidation of parallel and competing lines of railroad under the act of New Hampshire July 5, 1867, it is not necessary for plaintiff to show any special interest or grievance to redress beyond those which every citizen is supposed to have. *Currier v. Concord R. Corp.* 48 N. H. 825.

A stockholder of a road which has taken a lease from another of a branch which it acquired under foreclosure proceedings cannot, in an action to set aside the lease, raise the question of the power of the lessor to acquire title to the branch because it was a parallel or competing line to its own under a constitutional provision prohibiting consolidation of competing lines, or under a general public policy which has not found expression in legislation; but the question must be raised in a direct proceeding by the state. *Rogers v. Nashville, C. & St. L. R. Co.* 91 Fed. Rep. 299, 33 C. C. A. 517.

Where an illegal contract of consolidation between two competing railway lines has been executed, and one of the parties has derived all the benefits arising from the contract, its illegality is no defense to a suit in equity for an accounting and return of the consideration to the party whose property and equipments passed under the control of the other party to the contract. *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319. H. P. F.

proceeding as an original one in this court, to have declared invalid and of no force and effect a certain contract of lease entered into between the Montana Railway Company and the Butte, Anaconda, & Pacific Railway Company. Both of these railroad corporations are organized under the laws of this state, and operate railroads within Montana. The terms of the lease are substantially as follows: The Montana Railway Company leases to the Butte, Anaconda, & Pacific Railway Company all the railway, including lands, right of way, buildings, tracks, turntables, yards, and all real property pertaining thereto lying between Stuart Junction and Anaconda, in the county of Deer Lodge. The lease is to commence May 1, 1898, and to run ten years. The Butte, Anaconda, & Pacific Railway Company agrees to pay to the Montana Railway Company an annual rental of \$25,000, in monthly instalments. The Butte, Anaconda, & Pacific Company covenants to keep the leased premises, including the tracks and all property pertaining thereto, in as good condition as the same were at the time the lease became effective. It is provided that the leased property shall at all times be operated by the Butte, Anaconda, & Pacific Company in accordance with its charter and the laws, and all responsibilities of such operation shall be assumed by the lessee. The Montana Railway Company and the Northern Pacific Railway Company are to be at all times held harmless by the lessee for all acts or omissions that may occur in the operation of said property, except when the Northern Pacific Railway Company runs its own trains over the track of the Montana Railway Company, in which case the lessee is not to be responsible for accidents unless due to the defective track or negligence of the employees of the lessee. The Butte, Anaconda, & Pacific Company covenants to pay all expenses of operation and maintenance of the leased property, and all taxes and assessments during the period of the lease. The Butte, Anaconda, & Pacific Company further covenants that the business of the Oregon Short-Line Company, between Anaconda and all points reached by said Short Line, or by way of the same, shall at all times be handled upon as favorable terms as are accorded to any other line, and that no discrimination shall be made against the business of the Oregon Short Line, either in facilities accorded to it or the rates charged it, as compared with any other line doing business in Anaconda which passes over the Butte, Anaconda, & Pacific tracks. All freight business to and from points east of Butte reached by the Northern Pacific Railway destined to or from Anaconda is to be interchanged at Butte between the Northern Pacific Railway Company and the Butte, Anaconda, & Pacific Company, and the division of the revenues shall at no time during the continuance of the lease exceed the Butte, Anaconda, & Pacific Company's divisions now effective between the Butte, Anaconda, & Pacific Company and the Montana Central Railway Company, and shall at 45 L. R. A.

all times be as favorable to the Northern Pacific as to the Montana Central or Great Northern Railway Companies. The Northern Pacific is to have the right to run passenger trains to and from points east of Butte over the leased line between Stuart and Anaconda. Upon all joint business handled upon such trains the revenues shall be divided, and the division allotted the Butte, Anaconda, & Pacific Company upon competitive business shall be the local fares of the Butte, Anaconda, & Pacific Company from Butte to Anaconda, and upon noncompetitive business shall be the local fares from Stuart to Anaconda, as the same may be established from time to time, but at no time in excess of those existing at the time this lease becomes effective. The Butte, Anaconda, & Pacific Company shall be entitled to receive all the local passenger fares received or collected on such Northern Pacific trains upon such leased line, or for tickets or passenger fares thereon between Butte and Anaconda. In consideration thereof no charge is to be made by the Butte, Anaconda, & Pacific Company for the use of the leased tracks, or the facilities for the passenger business from Stuart to Anaconda except the fares of passengers as provided in the lease. Upon all joint freight business to and from stations upon the Northern Pacific Railroad or its connections west of Helena, Montana, to be interchanged at Stuart, the Butte, Anaconda, & Pacific shall be allowed on car load freight \$3.50 per car load, and upon less than car load 3 cents per 100 pounds; and upon passenger business its local fare, but not at any time in excess of 45 cents per passenger. The lease provides against discrimination against the business of the Montana Union or Northern Pacific Companies, interchanged with the Butte, Anaconda, & Pacific Company at Butte or Stuart, or other points of connection, as compared with any other exchange of business existing between the Butte, Anaconda, & Pacific Company and any other lines at the same or competing points. It is also agreed by the Northern Pacific that freight, passenger, and express rates between its eastern and western terminals and connections and Anaconda shall at all times be no higher than the rates between the same points and Butte, including the divisions agreed upon in the lease, or those allowed the Butte, Anaconda, & Pacific Company by other competing lines. Provision is also made for an allowance in case the Northern Pacific should handle passenger or express traffic between Butte, Stuart, and Anaconda over the leased premises for its competitors or any other railroads. The lessee is to receive all revenue and pay for all mails carried between Stuart and Anaconda on Northern Pacific trains. The lease contains provisions whereby, if the lessee fails to perform the covenants or obligations of the contract, the lessor may, at its option, terminate the lease, and repossess itself of the leased premises. The contract is also binding upon the successors and assigns of the party bound, and shall inure to the suc-

cessors and assigns of the party for whose benefit it is made.

The pleadings and stipulations show the following facts: The Montana Union Railroad Company, the Montana Railway Company, and the Butte, Anaconda, & Pacific Railway Company are separate corporations, but the stock of the Montana Union and of the Montana Railway Company is controlled by the Northern Pacific Railway Company. The Butte, Anaconda, & Pacific line starts from Butte, and runs to the city of Anaconda. For 14 miles after leaving Butte its course is south; then it runs northwesterly about 12 miles to Anaconda. The Montana Union runs from Butte to Garrison, a station on the Northern Pacific main line. It practically parallels the Butte, Anaconda, & Pacific for a distance of 14 miles; that is to say, from Butte towards Anaconda the lines are parallel for a distance of 14 miles. About 3 miles north of where the lines of the Montana Union and the Butte, Anaconda, & Pacific diverge is the station of Stuart, on the main line of the Montana Union. The Montana Railway Company's line runs from Stuart to Anaconda in a north-northwesterly direction. The Montana Railway and the Butte, Anaconda, & Pacific have one common terminus,—the city of Anaconda. Their other termini are Stuart, for the Montana Railway Company, and Butte, for the Butte, Anaconda, & Pacific. Stuart, a terminus of the Montana Railway Company, is from $2\frac{1}{2}$ to 3 miles from the nearest point on the Butte, Anaconda, & Pacific line. For several months prior to May 1, 1898, the Montana Railway was temporarily operated by the Northern Pacific, but on May 1 it leased its line between Anaconda and Stuart to the Butte, Anaconda, & Pacific Company, as heretofore stated. It is admitted that the Montana Railway and the Butte, Anaconda, & Pacific lines are connected at Anaconda, and that the shortest route from the city of Butte *via* Anaconda to Stuart, and stations on the Montana Union Railroad north of Stuart, and all stations on the Northern Pacific main line, is by way of the Butte, Anaconda, & Pacific to Anaconda, and from Anaconda to Stuart by the Montana Railway, and from Stuart northerly on the Montana Union to points along the lines of the Montana Union and Northern Pacific. It is also admitted that the Butte, Anaconda, & Pacific Company each day runs continuous trains over the route just described, and intends to continue to run such trains.

The proposition advanced by the attorney general is that the Butte, Anaconda, & Pacific Railway and the Montana Railway lines are parallel and competing, and that for that reason the lease of the Montana Railway to the Butte, Anaconda, & Pacific Company is prohibited by the Constitution, and *ultra vires* of the corporation. On the other hand, the defendants insist—First, that the facts establish that the above-mentioned lines of railway are not parallel or competing, and are continuous and connected; second, that, if the proposition just stated is not tenable,

still the lease is valid, and but the exercise of the powers granted to the aforesaid corporations by the laws of Montana under which they are organized, and not in conflict with the Constitution. It can be safely stated that, unless the legislature has given to the corporations here interested the right to lease, the power does not exist. This principle is now firmly established by the Supreme Court of the United States, having been laid down by Justice Miller, for the court, in *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950, in the following words: "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes,—that what is fairly implied is as much granted as what is expressed,—it remains that a charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." We are therefore brought to inquire where the consent is to be found. In considering this question, it becomes necessary to examine the Constitution of the state and the statutes, and then to observe their relation to the general subject under consideration, and to one another. Cutting out of the controlling constitutional provision language not material to railroad corporations, we have the following clause: "No railroad corporation, . . . or the lessees or managers thereof, shall consolidate its stock, property, or franchise with any other railroad corporation . . . owning or having under its control a parallel or competing line; neither shall it in any manner unite its business or earnings with the business or earnings of any other railroad corporation, nor shall any officer of such railroad . . . company act as an officer of any other railroad . . . company owning or having control of a parallel or competing line." Const. art. 15, § 6. Turning to the statutes, we find that the legislature adopted §§ 911, 912, and 913 of the Civil Code at the time of the adoption of the Codes. Section 911 authorizes any two or more railroad corporations whose respective lines, not being parallel or competing lines, are wholly or partly within this state, when their respective lines of road, or any branch thereof, so connect within this state that they may operate together as one property, to consolidate their capital stock, franchises, and property, and thereby to become one corporation by any name adopted, which may be that of one of them, upon such terms and conditions as may be agreed upon by the corporations in the manner provided by the statutes. Section 912 provides that any railroad corporation whose line is wholly or partly within Montana, or reaches the boundary lines thereof, whether organized under the laws of Montana or of the United States, or of any other state or territory, may lease or purchase the whole or any part of the railroad or line of railroad of any railroad corpora-

tion, together with all the rights, powers, immunities, franchises, etc., provided the railroad or line of railroad so leased or purchased is continuous or connected with its own line, and not a parallel or competing line. Section 913 provides that any railroad corporation organized as in the preceding sections shall have authority to negotiate and deliver its bonds, securities, or obligations, and negotiate the same in such manner as the board of directors may authorize or determine, and to secure the payment of such bonds the corporation may execute and deliver such mortgages or deeds of trust upon all or any part of its property as the directors may determine; and, if any such mortgage shall so provide, it shall be and remain a valid lien upon the property of the corporation irrespective of the law relating to chattel mortgages, and such mortgage shall be taken, held, and enforced as are mortgages of real estate. The foregoing statutes intended to give, and did give,—First, a complete power of consolidation, by which a corporation formed by a consolidation should be a corporation succeeding to and having, owning, and exercising all the powers, rights, franchises, and immunities possessed by the corporations consolidated into one, provided the consolidating corporations were not parallel or competing; second, an equally adequate power, whereby one railroad corporation could lease or purchase the whole or any part of another railroad corporation's property, together with its rights and franchises, provided the leased or purchased railroad was continuous or connected with its own line, and was not parallel or competing; third, a further general power to any railroad corporation to issue bonds and mortgage its property. If the statutes just cited were in force, and were the only ones in force, the questions necessary to be determined in this case would be simply whether or not the Montana Railway is continuous or connected with the Butte, Anaconda, & Pacific, and whether the Butte, Anaconda, & Pacific and the Montana Railways are competing and parallel. If those questions were answered affirmatively, clearly the power necessary to authorize the lease under examination is denied by the inhibitory language of the Constitution.

But we must go further, and consider another section of the statutes. By an act approved March 4, 1893 (3d Sess. Laws, p. 157), and especially preserved and continued in force by § 5186 of the Political Code, approved March 13, 1895, the legislature provided as follows: "Any railroad company now or hereafter incorporated pursuant to the laws of this state, or of the United States, or of any state or territory of the United States, may at any time, by means of subscription to the capital stock of any other railroad company, or by the purchase of its stock or bonds, or by guaranteeing its bonds, or otherwise, aid such company in the construction of its railroad within or without this state; and any company owning or operating a railroad within this state may extend the same into any other state or ter-

ritory, and may build, buy, lease, or may consolidate with any railroad or railroads in such other state or territory, or with any other railroad in this state, and may operate the same, and may own such real estate and other property in such other state or territory as may be necessary or convenient in the operation of such road; or any railroad company may sell or lease the whole or any part of its railroad or branches within this state, constructed or to be constructed, together with all property and rights, privileges, and franchises pertaining thereto, to any railroad company organized or existing pursuant to the laws of the United States, or of this state, or of any other state or territory of the United States; or any railroad company incorporated or existing under the laws of the United States, or of any state or territory of the United States, may extend, construct, maintain, and operate its railroad, or any portion or branch thereof, into and through this state, and may build branches from any point, or such extension to any place or places within this state; and the railroad company of any other state or territory of the United States which shall so purchase or lease a railroad, or any part thereof in this state, or shall extend or construct its road or any portion or branch thereof in this state, shall possess and may exercise and enjoy, as to the control, management, and operation of the said road, and as to the location, construction, and operation of any extension or branch thereof, all the rights, powers, privileges, and franchises possessed by railroad corporations organized under the laws of this state, including the exercise of the power of eminent domain. Such purchase, sale, consolidation with, or lease may be made, or such aid furnished upon such terms or conditions as may be agreed upon by the directors or trustees of the respective companies; but the same shall be approved or ratified by persons holding or representing a majority in amount of the capital stock of each of such companies, respectively, at any annual stockholders' meeting or at a special meeting of the stockholders called for that purpose, or by approval in writing of a majority in interest of the stockholders of each company respectively: provided, that nothing in the foregoing provisions shall be held or construed as curtailing the right of this state, or the counties through which any such road or roads may be located, to levy and collect taxes upon the same and upon the rolling stock thereof, in conformity with the provisions of the laws of this state upon that subject; and all roads or branches thereof in this state, so consolidated with, purchased or leased, or aided or extended into the state, shall be subject to taxation and to regulation and control by the laws of this state, in all respects the same as if constructed by corporations organized under the laws of this state; and any corporation of another state or territory, or of the United States, being the purchaser or lessee of a railroad within this state, or extending its railroad or any portion thereof into or through this state, shall establish and maintain an

office or offices in this state at some point or points on its line at which legal process and notice may be served, as upon railroad corporations of this state: provided further, that before any railroad corporation organized under the laws of any other state or territory or of the United States shall be permitted to avail itself of the benefits of this act, such corporation shall file with the secretary of state a true copy of its charter or articles of incorporation." Civ. Code, § 923. There are manifest and numerous irreconcilable inconsistencies between this last section quoted and §§ 911 and 912. Although all three statutes refer to the general subject of consolidation, purchasing, and leasing of railroads by other railroad corporations, the method of procedure to effect a consolidation is different, and restrictions expressly included within the provisions of §§ 911 and 912, not necessary to be here set forth in detail, are not found in § 923. But, as more conspicuous than other differences, it is noticeable that in § 923 the right to consolidate, lease, or buy is granted without regard to whether or not the railroads owned by the contracting parties are parallel or competing, or continuous or connected. The later statute was a radical departure from a previous legislative policy. It may be this departure arose by reason of considerations which led the legislature to believe that principles of public policy do not invalidate reasonable traffic arrangements between lines of railway whereby one railroad corporation may lease for a reasonable period of time an independently incorporated short line, which is a spur or feeder of still another and more important line; and that on this account they were led to authorize in express terms such agreements, even though the leased line is a link which by its connections becomes a competing line. They had a right, subject to the limitations of the Constitution, to adopt a policy less restricted than that which had been recommended by the Code commissioners, or established by their own action just previously taken; and it is not for the court to determine the wisdom of a policy underlying laws which have resulted from changed opinions of the lawmaking body. It is far more likely, however, that the peculiar condition presented really arose by the difference of views between the Code commissioners who reported the Civil Code in 1892 and the several legislatures which met after the report of that commission, and before the adoption of the Codes as reported. It appears that §§ 555 and 556 of the Civil Code, as reported by the Code commission, were adopted February 19, 1895, when the Civil Code was adopted, as §§ 911 and 912 of that Code. The legislature, for convenience sake, passed the whole Code substantially as reported, and then proceeded to amend or revise the Code as passed. But between the time of the report of the Code commission and the adoption of the Codes, the legislative session of 1893 occurred, and it was then that § 923 was enacted. Thereafter came the session of 1895,

whereat a preserving act (Pol. Code, § 5180) was passed after the adoption of the Codes. This preserving act specially continued in force § 923. Applying now the rules of construction laid down in the case of *State, Aachen & M. F. Ins. Co., v. Rotwitt*, 17 Mont. 41; *Steele v. Gilpatrick*, 18 Mont. 453; *Proctor v. Cascade County*, 20 Mont. 315,—it is our opinion that the intent of the legislature was to cover the whole subject of delegating the power to railroad corporations to consolidate, lease, and purchase by § 923, and in this respect to revise and repeal the provisions of §§ 911 and 912. So far, therefore, as the power is involved, § 923 displaced and repealed all former laws upon that subject. Whether a certain manner of procedure laid down in § 911 is yet in force, we need not here inquire.

Proceeding, then, the case comes to this: If the law (§ 923) is not in conflict with the constitutional section quoted, the Butte, Anaconda, & Pacific Company can lease the Montana Railway line irrespective of all questions of competition or parallelism. We now speak of leasing only because the power to consolidate, although expressly given by § 923, obviously can only be exercised in a constitutional manner; that is, by railroad corporations not owning or having under their control parallel or competing lines. The language of the Constitution in respect to consolidation is too plain to require any argument on that point. No one could seriously contend that, if the railroad corporations, parties to the lease in question, are parallel or competing, they can consolidate into one resultant corporation, directly or indirectly. Section 923 is to be read as merely authorizing the amalgamation or consolidation of railroads not forbidden to amalgamate or consolidate by the Constitution. *Cooley, Const. Lim.* 218. The correctness or applicability of these rules of construction is not seriously controverted, we take it, by the attorney general. There is, therefore, authority in the railroad corporations concerned in this suit, to make the contract of lease under § 923, unless such authority is denied under the Constitution, for the reason that the lines involved are parallel or competing lines, and that the lease between them is a consolidation of one with the other.

We now directly meet the recurrent questions: Are the roads of the Butte, Anaconda, & Pacific and the Montana Railway Companies parallel or competing lines, and, if they are, may they contract by lease? The true rule is that whether two railroads are parallel or competing is a question of fact,—of physical fact. Actual mathematical parallelism is easily demonstrable by engineers' maps of surveys and calculations. Exact parallelism, however, is not what is included in the meaning of the words of the Constitution forbidding consolidation of parallel railroads. A reasonable construction must obtain. In a mountainous country it is well-nigh impossible to conceive of two railroads running any distance precisely equidistant

at all points. We should say that by parallel railroads are meant railroads running in one general direction, traversing the same section of country, and running within a few miles of one another throughout their respective routes. They may or may not be competing. That depends upon their termini, and their commands of traffic, *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849. Independently of the Montana Union Railroad, the Montana Railway cannot be said to be a parallel line to the Butte, Anaconda, & Pacific between Butte and Anaconda. One of the principal terminal points of the Montana Railway line is Stuart, on the line of the Montana Union, while one of the principal terminal points of the Butte, Anaconda, & Pacific is Butte. Anaconda is the other principal terminal point of each. From Stuart to Anaconda, though,—a distance of about 12 miles,—there is a substantial parallelism in their routes. Still, we think it doubtful whether the Montana Railway is a parallel line of the Butte, Anaconda, & Pacific in a sense that would prevent its union with the Butte, Anaconda, & Pacific, if such consolidation or union were attempted under the law. But, passing that question without decision of it, are they competing lines of railway? Here again, if we take the separate corporation, the Montana Railway Company, and its railroad line as an independent one, and examine the maps and consider the section through which the roads run, we find there could be no substantial competition with the Butte, Anaconda, & Pacific, for the reason that the traffic between Stuart and Anaconda on the Montana Railway, and that point on the Butte, Anaconda, & Pacific nearest to Stuart and between such point and Anaconda, and between intermediate points and Anaconda, is entirely insignificant, as there are no towns or freight stations to furnish business sufficient to make such competition along the lines of the two roads between such points and the city of Anaconda. Whether lines of road are competitive or not depends upon the business of the companies, the conduct of the roads by their authorities, their channels of traffic, and generally—nearly always—upon whether the roads extend for transportation from and to the same points along their routes. Strictly speaking, the line of road of the Montana Railway Company consists of the road—the superstructure—over which it operates its trains in the exercise of its franchise, and none other. From an exact standpoint it is limited in its railroad operation to the few miles of rails and other property belonging to its own corporation, inasmuch as it neither controls nor operates other roads by lease, ownership, consolidation, or otherwise. Thus literally regarding the situation, there could be no competition between the Montana Railway and the Butte, Anaconda, & Pacific lines.

But a majority of the court prefer to adopt what we think to be a more practical way of looking upon this branch of the case, 45 L. R. A.

and to consider the Constitution as comprehending by competing lines not only railroads which run between the same two principal points on their own lines, but those which, having one common terminus, yet are actually connected with other railroads, and which, by arrangements with such other railroads concerning the transportation of freight and passengers, are so related to one another in fact as to give them the opportunity by geographical situation to directly cut rates to principal or terminal points. *East Line & R. River R. Co. v. State*, 75 Tex. 434. To apply this by a plain illustration: A merchant in Anaconda buys his goods at San Francisco. The goods are delivered in transit at Butte. From that point to Anaconda the merchant has a choice of routes, one practically as direct as the other. He may ship over the Butte, Anaconda, & Pacific to Anaconda, or over the Montana Union to Stuart, and thence to Anaconda via the Montana Railway route. They are equally convenient, and in a situation to underbid one another as to the rates of transportation. Especially is this so in the illustration given, for the Montana Union and the Montana Railway Companies are both under the control of the Northern Pacific, so that the traffic arrangements as well as other conditions exist whereby the competition can be vigorous and effective. Conditions of fact made apparent by the record and plats before us have, for the reasons given, led a majority of the court to conclude that by its alliance with the Northern Pacific, and its geographical situation, the Montana Railway line is a competing line with the Butte, Anaconda, & Pacific between Butte and Anaconda. Reverting to the Constitution, we find no prohibition against a railroad corporation leasing its stock, property, or franchise to any other railroad corporation, or having under its control a parallel or competing line, unless a leasing is a consolidation, or unless there are other parts of § 6 of article 15 which should be construed as prohibiting such contracts of lease. Many Constitutions, in their provisions to guard against all possible contingencies whereby competition between railroads may be interfered with, do prohibit leasing or purchasing, as well as consolidation; others, in terms much like ours, only prohibit consolidation. As bearing upon the evident policies of several certain states at the dates of their adoption of their respective Constitutions, provisions of organic laws as they stood in 1894 upon this subject may be grouped as follows: The following states provide that no railroad corporation, or the lessees, purchasers, or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or control, any other railroad corporation owning or having under its control a parallel or competing line: Arkansas, Const. 1874, art. 17, § 4; Kentucky, Const. § 201; Missouri, Const. 1873, art. 12, § 17; Pennsylvania, Const. art. 17,

§ 4; Texas, Const. art. 10, § 5. The following states substantially provide only that no railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property, or franchises with any other railroad corporation owning, or having under its control, a parallel or competing line: Colorado, Const. 1876, art. 15, § 5; Illinois, Const. 1870, art. 11, § 11; Michigan, Const. 1850, art. 19a, § 2; Nebraska, Const. 1873, art. 11, § 3; Washington, Const. 1889, art. 12, § 16. The Constitutions of North Dakota (Const. 1889, art. 7, § 141) and of South Dakota (Const. 1889, art. 17, § 14) prohibit in identical language the consolidation of the stock, property, or franchises of railroads owning parallel or competing lines, but especially provide that "any attempt to evade the provisions of this section [pertaining to consolidation] by any railroad corporation by lease or otherwise, shall work a forfeiture of its charter." There we have, in effect, a provision against leasing for a long time, if not altogether. In West Virginia, by § 11 of article 11 of the Constitution of 1872, consolidation or obtaining the possession of parallel or competing lines by lease or other contract is prohibited without the permission of the legislature. The statutes (Code 1887, p. 521, § 53) give these rights, and provide the manner of their exercise. In Wyoming (Const. 1889, art. 10, § 8) there is simply a general prohibition against consolidation or combination of corporations of any kind to prevent competition. No special clause is found as applicable to railroads or any other class of corporations. In Georgia the Constitution (art. 4, § 2, ¶ 4) denies to the legislature the power to authorize any corporation to make any contract with another corporation "which may have the effect or be intended to have the effect to defeat or lessen competition in their respective businesses or to encourage monopoly." In Utah (Const. 1895, art. 12, § 13) consolidation is prohibited with any other railroad "owning a competing line." This utterance is the very latest constitutional provision, and is noteworthy as not prohibiting leasing or purchasing, or even consolidation, of one road with another which has under its control a competing line or a parallel line.

Comparison between these various constitutional limitations shows that no one is precisely like the prohibition of the Montana Constitution. Similarity exists in but one principal respect. Almost every Constitution imposes various limitations upon the power of consolidation, and so general is antagonism to the consolidation of competing railroads that, where the Constitutions are silent, statutory enactments frequently prevail by which the principle is affirmatively established that there shall be no consolidation of competing railroads. Minnesota, Gen. Stat. 1894, § 2716; Arizona, Rev. Stat. § 318; New Hampshire, Gen. Laws, p. 377, § 11; New York, Laws 1869, chap. 917, § 9; North Carolina, Battle's Revision, p. 751, § 65; Wisconsin, Rev. Stat. § 1833. In Florida (Rev. Stat. 1892, § 2248), parallel or competing roads may not consolidate except by

consent of the railroad commission. Other states, by withholding the power to consolidate, prohibit the exercise of it. Conforming to this general policy, Montana has by no uncertain language aligned herself with her older sister states, where experience has demonstrated that the merger of two competing railroads into one is apt to result in stifling free competition, and hence is disadvantageous to the well-being of the state. Sufficient demonstration of this proposition consists in the statement that great accumulations of property in the hands of any corporate power, likely to hold on to such accumulations, are dangerous to public welfare. The life of an individual is too limited to render such dangers very great where tremendous wealth is in his hands, but a corporation seldom feels that the bounds of human life, or even of its own chartered existence, should too closely circumscribe its actions. Restraints by limitations upon and within their grants of powers are necessary, lest they may become much too strong for society. If, for instance, consolidation were allowed with no bounds of restraint, a railroad's possessions might become a colossal enterprise owning all means of transportation within a state. Without rivalry of railroads, monopolies might grow up, and, to bring the dangers of destroying competition before us, that remarkable progress which this young state has made in its healthy development could be stayed by the consolidation or amalgamation of railroad corporations owning competing lines. The maxim, "Competition is the life of trade," forms the base of the constitutional prohibition against consolidation of rival railroads, and whatever consolidation does include within its meaning is absolutely illegal and void. What is a consolidation of one railroad corporation with another? 1 Rorer, Railroads, p. 588, thus defines it: "The consolidation of two or more railroad corporations is the permanent union of their interests, management, and control, either in the formation of a new company out of the consolidated ones, or else by a consolidated management of the old ones unitedly, whilst their distinct corporate entities still remain. It can only be brought about by authority of law. A mere co-operating temporarily in the running of lines and transacting the business of two or more roads does not amount to a consolidation thereof." The supreme court of Alabama, in *Meyer v. Johnston*, 64 Ala. 603, said: "When the rights, franchises, and effects of two or more corporations are, by legal authority and agreement of the parties, combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is, in law, and according to common understanding, a consolidation of such companies, whether such single corporation, called the consolidated company, be a new one then created, or one of the original companies continuing in existence with only larger rights, capacities, and property. Accept-

ance of this as correct makes it easy to understand that authority given to consolidate 'to such extent, and on such terms, as the parties may agree upon' confers the power to constitute one of the original companies the consolidated company." From the Alabama court's opinion, Reese on *Ultra Vires* (§ 142) has deduced his text, from which we quote: "The 'consolidation' of a corporation has been defined to be 'a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new.' The more modern understanding of a consolidation, however, might be better stated by saying that when the rights, franchises, and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole, and committed to a single corporation, the stockholders of which are composed of those of the companies thus agreeing, this is in law a consolidation, whether the consolidated company be a new one then created, or one of the original companies continuing in existence with only larger rights, capacity, and property. 'Amalgamation' has been declared to be when the existing companies agree to abandon their respective articles of association and regulation, and to register themselves under new articles as one body. This would be a new company, formed by the coalition or amalgamation of the companies previously existing. The expression 'amalgamation,' however, is of English origin, has never appealed to the judicial sense of this country, and is seldom used to designate the union of two or more corporations; the word 'consolidation' being the term in common use." In *Mackintosh v. Flint & P. M. R. Co.* 34 Fed. Rep. 582, the court, recognizing a difference between a purchase and a consolidation, observed: "Under the general railroad law, . . . companies are allowed to consolidate . . . when they form continuous or connecting lines. This contemplates the formation of a new corporation; and requires the consent of the majority of the stockholders in each company. This statute, however, does not cover this case. This is not to be a consolidation, but a purchase of the latter company's stock, property, and franchises, and to use the same as part and parcel of the purchasing company, and then to bring the acquisition within the operation of its own charter. The consolidation statute does not authorize one company thus to acquire and absorb another." 2 Elliott on Railroads, § 335, says: "Ordinarily, the effect of a consolidation is to dissolve the old companies and form a new one; but this result does not always follow, for it depends largely upon the terms of the consolidation, and the legislative intent as manifested in the statute under which the consolidation takes place; and the constituent companies usually have at least a qualified existence for the purpose of winding up their affairs and preserving the rights of their creditors. The term 'consolidation' is an elastic one, and may include a union of two or more corpora-

tions into a new one with a different name, with or without extinguishing the constituent corporations, or the merger of two or more corporations into another existing corporation under the name of the latter. There is, as we have already said, a distinction between these modes of consolidation. In the latter case, if the merger is complete, it is evident that the one corporation is extinguished unless kept alive for certain purposes, while it is equally clear that the other, in which it is merged, is not dissolved. In other words, the legislative intention in such a case would seem to be to unite the two companies under the old charter of one of them, while statutes authorizing the consolidation of two or more corporations in the ordinary way are generally construed as authorizing the formation of a new and distinct corporation, thus extinguishing all the constituent companies unless a contrary intention is manifest." Further citations from the great number of cases that we have studied would be superfluous, for they are practically uniform in defining a consolidation of corporations to be a merger, a union, or amalgamation, by which the stock of the two corporations is made one, by which their property and franchises are combined into one, by which their powers become the powers of one, by which their names are merged into one, and by which the identity of two practically, if not actually, runs into one.

Section 911 of the Civil Code of Montana is not merely a legislative declaration of the manner of consolidation, but serves as a definition as well. It specially provides how two railroad corporations may become one by any name adopted, how their shares may be retired or exchanged for the capital stock of the resultant corporation, how the corporation formed by the consolidation shall succeed to the rights, powers, privileges, franchises, immunities, and property possessed by the corporations so consolidated, etc. Ordinarily no idea of a lease would ever enter into any explanation of what constituted a consolidation, unless such contract of lease was for so long a period of time, or by its terms was such as to make it a practical merger of one corporation into another. Lease does not imply consolidation, nor consolidation lease. The power to consolidate, as has been seen, is a power to make two corporations one; the power to lease carries with it no power to pass anything except the right to use the property leased. In the lease under consideration there is no merger of ownership, no communion of interest, no distribution of receipts based upon a contingent measure of profits, no common ownership of shares of stock, no joint management, and no yielding up of an independent corporate existence by the lessor to the lessee. As was said in *State v. Vanderbilt*, 37 Ohio St. 590: "Power to lease does not imply the power to consolidate, nor power to consolidate the power to lease. They are distinct and independent powers. Nothing passes under the lease except the right to the use. The lessor retains its existence, and its right to consolidate

with connecting lines. There can be no consolidation except as to connecting lines. These connecting lines belong to the lessor companies, but these have not entered into the consolidation. In *Mills v. Central R. Co.* 41 N. J. Eq. 1, a question arose involving the power to lease under a power to consolidate. Chancellor Runyon, for the court, expressly held that power to consolidate did not involve authority to lease, and did not enlarge an authority to convey lands, etc., conferred by a charter to a railroad company. The reasoning of that case was that a power to consolidate is to take in a partner, or to go in as a partner, while power to lease is power to dispose of the whole concern to a stranger. "In a consolidation," says the court, "the stockholders of the respective companies still retain, to a certain extent, control of their corporate property, but by a lease the stockholders of the leasing company part with the control of their corporate property, and hand it over to the others, and abandon their enterprise." We cannot approve altogether of the reasoning of the chancellor, except as it was applicable to the facts of that case, which involved a railroad lease of 999 years. We are of the opinion that a lease, fair in its terms, for ten years, in no manner involves an abandonment of a railroad enterprise, or is in fact more than a temporary parting with the control of the lessors' corporate property. Reservations in this lease of the Montana Railway Company to the Butte, Anaconda, & Pacific give the lessor corporation right to repossess itself of its property, and to oust the lessee, and terminate the lease, in the event of certain violations of the covenants of the contract. There is nothing contained in its provisions from which an abandonment can be inferred. The case cited is none the less a strong support of the view that the prohibition against a power to consolidate does not include a prohibition of a power to lease when the legislature has clearly authorized such latter power; for, if a lease of 999 years is not a consolidation, *a fortiori* a lease of ten years is not.

Distinction has also been made between union and consolidation and purchasing by one railroad corporation of another's property and franchises. By the railroad law of New Jersey power was given to railroad companies to lease their roads to any other corporation, or to unite and consolidate. But the court held, in *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5, that there could be no purchase of a rival railroad under a power of consolidation, as the powers given did not authorize it. In *Gere v. New York C. & H. R. R. Co.* 19 Abb. N. C. 193, we have an adjudication of this important question directly in point. The case is of high authority because of the list of eminent counsel who presented it to the court. Gere and others brought an action on their own behalf and in behalf of all other stockholders of the New York Central & Hudson River Railroad Company against that corporation and the 45 L. R. A.

New York, West Shore, & Buffalo Railroad Company and certain firms to restrain the consummation of a lease between the railroad companies. The West Shore & Buffalo Company was a competing road in all respects for its entire length. It attempted to lease its road, property, and franchises to the New York Central Company for the term of 475 years. The rental consideration was a guaranty of payment of the principal and interest of certain bonds of the West Shore road. The statute of New York authorized any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter gave the use of the leased railroad in such manner as might be prescribed in the contract. The statute then contained these words: "But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract." By Laws 1869, chap. 917, § 9, railroad corporations were also authorized to consolidate and merge their capital stock, franchises, and property with the capital stock, franchises, and property of any other railroad, etc.; and it was further provided that "no companies or corporations of this state whose railroads run on parallel or competing lines shall be authorized by this act to merge or consolidate." The court, through Kennedy, J., first disposed of the question of power to lease by holding that it existed under the statutes referred to, and then discussed the prohibitory section above quoted in the following language: "The leasing of one railroad by another, whether for a longer or shorter period, is not a merger or consolidation. The term 'lease' implies the continued existence of the corporation, the lessor, with all its powers and functions; and all the rights incident to its creation; and it would be a gross misapplication of terms to hold that a leasing or contract for use by one railroad to another is a merger or consolidation of the two roads. I am therefore forced to the position that it—the West Shore road—has the authority to execute the lease, and the New York Central has the power and right to receive the same, and to pay rental for the use thereof; and because said roads are competing roads, there being no statutory inhibition upon that ground, it is not a reason why a lease may not be executed by the one and accepted by the other. Upon the assumption that the legislature has authorized a lease between two roads situated as these two roads are, the question of public policy does not enter into a consideration of the questions involved here. If the power has been granted by the legislature, although it may be deemed unwise, and in this instance dangerous in its execution, the remedy will be found in another department of the government, and is not lodged in the judiciary. Several statutes recognize the right, power, and authority of the lessee of a railroad to receive by transfer from the

lessor or other or others owning the same the capital stock in the leased road. Laws 1855, chap. 302; Laws 1867, chap. 254; Laws 1883, chap. 383." Thompson on Corporations (vol. 5, § 5891) approves of the doctrine of *Gere v. New York C. & H. R. R. Co.* 19 Abb. N. C. 193, and says that "a statute prohibiting railroad corporations 'whose roads run on parallel or competing lines' from merging or consolidating does not prohibit one such corporation from leasing its road to another."

As against the right to contract by lease, the learned attorney general relies upon the case of *State, Leese, v. Atchison & N. R. Co.* 24 Neb. 143. There the question arose of the power of two lines of railway to consolidate, when, after they were consolidated, they would form a continuous line without break of gauge or interruption. It was held that the Atchison & Nebraska Railway, extending from Atchison, Kansas, to Lincoln, Nebraska, and leased to the Burlington & Missouri River Railroad, did not form a continuous line with the Burlington & Missouri, and that the case was not within the provision of the statute authorizing the making of a lease where the roads of the lessee and lessor will form a continuous line, and that the lease was, therefore, unauthorized. After deciding this question, the court, through Maxwell, Ch. J., proceeded obiter to fortify its decision upon the further ground that the lease was, in effect, prohibited by the constitutional provision against consolidating railroad corporations owning parallel or competing lines. "The word 'consolidate,'" said the chief justice, "is here used in the sense of 'join' or 'unite.' The constitutional convention aimed at practical results. . . . The law cannot be evaded, therefore, by substituting a lease for a deed of conveyance." The court regarded the lease in that case as within the inhibition of the Constitution. The decision of the Nebraska case was based, however, upon a construction placed upon an attempt by one railroad to lease another competing road for a period of 999 years, and what we have said heretofore in relation to the proper limitations to be put upon the language of Chancellor Runyon in the New Jersey case is applicable to the Nebraska decision also. A lease for 999 years may be properly regarded as a joinder or consolidation of two competing railroads; it may be such a lease practically involves the consolidation and control of parallel or competing roads, and necessarily, in effect, operates as a surrender of corporate franchises by the lessor corporation. This point was emphasized in the opinion. But conceding, for the sake of argument, that the Nebraska decision is directly in point, its force and effect are very much weakened by the subsequent decision by the same court in the same case, reported in *State, Atty. Gen., v. Atchison & N. R. Co.* 38 Neb. 437. After the first decision, in 1888, by Chief Justice Maxwell, and after it had been held that the lease of respondent to the Burlington & Missouri River Rail-

road Company should be declared void, upon a demurrer, respondent answered and negatived all the allegations of infringement of the provisions of the statutes and Constitution of the state of Nebraska. The referee afterwards decided that the roads were not competing roads within the meaning of the Constitution, and that, therefore, the lease was valid. The court sustained the lease by a brief opinion. Chief Justice Maxwell, who had written the opinion of the court at the former hearing, dissented, principally upon the ground that the roads were competing roads, and that the lease was a violation of the constitutional provision. His construction of the majority opinion is that it contains an admission that the defendant is a competing line at the most important point on the roads, and upon this admission he says there is no power to declare such consolidation not prohibited by the Constitution. The case stands, therefore, as practically overruled by this later decision, for there is no escaping the conclusion made plain by Judge Maxwell that the court has receded from its former doctrine.

Pearshall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, also cited by the attorney general, involved a proposed arrangement between the Great Northern and Northern Pacific Railway corporations, by which there was to be an organization of a new corporation, which should issue its bonds, payment of which was to be guaranteed by the Great Northern, part of the capital stock to be transferred to the shareholders of the Great Northern; and a traffic contract was to be entered into by which the common earnings were to be divided, and traffic was to be exchanged. The statutes of Minnesota forbid railroad corporations to consolidate with, lease, or purchase, or in any way to become owner of or control, any other railroad corporation, or any stock, franchises, rights, or property thereof, which owns or controls a parallel or competing line. The case was decided upon the theory that the arrangement was a consolidation of two competing corporations. The agreement between them was regarded as nothing less than a purchase of a controlling interest, and as practically contemplating the absolute control of the Northern Pacific by the reorganized corporation. The "ultimate amalgamation" seemed apparent to the court, and the statute was held applicable to prevent such an amalgamation. The decision affirms our views upon the question of consolidation, but, considering the statute of Minnesota, it has little or no bearing upon the questions involved in this case.

We are not unmindful of the spirit which pervades the more modern Constitutions against arrangements between competing lines of railroad which may result in monopolies of traffic, and we are not disposed to yield at all in that rigidity of interpretation which we believe must be placed upon the prohibition of the Constitution against consolidation of such roads. On the other hand, there are certain fundamental principles of

construction by which courts must be guided in correctly ascertaining the intent of a written Constitution. Judges are not at liberty to declare an act of the legislature void because, "in their opinion, it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words." Cooley, Const. Lim. p. 204. The framers of the Constitution are presumed to have employed language with sufficient precision to convey the intent of the instrument framed. And when they only prohibited consolidation of competing railway lines, we understand the word to have been used in its natural sense, and that the Constitution intended what it says; that is, forbids what it has forbidden. Nor does an apparent impolicy of a statute authorize a court to declare it void. "When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare the limitation under the notion of having discovered something in the spirit of the Constitution upon a subject which is not even mentioned in the instrument." *People, Smith, v. Fisher*, 24 Wend. 215. There is a conclusive presumption, when a state law is attacked upon the ground that it is void, that it is valid unless the Constitution of the state prohibits it. Before it can be set aside as invalid, we must find that "limitations have been imposed upon the complete power which the legislative department of the state has vested in its creation." Cooley, Const. Lim. p. 206. It is therefore upon these principles that we have patiently and deliberately considered this case. What exigencies may have arisen which deterred the framers of the Constitution from prohibiting reasonable leases by one railroad of another, even though they be of competing lines, it is not for us to say. In Montana, as in many other states, the question of authority for leasing railroads has been left to the legislature, which has in turn exercised its power. The courts cannot determine a policy unless it is fairly to be inferred from the language used. It may have been the belief that excessive restrictions, such as the denial altogether of the power to lease, were unwise, and likely to result in greater harm than good; or it may have been the security felt by knowledge of the fact that by § 5 of the same article of the Constitution, which prohibited consolidation, all railroads are deemed subject to legislative control, and subject to the power of the legislature to regulate and control by law the rates of transportation of passengers and freight by such companies as common carriers from one point to another in the state. Safety against extortion is always guaranteed by this section; and if the two corporations, parties to this contract of lease under consideration, should attempt to charge excessive rates, the power is in the legislature to protect the people. In the particular lease before us, provision is made by covenant against increased rates. In conclusion, it is our unanimous and mature judgment that, while the constitutional section quoted absolutely prohibits consolidation, 45 L. R. A.

whether it be direct or indirect, still the difference between a lease and a consolidation is too plain to allow any interpretation being put upon the constitutional section quoted, whereby the power to lease is denied by the prohibition against consolidation.

It is unnecessary to dwell upon the latter clause of § 6 of article 15 of the Constitution, heretofore quoted, by which one railroad shall not unite its business, etc., with the business of another railroad, as we are all of the opinion that it cannot be applied at all to the case before us, but pertains to different conditions.

The petition is denied.

Famberton, Ch. J., and Pigott, J., concur.

MERCHANTS' NATIONAL BANK of Great Falls

v.

GREAT FALLS OPERA HOUSE COMPANY *et al.*,

and

F. P. ATKINSON, *Appt.*,

and

Charles M. WEBSTER *et al.*, *Respts.*

(.....Mont.....)

1. The remedy provided by § 1242, Code of Civil Procedure, to enable a surety who has satisfied the claim to secure contribution from his cosurety is cumulative merely, and does not preclude a resort to the courts to enforce the right in any recognized mode.
2. A surety who has paid a judgment against himself and his cosureties on account of the principal's debt may take an assignment of it to himself as a basis for enforcing contribution from his cosureties.
3. The satisfaction of a judgment for a principal's debt which a surety has paid and had assigned to himself to enable him to enforce contribution from a cosurety, for the purpose of facilitating his dealings in real estate upon which the judgment was apparently a lien, will not inure to the benefit of the nonpaying surety, or absolve him from liability to contribute.
4. In a proceeding by a surety who has paid a judgment for the principal's debt and taken an assignment thereof to himself to enforce contribution from a cosurety, he may testify that a satisfaction of the judgment which he had subsequently effected was not intended to inure to the benefit of the cosurety.

(June 6, 1899.)

APPEAL by defendant Atkinson from an order of the District Court for Cascade County directing the issuance of an execution upon a judgment in favor of plaintiff against defendant Atkinson upon motion of defendants Webster *et al.*, who had paid the judgment as sureties. *Affirmed.*

The facts are stated in the opinion.

NOTE.—On the question of the right of a surety to enforce a judgment which he had paid, see note to Frank v. Fraylor (Ind.) 16 L. R. A. 115.

Messrs. Clayberg, Corbett, & Gunn, W. G. Downing, and W. M. Cockerill, for appellant:

The court erred in granting the motion for the reason that no notice of payment and claim for contribution was filed as provided for by § 1242 of the Code of Civil Procedure of Montana.

By the statute a summary method is presented for securing contribution between judgment debtors. In order to enable a person to take the benefits of this statute it is necessary that its provisions should be strictly observed.

24 Am. & Eng. Enc. Law, pp. 497, 498; *Hansen v. Martin*, 63 Cal. 282; *Davis v. Heimbach*, 75 Cal. 261; *Clark v. Austin*, 96 Cal. 283.

The court erred in striking from the affidavit of appellant the plea of the statute of limitations.

Chipman v. Morrill, 20 Cal. 131; *Sherwood v. Dunbar*, 6 Cal. 53; *Richter v. Henningsan*, 110 Cal. 530; *Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 503; *Oppman v. Steinbrenner*, 17 Mont. 369; 1 Brandt, Suretyship & Guaranty, § 295; 7 Am. & Eng. Enc. Law, 2d ed. p. 340; Wood, Limitation of Actions, 320; *Faires v. Cockerell*, 88 Tex. 428, 28 L. R. A. 528; *Scribner v. Hickok*, 4 Johns. Ch. 530; *Cuyler v. Enswoorth*, 6 Paige, 32.

The judgment had been satisfied of record.

There is in fact nothing to which the surety can be subrogated.

Peebles v. Gay, 115 N. C. 38.

The surety must seek contribution by an independent action.

Davis v. Heimbach, 75 Cal. 261.

Respondents have been reimbursed for the money paid by them in satisfaction of the judgment.

The judgment was paid out of the proceeds of a note given to the Northwestern National Bank, and this note in turn was paid out of the proceeds of notes executed by the Opera House Company and indorsed by respondents and others.

Where there are two or more indorsers on a promissory note, and one of such indorsers, together with the principal or maker, executes a new note which is taken in satisfaction of the old note, and the indorser executing the new note is required to pay the same, he cannot enforce contribution from his coindorser on the original note.

Chapman v. Garber, 46 Neb. 16; *Bell v. Boyd*, 76 Tex. 133.

Where a surety is not entitled to contribution or repayment, he cannot claim the benefit of the doctrine of subrogation. If he is entitled to the benefit of contribution or repayment, but does not commence proceedings to enforce such right within the time limited by law, he cannot have the benefit of the doctrine of subrogation.

2 Brandt, Suretyship & Guaranty, § 307; *Bank of Pennsylvania v. Potius*, 10 Watts, 148; *Johnston v. Belden*, 49 Iowa, 301; *Krider v. Ienbice*, 123 Ind. 10; *Junker v. Rush*, 136 Ill. 179, 11 L. R. A. 183; *Ritten-* 45 L. R. A.

house v. Levering, 6 Watts & S. 190; *Faires v. Cockerell*, 88 Tex. 428, 28 L. R. A. 528.

The right of the respondents against the appellant Atkinson is not based upon the judgments, but upon an implied contract created by law.

Junker v. Rush, 136 Ill. 179, 11 L. R. A. 183; *Harrah v. Jacobs*, 75 Iowa, 72, 1 L. R. A. 152; *Faires v. Cockerell*, 88 Tex. 428, 28 L. R. A. 528; *Frevert v. Henry*, 14 Nev. 191; *Thayer v. Daniels*, 110 Mass. 345; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669; *Keller v. Rhoads*, 39 Pa. 513, 80 Am. Dec. 539; Wood, Limitation of Actions, § 145; *Chipman v. Morrill*, 20 Cal. 131.

The legislature having provided the condition upon which the judgment may be kept alive for the benefit of the surety, this condition must be complied with.

Davis v. Heimbach, 75 Cal. 261; *Clark v. Austin*, 96 Cal. 283.

Mr. L. Parker Veasey, for respondents:

The full payment of a debt by one of several joint debtors may inure to the benefit of all, but this is only so when the payment is intended so to operate.

Brown v. White, 29 N. J. L. 514, 80 Am. Dec. 227.

If the debt be kept alive at the time, it cannot be satisfied by the very act which keeps it alive. To construe that as a payment which is meant to be an assignment is a contradiction in terms.

McIntyre v. Miller, 13 Mees, & W. 728; *Coffee v. Tevis*, 17 Cal. 245; *Scribner v. Hickok*, 4 Johns. Ch. 532; *Wheeler's Estate*, 1 Md. Ch. 80.

The affixing of the corporate name of the Opera House Company to these new notes was not authorized, and was therefore void and of no effect.

Helena Nat. Bank v. Rocky Mountain Teleg. Co. 20 Mont. 379; *Park Hotel Co. v. Fourth Nat. Bank*, 58 U. S. App. 674, 86 Fed. Rep. 742, 30 C. C. A. 409; *Hall v. Auburn Turnp. Co.* 27 Cal. 256, 87 Am. Dec. 75.

Brantly, Ch. J., delivered the opinion of the court:

This is an appeal from an order made and entered in the district court of the eighth judicial district in and for Cascade county on January 30, 1897, directing execution to issue in favor of C. M. Webster, H. O. Chowen, and Ernest Crutcher against their co-defendant and cosurety, F. P. Atkinson. On December 22, 1892, the plaintiff herein recovered judgment against the Great Falls Opera House Company, a corporation, as principal, and C. M. Webster, Charles Wegner, H. O. Chowen, F. P. Atkinson, Ira Myers, and Ernest Crutcher, as sureties, for the sum of \$2,242.50, with interest at 10 per cent per annum from the date thereof. The motion for execution herein against F. P. Atkinson was made upon the same day as the motion made in the case of *Northwestern Nat. Bank v. Great Falls Opera House Co.* 21 Mont. —, 57 Pac. 440. It was heard at the same time, and upon substantially the

same proof. The right to contribution from Atkinson in this case, however, is based upon a formal assignment of the judgment by the plaintiff to the moving defendants after payment of the same by them. This payment was made on December 23, 1892, and the facts with reference to it are set forth in full in the opinion in *Northwestern Nat. Bank v. Great Falls Opera House Co.* 20 Mont. —, 57 Pac. 440. The affidavit of the moving defendants herein differs from the affidavit made in that case in that it predicates the claim of contribution upon the assignment of the judgment. It also appears from the affidavit that, though assigned to the respondents, the judgment was thereafter formally satisfied by the attorneys for plaintiff at the request of some one of the respondents, in order that it might not appear as a lien upon the real estate of the respondents which they were selling from time to time. This formal satisfaction is alleged to have been made for this purpose only. The defenses alleged in the counter affidavit of Atkinson in this case are the same as in the former case. The action of the court upon the defense based upon the alleged contract of Atkinson with Webster, Chown, Crutcher, and Myers, and also upon the plea of the statute of limitations, was the same. The contract sought to be made available herein is the same as the one alleged in that case, Atkinson claiming that the agreement of release in consideration of the loan of \$3,200 by the Cascade Bank on February 14, 1893, applied to both judgments. After the proof was heard, the court below ordered execution to issue against Atkinson for \$448.50, or one fifth of the judgment, with interest; it appearing that Ira Myers had contributed his share of the judgment, and that Wegner was insolvent. From this order Atkinson appeals.

Besides the assignments of error made in the former case, which were therein considered and disposed of, and will not be here again examined, the appellant asks a reversal on two grounds: (1) That the court erred in granting the motion for the reason that no notice of payment and claim of contribution was filed as provided by § 1242, Code of Civil Procedure; and (2) that the court erred in granting the motion for the reason that the judgment had been satisfied of record.

1. The contention is here made that the respondents, having failed to give the notice required in order to avail themselves of the provisions of § 1242, cannot have the relief sought under the assigned judgment; and this is equivalent to saying that, because the legislature has provided a summary mode by which a surety may enforce reimbursement or contribution under the judgment, the respondents may not, therefore, resort to the remedy invoked here. We understand, however, that the remedy provided by this section is cumulative, and that all the rights and equities existing in favor of the sureties in this regard will be enforced by the courts in proper cases, notwithstanding the existence of the statute providing the summary

mode. The surety may proceed to obtain relief by any recognized mode. *McDaniel v. Lee*, 37 Mo. 206; *Peters v. McWilliams*, 36 Ohio St. 155; *German-American Sav. Bank v. Fritz*, 68 Wis. 390. In the case of *Peters v. McWilliams*, 36 Ohio St. 155, in commenting upon a similar statute, the court says: "The effect of this statute upon the case at bar is to give the plaintiff, who had an existing demand on defendant, a cumulative remedy." It clearly appears in this case that the respondents at the time of payment took an assignment of the judgment, intending to keep it alive in order to enforce contribution from their cosureties. The question presented by this contention therefore is, May a surety who has paid a judgment against himself and his cosureties take an assignment of it to himself, and avail himself of it to enforce contribution from his nonpaying cosureties? The right of a surety who has paid the judgment against himself and his principal to keep it alive by having an assignment made to a stranger for his benefit is well settled. 2 Freeman, Judgm. § 470; Black, Judgm. § 998. He may also, as against his principal, be subrogated to all the rights of the creditor under the judgment, where such is the intention at the time payment is made. *German-American Sav. Bank v. Fritz*, *supra*; *Eddy v. Traver*, 6 Paige, 521, 31 Am. Dec. 261; *Goodyear v. Watson*, 14 Barb. 486; *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629; 2 Freeman, Judgm. *supra*. And this may be done whether an assignment be made for the benefit of the surety or not. *Scribner v. Hickok*, 4 Johns. Ch. 530; *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629, with notes. The court will, in such case, make the substitution, and grant such relief as may be proper. It is held, also, that a voluntary payment of the judgment by one of several defendants primarily liable thereunder inures to the benefit of all, and extinguishes the judgment. 2 Freeman, Judgm. § 472. "Whether one of the several persons against whom a joint judgment has been recovered may pay the judgment, and still keep it on foot by any means or for any purpose, is a question upon which the authorities are very equally divided." *Ibid*. It is held in New York that this cannot be done. *Harbock v. Vanderbilt*, 20 N. Y. 395; *Booth v. Farmers' & M. Nat. Bank*, 74 N. Y. 228. This rule is recognized in Massachusetts, Vermont, North Carolina, Indiana, and Alabama. *Hammatt v. Wyman*, 9 Mass. 138; *Porter v. Gile*, 44 Vt. 520; *Sherwood v. Collier*, 14 N. C. (3 Dev. L.) 380, 24 Am. Dec. 264; *Preslar v. Stallworth*, 37 Ala. 402; *Klippel v. Shields*, 90 Ind. 81. But there is an intimation in these cases cited from New York, Indiana, and North Carolina that this is not the rule where there are special circumstances in the case, and the judgment be assigned for the benefit of the paying defendant, or where he occupies the position of a surety, and not that of one who is primarily liable. In *Klippel v. Shields*, 90 Ind. 81, the court says: "There are cases where a different rule ap-

plies; as where the person who pays the debt occupies the position of a surety, or some similar position." On the other hand, it is held by eminent authority that a surety who pays the judgment for his principal and co-sureties may not only keep the judgment alive as to his principal to enforce reimbursement, but also against his co-sureties for the purposes of contribution; and this may be done either by assignment to a third party for the benefit of the surety paying, or by direct assignment to the surety himself. *Coffee v. Tevis*, 17 Cal. 239; *Wheeler's Estate*, 1 Md. Ch. 80; *Brown v. White*, 29 N. J. L. 514, 80 Am. Dec. 226; *Scribner v. Hickok*, 4 Johns. Ch. 530; *Lidderdale v. Robinson*, 12 Wheat. 595, 6 L. ed. 740; 1 Brandt, Sur. 2d ed. § 279. The right to subrogation in such cases is made to depend upon the intention of the debtor at the time the payment is made. In *Campbell v. Pope*, 96 Mo. 468, a judgment had been rendered against several joint defendants, including the city of St. Louis. The judgment was for a tort. Under a clause in its charter the city of St. Louis was only secondarily liable. This judgment was assigned by the plaintiff to a third party, to be kept alive for the benefit of the city, which paid it for the purpose of enforcing contribution. The court supports the right to do this, and, after citing with approval the doctrine of the cases *supra*, says: "We must hold, and do hold, that the payment made by Campbell for the assignment of the judgment was not intended to be a satisfaction of the judgment, and that the assignment thereof to him was made for the purpose of keeping the judgment alive, so that it might be enforced against the codefendants, who, under the judgment and charter provision above quoted, were primarily liable for its payment." We are unable to draw any substantial distinction between the rights of a surety against his principal and his rights as against his co-surety. In each case they are founded upon the implied agreement, growing out of the relation the parties bear to each other, that the one will refund or make good to the other money paid out by the former for the benefit of the latter. If the assignment can be made to a third party, and he can proceed as the agent of the paying defendant to enforce contribution against the codefendants, there is no sound reason why the same thing cannot be done by an assignment directly to the paying defendant himself, and contribution enforced in his name. To say that one can do through an agent what he cannot do himself seems absurd. In the case of *Coffee v. Tevis*, 17 Cal. 239, the court brushes aside this fiction, and treats the judgment assigned to the agent as if it had been made directly to the paying defendant. We are of the opinion, not only that the assignment may be made for the benefit of the co-surety, but that it may be made directly to the person who is to benefit by it, and that he may enforce it in his own name. This conclusion seems to be in conformity with the spirit of our statute that the real party in interest shall prosecute

the action in his own name. Section 4, div. 1, Comp. Stat. 1887 (Code Civ. Proc. 1895, § 570).

2. It appears from the record, without dispute, that the judgment in this case was formally satisfied by an entry on the judgment record some time after the assignment was made. The respondents were engaged in dealing in real estate, and this satisfaction was entered in order that the lien of the judgment might not appear as a cloud upon their title. The judgment standing open as to them, they were put to the inconvenience of securing releases, or giving bond to clear the title. Crutcher, after taking advice, procured the satisfaction to be entered by counsel for the bank. It was intended to have it entered as to respondents only. Atkinson had no connection with the matter, nor did he pay any consideration for it. The contention is made that this entry of satisfaction precludes the respondents from obtaining any relief. This contention would be well founded if the satisfaction had been entered generally by plaintiff before the assignment, or, at the request of the defendants, after the assignment, for the purpose of discharging the judgment. 2 Freeman, Judgm. § 466. But such was not the case here. The judgment was assigned by the plaintiff to the respondents, to be kept alive by them for the purpose of enforcing contribution, and no entry of satisfaction thereof would inure to the benefit of the nonpaying surety unless the intention was thereby to discharge him. It was the intention here that the satisfaction of the judgment should be effective only as to the respondents, and not as to the other defendants. It was not entered in pursuance of any agreement between appellant and respondents. Therefore, as to him, the judgment remained unsatisfied, and, if in force at all against him, it was in force for all purposes. A formal satisfaction of a debt, without payment, where it is intended that discharge shall take effect upon such payment, does not prevent the payee from enforcing the collection of his claim. There is no reason why the same rule should not apply to a judgment. In reaching the conclusions we announce in this case, we are not unmindful of the old distinctions between actions at law and in equity. Under the provisions of our statute (Comp. Stat. 1887, div. 1, § 1; Code Civ. Proc. 1895, § 460) these distinctions have been abolished, and the court, having jurisdiction of the parties, can accord such relief as the facts of the case may justify. *Faurot v. Gates*, 86 Wis. 569. An examination of the authorities cited in the former part of this opinion will show that courts of equity readily granted such relief as is sought herein, and we see no reason why it should be denied here, and the respondents driven to a separate action.

3. A further assignment is made by counsel for appellant in their argument, though it is not in their brief, that the court below erred in permitting respondent Crutcher to state in his testimony that it was not his intention, at the time he procured satisfaction

of the judgment to be entered, to satisfy it as to appellant. This evidence was clearly competent, and the trial court committed no error in admitting it.

Let the order appealed from be affirmed.

Hunt, J., concurs. Pigott, J., disqualified.

TEXAS SUPREME COURT.

B. M. HUTCHESON *et al.*, Plffs. in Err.,
v.

Robert C. STORRIE.

(.....Tex.....)

1. A statute authorizing assessments on abutting property for the cost of a public improvement, in a sum materially exceeding the special benefits which that property derives from the work, is in violation of the constitutional provision against taking property without due process of law, or taking it for public use without just compensation.
2. An abutting property owner is not estopped to deny the validity of an assessment made without any fair opportunity to such owner to contest its correctness.
3. The failure of an abutting owner to appear when opportunity was afforded to contest an assessment, in default of which the statute provides that he be estopped from contesting the validity of the assessment, does not preclude him from showing that the assessment was invalid because the statutory basis on which it was made was unconstitutional.

(June 19, 1899.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment affirming a judgment of the District Court of Harris County in favor of plaintiff in an action brought to enforce a street-paving assessment. *Reversed.*

The facts are stated in the opinion.

Messrs. Hutcheson, Campbell, & Myers, for plaintiffs in error:

The making of an improvement on a street and charging the entire cost of the work done in front of a particular lot, block, or tract of land on the owner and the land itself exclusively, and without any sort of proportion or apportionment between him and it and the public or adjacent property or property holders on the same street, is such a burden imposed on land and citizen as cannot be done in this state, because of the provision of article 3, § 48, of the Constitution.

6 Am. & Eng. Enc. Law, 2d ed. 921; *Green-castle Twp. v. Black*, 5 Ind. 570; *Newell v. People, Phelps*, 7 N. Y. 9.

In the construction of a Constitution, it is to be presumed that the language in which it is written was carefully selected and made to express the will of the people, and that, in adopting it, they intended to give effect to every one of its provisions.

Mellinger v. Houston, 68 Tex. 44; *Gulf, C.*

NOTE.—On the question of the constitutionality of assessments for local improvements, see also *Asberry v. Roanoke* (Va.) 42 L. R. A. 636, and *footnote* thereto.

& *S. F. R. Co. v. Rambolt*, 67 Tex. 657; *Gibbons v. Ogden*, 9 Wheat. 188, 6 L. ed. 68; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Denn v. Reid*, 10 Pet. 524, 9 L. ed. 519; *Carroll v. State*, 58 Ala. 396; *Beardstown v. Virginia*, 76 Ill. 34; *People v. New York O. R. Co.* 24 N. Y. 487; *Smith v. Thursby*, 28 Md. 269; *Cooley, Const. Lim.* 2d ed. p. 55; *Story, Const.* § 400.

The effect of the proceeding being to charge the property of the citizen with a burden for the public benefit, the requirements of the law as to the exercise of the power should be deemed mandatory.

Flewelling v. Proetzel, 80 Tex. 196; *Higgins v. Bordages*, 83 Tex. 463; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Taylor v. Boyd*, 63 Tex. 540.

The principle upon which this character of assessment is founded is that of special benefit to the property charged, equaling the amount of the assessment. If there be no special and peculiar benefit, the assessment is simply an arbitrary exaction which cannot be sustained.

25 Am. & Eng. Enc. Law, p. 497; *Cooley, Taxn.* 2d ed. pp. 661–663; *Dill. Mun. Corp.* 3d ed. § 761, note; *Cooley, Const. Lim.* 2d ed. 494; 2 *Desty, Taxn.* 1236–1257; *Stuart v. Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Keith v. Philadelphia*, 126 Pa. 581; *Preston v. Rudd*, 84 Ky. 150; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 527, 90 Am. Dec. 634; *Ellison v. Lindford*, 7 Utah, 166; *Howell v. Tacoma*, 3 Wash. 711; *People v. Daniels*, 6 Utah, 293, 5 L. R. A. 444; *Cleveland v. Tripp*, 13 R. I. 61; *Oregon & O. R. Co. v. Portland*, 25 Or. 229, 22 L. R. A. 713; *Dyar v. Farmington*, 70 Me. 527; *Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *Chamberlain v. Cleveland*, 34 Ohio St. 562.

When a street is improved the entire street is a taxing district, and substantial uniformity between the parties in that district in the amount and extent of the burden imposed on them is requisite to a just and constitutional burden. This question can only be attained by making a property holder's tax such a proportion of the entire tax of the whole street as its frontage sustains to the whole street.

Cooley, Taxn. 1st ed. 453, 2d ed. 647; *Cooley, Const. Lim.* 6th ed. 625; 25 Am. & Eng. Enc. Law, p. 525; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Woodbridge v. Detroit*, 8 Mich. 274; *Motz v. Detroit*, 18 Mich. 495; *St. Louis, McGrath, v. Clemens*, 49 Mo. 552; *Independence v. Gates*, 110 Mo. 374; *Municipality No. 1 v. White*, 9 La. Ann. 447; *Diggins v. Brown*, 76 Cal. 322; *Parker v. Challiss*, 9 Kan. 157;

Lawrence v. Killam, 11 Kan. 499; *Desty*, Taxn. §§ 1238 *et seq.*

The difference in price between the amount thus imposed on lots renders the burden unequal and the assessment void. The principle *de minimis lea non curat* does not apply in tax cases.

Cooley, Const. Lim. 521; *Case v. Dean*, 16 Mich. 12; *Lufkin v. Galveston*, 73 Tex. 343.

The assessment imposed upon and sought to be enforced against appellant and her property has not been imposed by "due process of law," and is in violation of the Constitution of the United States and of the state of Texas in that respect.

Rhine v. McKinney, 53 Tex. 361; *Paulsen v. Portland*, 149 U. S. 38, 37 L. ed. 640; *Cooley*, Const. Lim. 2d ed. 353, 354, last ed. 431, 432; *Stuart v. Palmer*, 74 N. Y. 184, 30 Am. Rep. 289; *Johnson v. Holland*, 17 Tex. Civ. App. 210; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 103*, 111 U. S. 708, 28 L. ed. 572.

The proceedings in this case were wanting in many particulars constituting "due process of law" admitting that the charter prescribed a constitutional method in that regard.

Red v. Augusta, 25 Ga. 386; *City Charter*, § 24, p. 15; *Peuple, Locke, v. Rochester*, 5 Lans. 11; *State v. Jersey City*, 27 N. J. L. 536.

The burdens were imposed unequally and much more oppressively on one than another of the persons and property situated on the same street and in the same district.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Lovenberg v. Galveston*, 17 Tex. Civ. App. 162.

Messrs. Ewing & Ring for defendant in error.

Brown, J., delivered the opinion of the court:

We omit many of the facts of this case which are immaterial in considering the questions presented to this court. The following are the material facts: Bettie M. Hutcheson, wife of J. C. Hutcheson, owned in her separate right a block of land containing about twenty acres, fronting 647 feet on the north side of the Harrisburg road, and some other lots upon the said road, all lying within the limits of the city of Houston between the International & Great Northern Railroad and the corporate line of the city. At a meeting of the city council of the city of Houston, held on August 13, 1894, the council adopted a resolution declaring that the improvement of the Harrisburg road from the International & Great Northern Railroad tracks to the city limits was a public necessity. The resolution stated the different kinds of material of which the improvement might be made, and directed that bids for the work be solicited. The third section of the resolution is in the following language: "The cost of constructing said improvements, except as to street intersections, together with the cost of collecting thereof, shall, as provided in § 24 of the char-

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ter of said city, be wholly defrayed by the owner of the lot or lots, block or blocks, or tracts of land when not divided into lots or blocks abutting on said portion of said streets or avenues to be so improved, and said improvements shall be paid for in five equal annual instalments." The resolution was published as required by the provisions of the charter, and the city engineer made specifications for the work, which were approved by the city council, and, after due advertisement, the city council entered into a contract with R. C. Storrie to make the improvement ordered. The city engineer, in accordance with the terms of the charter made and filed a roll of ownership upon which the property of Mrs. Hutcheson was placed, and the cost of the improvement, according to the contract, was apportioned to the said property by the front foot thereof, as required by the charter to be done. The roll of ownership thus made out was filed with the secretary of the city, who gave notice of its filing, as required by the charter, and, there being no objection presented on the part of Mrs. Hutcheson, it was approved by the council, and improvement certificates were ordered to be issued to R. C. Storrie for the cost of the work, when approved by the board of public works. R. C. Storrie did the work according to the contract, and the improvement certificates were issued and delivered to him. Mrs. Hutcheson having failed to pay the instalments, this suit was filed to enforce their collection, and the district court entered judgment foreclosing a lien upon the property for the amount assessed, except the correction of some errors. Mrs. Hutcheson's property was situated in a part of the city of Houston where there were very few houses of any kind, and most of them small and of little value. Much of the property in that vicinity was used for pasturage, and there were no water mains or pipes, electric lights, or sewerage in that portion of the city. As to whether the value of the property was equal to the amount assessed upon it for the improvement, the testimony was conflicting and the issue not determined by the court of civil appeals. Mrs. Hutcheson offered evidence to show that there were no special benefits derived by her property from the improvements made, which was excluded by the court, and there was no evidence that such benefits did exist. The court of civil appeals affirmed the judgment of the district court, from which Mrs. Hutcheson and her husband have sued out this writ of error.

Plaintiffs in error present a number of objections to the judgment, all based upon the proposition that the charter of the city of Houston, in so far as it authorizes the city council to improve the streets at the cost of abutting property, without regard to special benefits to the property, is violative of §§ 17 and 19 of article 1 of the Constitution of this state which read as follows:

"Sec. 17. No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation

being made, unless by the consent of such person. . . ."

"Sec. 19. No citizen of this state shall be deprived of life, liberty, property, privileges, or immunities, or in any manner disfranchised, except by the due course of the law of the land."

Also that it is in conflict with the following provision of § 1 of the 14th Amendment to the Constitution of the United States: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The court of civil appeals followed strictly the case of *Adams v. Fisher*, 75 Tex. 657, in which Judge Stayton said: "The charter of the city of Galveston gives to its council the legislative power to determine whether such an improvement will be for the public interest, and also to determine whether it will be of such benefit to property fronting on that part of the street to be improved as will justify the imposition of a part of the cost of the improvement on the owners of such property, and its determination of this question must be deemed conclusive," and, in support of the opinion, Judge Stayton quoted from *Ludlow v. Cincinnati Southern R. Co.* 78 Ky. 360, as follows: "While assessments of this character, as distinguished from general taxation, rest upon the basis of benefits or presumable benefits to the property assessed, it is not essential to their validity that actual enhancement in value or other benefit to the owner shall be shown. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement and of the question of benefit to the owners of abutting property." In that opinion this court followed the great weight of authority by which this extraordinary power has been sustained with remarkable unanimity. But in the case of *Norwood v. Baker*, 172 U. S. 209, 43 L. ed. 443, recently decided by the Supreme Court of the United States, the rule announced in *Adams v. Fisher* has been completely overturned, and all precedents establishing it have been set aside. We recognize the binding force of the decision of the Supreme Court of the United States upon this question, but we the more readily apply it because we indorse it as a timely and just announcement of the superiority of a constitutional guaranty over a rule of law established by the courts. We feel some satisfaction, also, in the fact that the Constitution of this state provides with equal fullness for the protection of the rights of property under such circumstances as does the Constitution of the United States, and, if the action now undergoing investigation is violative of the Constitution of the United States, it is more palpably a violation of the plainer provisions of the Constitution of the state of Texas.

The first question is, What scope are we to give to the case of *Norwood v. Baker*, as authority in the decision of this case? Counsel for Storrie have presented an able and in-

genious argument in which they endeavor to limit *Norwood v. Baker* by contrasting it with previous decisions of the same court, and, by ascribing to the former decisions superiority, they seek to eliminate from the latter case every point which contradicts a former decision. It is claimed that because the court says *Norwood v. Baker* is not in conflict with the former decisions that court did not intend to decide that which is in fact in conflict. The more reasonable conclusion is that the court did not understand the former cases to embrace the grounds upon which the later case rests. The case mainly relied upon for this purpose is *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, in which the assessment was made by an act of Congress, while in the case of *Norwood v. Baker*, it was made by a municipal corporation under an act of the legislature. In the former case the court distinguishes the two classes in the following language: "There is a wide difference between a tax or assessment prescribed by a legislative body having full authority over the subject and one imposed by a municipal corporation acting under a limited and delegated authority. And the difference is still wider between a legislative act making an assessment and the action of mere functionaries whose authority is derived from municipal ordinances." The distinction drawn may not be sound, but the statement shows that the question decided in *Norwood v. Baker* was not determined in the case relied upon.

Norwood v. Baker establishes the following propositions, which are applicable to the case at bar:

1. The legislature of a state cannot authorize a municipal corporation to assess upon abutting property the cost of a public improvement in a sum materially exceeding the special benefits which that property may derive from the work. The court said: "In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation." It has been uniformly held that such assessments rest upon the ground that the benefits conferred are equal to the demands made upon the property; but the courts, in applying the law to the particular cases, have heretofore ignored the principle upon which the authority rests, and have held that the exercise of the power will be upheld, although the facts out of which it arises do not exist, and that benefits will be presumed to equal the assessment.

2. The legislature of a state cannot confer upon a municipal corporation the authority to make such assessment conclusive upon the owner without giving an opportunity to contest the question of benefits. Upon that point the court said: "As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and

therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received." If the law under which the assessment in controversy in this suit was made did not afford to the property owner a fair opportunity to contest the correctness of the assessment made upon her property, she was not estopped to deny its validity.

3. In *Norwood v. Baker* the Supreme Court of the United States laid down the rule that, because the assessment was made under a law that did not afford property owners the opportunity to be heard nor empower the city authorities to consider the question of benefits, the assessment in that case was a nullity. Upon this proposition that honorable court said: "It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show or offer to show by proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that, if the proof had shown an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the cost and expenses assessed upon the abutting property exceeded the special benefits. The 45 L. R. A.

assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one." From the record it appears that, in determining the amount to be assessed against the property of Mrs. Hutcheson neither the city council nor the municipal officers considered the question of special benefits which might accrue to the land from the work, but proceeded upon the basis of the cost of the improvement to determine the amount. It follows that the assessment is void, unless Mrs. Hutcheson is estopped to set up the defense by a failure to enter a protest against the proceeding and to sue out an injunction against the council.

The charter of the city of Houston confers upon the city council full authority and control over its streets and alleys, and empowers the council to determine what street or portion of any street shall be improved, and whether the cost of such improvement shall be paid by the city in whole or in part, or by the owners of the abutting property either in whole or in part. If the city council should determine to charge the cost or any portion of it upon the abutting property, then, by a two-thirds vote of all of the aldermen, it must determine whether the improvement is necessary to the public interest. When these questions have been settled by the council, if it be decided that the cost of the improvement shall be paid by the owners of the abutting property, the charter provides that "the cost . . . shall be defrayed, in case of . . . street improvements, by the owner or owners of the lot or lots, block or blocks, tracts of land, when not laid out into lots and blocks, abutting on such street or portion of street improved, according to the cost of work in front of the particular lot or block or tracts of land." Special Laws 1893, p. 21, § 24. The city council is also empowered to determine whether the work shall be paid for in money, bonds of the city, or improvement certificates, and to make a contract for it. After the contract has been made, it is the duty of the city engineer to make out a roll of property abutting on the street to be improved, and to specify upon such roll, among other things, "the total cost, as ascertained and calculated by the city engineer, of such improvements necessary to be borne by each and to be paid by each owner of such property as described in such roll." Id. p. 24. There is no discretion lodged with the city council in determining the assessment to be made upon the abutting property, but the charter absolutely fixes the rule by which the assessment is to be governed, and devolves upon the engineer the mere ministerial duty to ascertain by calculation what the work in front of the particular lot will cost, under the contract, according to the specifications. The law prescribed the standard to be the cost of work done in front of the lot, the specifications showed the work to be performed, and the contract fixed the

price. A calculation alone was necessary to ascertain the sum to be expressed on the roll. Neither the council nor the engineer could proceed upon any other basis than that expressed in that statute, for we must look alone to the charter for the powers to be exercised by these officials. If, however, there were room for doubt as to the rule by which the assessment is to be made, the charter would set that at rest, for in the next succeeding phrase of the same sentence is to be found the following provision: "And in case of sewerage or drainage improvements [the cost] shall be defrayed by the owner or owners of such lot or lots, block or blocks, or tracts of land, when not laid out into lots or blocks, according to the proportionate benefits of the lots," etc. Id. p. 21, § 24. It is apparent that, in the enactment of these provisions in the same section and in the same sentence, the distinction between the assessment of the cost and the assessment of the value of benefits was present in the legislative mind, and that the rule of assessing for street improvements according to the cost of the work, without regard to benefits, was intentionally and distinctly applied to that class of work with the intention to exclude benefits. Up to this point in the procedure there certainly could have been no departure from the rule expressed in the charter by the city council or any officer engaged in the execution of the powers conferred. Special benefits could not have been considered. But it is claimed that the charter provides for a hearing before the council at which the rights of the parties might have been adjusted upon the basis of benefits, and that the plaintiffs in error are estopped to deny the validity of the assessment, because they failed to call upon the council by petition to revise and correct the proceedings and remedy the wrong. The question arises, Did the charter afford to Mrs. Hutcheson an opportunity to contest the mode of making the levy? After the roll of ownership has been prepared by the city engineer and approved by the board of public works and by the city council, it must be filed with the secretary of the city, who is required to publish the following notice: "Persons owning property on [here insert the name of street or streets, or description of portions of the same referred to in said roll, or a description of the territory or district to which the roll relates], are hereby notified that the roll of ownership showing the amount of the special assessment tax levied against the owners of property above referred to, to cover the cost of improvement made in accordance with the resolution of the city council relating to the same, adopted [here insert the date of the resolution], has been placed in the office of the city secretary for inspection, in order that all persons interested therein, or to be affected thereby, may have an opportunity of calling the attention of the city council to any errors or mistakes connected with such assessments levied against property owned by them, as shown in said rolls." Id. p. 25, § 27. The secre-

tary is required to mail a copy of a notice to the postoffice address of the property owner. At any time within ten days after the first publication of the notice, the property owner may, "by petition to the city council, filed with the city secretary, object to any such acts and proceedings and show wherein they have been or may be wronged or injured thereby, and to ask for a revision or correction of the same; and they shall be permitted, and it shall be their duty, before the final approval of such roll, to appear in person, or by agent or attorney, before said city council, and not thereafter at any time before any other tribunal, fraud and collusion, which was then unknown and could not by reasonable diligence have been ascertained, excepted, and apply for redress for such wrong or injury, and for the correction of such errors as they may point out and establish to the satisfaction of said council; nor shall any such roll be finally approved by the city council after filing of such petition by any person so affected or liable to be affected by said proceedings, until such petition shall have been heard and acted upon by the city council, although it shall not be necessary to incorporate in the minutes of said city council its action thereon; and it shall be the duty of any person who may deem himself injured by the action or non-action of the city council in reference to the matters contained in such petition, within five days after the approval of such roll of ownership, to apply to the proper court for an injunction, based on the facts alleged in such petition, restraining further action on the part of the city officials, or any of them, in reference to the matter complained of in such petition, and to the extent of the petitioner's interest in the same; and neglect or failure so to do shall forever estop such petitioner and all parties claiming under him from denying the correctness of said roll or the regularity of all proceedings previously had in reference thereto, or the validity of the special tax therein assessed against the land owned by him." Id. p. 26, § 27. The foregoing provision of the charter authorizes the property owner to call upon the city council to revise and correct errors committed in the proceedings had in assessing the cost of improvement against his property, but it does not empower the council to do anything that it or its officers could not have done in the first instance. The words "revision" and "correction" mean that the council may be called upon to review that which had been done, and to make the proceedings conform to the law. *Vinsant v. Knoch*, 27 Ark. 272. The city council and the officers acting under the authority of the charter of the city of Houston having no power in the first instance to consider the question of benefits in fixing the amount to be charged against Mrs. Hutcheson's property a revision and correction of the acts done could not give relief against the wrong complained of. In support of this conclusion, we call attention to the potent fact that the city had entered into a contract with Storrie for the

performance of the work at a stipulated price and with the agreement that he should be paid in improvement certificates, which would hold a lien upon the property, before the amount of the assessment was ascertained. If the engineer, for instance, committed an error in estimating the cost of the work in front of Mrs. Hutcheson's property, then a revision and correction of that act by the council could be had and the wrong could be corrected, because the contract itself furnishes the data, and the correction would accord with the contract. If, however, the council had changed the basis of the assessment against Mrs. Hutcheson's property from the costs of the work to that of benefits received by the property, whereby the amount assessed would be lessened, the contract would have been annulled. A construction should not be placed upon the language that would empower the city to destroy the contract without the consent of Storrie. The claim that, upon petition of Mrs. Hutcheson, the council could have afforded relief from the unlawful exaction, is wholly unsupported by the terms of the law, and is in direct conflict with many of its provisions. The wrong did not consist in a failure to follow the directions of the law, but in obeying its unconstitutional requirements. The authority conferred upon the court to issue an injunction restraining the council from proceeding further is limited to "the facts alleged in the protest," and is no broader than that vested in the council. The court is simply empowered, by writ of injunction, to restrain the council from doing acts contrary to the charter, and to correct any errors which that body might have corrected. It is claimed that the jurisdiction of the court must be held to be broad enough to embrace the subject of estoppel provided for in the law. Therefore the court, by injunction, could inquire into and correct anything done which affected the validity of the levy. But we think that the estoppel to question the "validity" of the tax, must be construed to forbid the owner to set up such invalidity as might arise from a want of compliance with the terms of the charter, and not such as might grow out of want of authority in the city to make the assessment. The right to apply to a court for injunction is, as above stated, expressly limited to the facts alleged in the petition to the council. The authority of the district court is revisory and confined to correcting the acts done by the council and city officers. If the legislature had enacted in plain words that a failure to apply for injunction against a levy of the cost of improvement upon the property should estop the owner to deny the validity of such assessment, the law would be void, because the legislature could not validate by estoppel an act that it is forbidden by the Constitution to authorize. It is asserted that Mrs. Hutcheson might have had the question of benefits investigated in this suit and the assessment reduced so as not to exceed the special benefits received. The charter provides: "And at all times and in 45 L. R. A.

all proceedings in any court in which the validity of any special tax assessment that might have been laid under the charter of the city of Houston or amendments thereto, as shown by any roll of ownership, purporting to have been prepared by the city engineer in accordance with the provisions thereof, may be called in question, a recovery shall nevertheless be had in such suit for such sum as ought to have been assessed against the tract of land involved; according to the mode of apportionment, provided in the law of said city applicable to such improvement, and if for any reason, in law or fact, such recovery cannot be had, then a recovery shall be allowed, *quantum valebat*, not exceeding the contract price for the improvement in front of the lot or lots, block or blocks, or tracts of land involved, according to the front-foot rule or standard; and if for any reason, in law or fact, recovery cannot be had in either of the above modes, then recovery shall be allowed not exceeding the contract price, to the extent and according to the standard of benefits from the improvements in question to the lot or lots, block or blocks, or tracts of land involved." Special Laws 1893, p. 26, § 27. The legislature attempted to secure contractors for this class of work against all contingencies, and to authorize them, in case their contracts and the proceedings by virtue of which their claims arose were unenforceable, to recover nevertheless from the property owners upon one of the grounds named. It is unnecessary for us to determine whether the legislature could effect such a purpose or not. The language does not purport to authorize the defendant in such proceeding to inaugurate the inquiry, and the construction would conflict with that part of the charter which declares that the property owner shall not do that thing. Substantially the same proposition was presented in the case of *Norwood v. Baker*, where it was contended that the party who sought the injunction in that case should have shown that the assessment was in excess of the benefits received, and that the court should have rendered judgment for the amount that the property was benefited by the improvement. In answer to this proposition, that court said: "This suggestion implies that, if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the

costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one." The quotation thoroughly refutes the contention made in this case, and needs no argument to support it. It would be quite unusual to require the defendant in a suit, upon a demand wholly invalid, to furnish the plaintiff a valid cause of action as a condition precedent to defending himself against the unlawful claim. If the charter of the city of Houston, under which the assessment in this case was made, could, by any fair and reasonable construction, be held to secure the property owner the right, at a time when it could be made effective, to contest the validity of the levy, because not made upon the basis of benefits, it would be the duty of this court to so construe it. But, in order to justify such a construction, it should be so obvious that the property owner, upon a fair consideration of its provisions, would have known at the time of the proceeding that the remedy was afforded by the charter. If this court should force a construction of the charter which could not reasonably have been understood to be the meaning of the law at the time the acts were being performed, it would be not only judicial legislation, but retroactive as well, which would be as unreasonable and

arbitrary as the rule by which courts are required to conclusively presume that the city council has found the special benefits to be equal to the cost, when in fact there were no benefits and the council had no power to consider the question.

It is to be regretted that contractors and others may have been involved in financial loss by reason of an unconstitutional enactment of the legislative department, and courts will always preserve the rights of those who act in compliance with the law of the land, as far as it can be done lawfully; but the guaranties of the Federal and state Constitutions must not be subordinated to questions of finance or sentiments of justice. Justice will be best preserved by upholding the limitations against the exercise of arbitrary power. When a law comes in conflict with the Constitution of the United States or of the state of Texas, then the law must yield, and the Constitution be upheld and sustained. We conclude that the assessment made in this case was void, and that it gave no right against Mrs. Hutcheson, either of a personal nature or a lien upon her property, and that the pleadings and evidence conclusively show that no right of action can be shown.

It is therefore ordered that the judgments of the District Court and Court of Civil Appeals be reversed, and that judgment be here rendered for defendants, B. M. and J. C. Hutcheson.

WYOMING SUPREME COURT.

Henry RASMUSSEN
v.

BOARD OF COUNTY COMMISSIONERS
FOR CARBON COUNTY.

(.....Wyo.....)

1. Payment to a *de facto* officer is no defense to an action brought by a *de jure* officer for the salary of an office to which he has been legally declared entitled from the commencement of the term, except when he is himself in fault by failure to qualify.
2. A *de jure* officer is not entitled to the salary of the office for a period during which he was excluded from the office by his own fault in failing to qualify, and during which a *de facto* officer has held the office and received the pay.

(April 24, 1899.)

QUESTIONS RESERVED by the District Court for Carbon County for the opinion of the Supreme Court which arose in an action brought by the county treasurer to recover a salary due him as such officer for a period during which he had been kept out of office by a *de facto* officer. Judgment in plaintiff's favor.

NOTE.—On the question of the right of a *de jure* officer to recover the salary of the office after it has been paid to the *de facto* officer, 45 L. R. A.

The facts are stated in the opinion.

Mr. Nellis E. Corthell, for plaintiff:

The judgment and the canvass derive their only force and validity from the election itself, and are simply declaratory of the right which has already previously arisen and been perfected.

State v. Johnson, 17 Ark. 407; *Carroll v. Siebenthaler*, 37 Cal. 195; *Swann v. Turner*, 23 Miss. 565; *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Kreitz v. Behrensmeyer*, 140 Ill. 496, 24 L. R. A. 59; *People, Smith, v. Pease*, 27 N. Y. 56, 84 Am. Dec. 242; *Shannon v. Baker*, 33 Ind. 391.

The right of one who holds office by election arises from the fact and at the time of his election.

An office is "a right to exercise a public (or private) employment, and to take the fees and emoluments thereunto belonging."

2 Bl. Com. 38; *United States v. Hartwell*, 6 Wall. 393, 18 L. ed. 832.

The salary "is an incident to the office, and cannot be detached from it."

Blair v. Marye, 80 Va. 492; *Kendall v. Raybould*, 13 Utah, 226; *People, Stratton, v. Oulton*, 28 Cal. 44; *People, Dorsey, v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal.

see *State, Greeley County, v. Milne* (Neb.) 19 L. R. A. 689, and note; also *Kreitz v. Behrensmeyer* (Ill.) 24 L. R. A. 59.

195; *People, Dennis, v. Brennan*, 30 How. Pr. 417; *People, Morton, v. Tieman*, 30 Barb. 193; *Fitzsimmons v. Brooklyn*, 102 N. Y. 538, 55 Am. Rep. 835.

No one except an officer *de jure* can recover the salary, even though he performs the duties and exercises the functions of the office.

Meagher v. Storey County, 5 Nev. 245; *Carroll v. Siebenthaler*, 37 Cal. 195; *People, Dennis, v. Brennan*, 30 How. Pr. 417; *Kimball v. Alcorn*, 45 Miss. 158; *McCue v. Wapello County*, 56 Iowa, 698, 41 Am. Rep. 134; *Dolan v. New York*, 68 N. Y. 279, 23 Am. Rep. 168; *Macon v. Hays*, 25 Ga. 590; *People, Henry, v. Nostrand*, 46 N. Y. 382.

Where the salary has been paid to the incumbent, the person rightfully entitled to the office may recover from him the entire amount so received.

Kreitz v. Behrensmeyer, 149 Ill. 496, 24 L. R. A. 59; *People, Smith, v. Pease*, 27 N. Y. 56, 84 Am. Dec. 242; *Dolan v. New York*, 68 N. Y. 280, 23 Am. Rep. 168; *State, Coltharp, v. Holmes*, 43 La. Ann. 1185; *Wenner v. Smith*, 4 Utah, 238.

The board of county commissioners could not by paying Baker the salary for part of the plaintiff's term take away the plaintiff's right to so much of that salary.

State, Worrell, v. Carr, 129 Ind. 44, 13 L. R. A. 177; *Pimental v. Marques*, 109 Cal. 406; *Aldritt v. Pantan*, 17 Mont. 187.

The salary may be recovered by the *de jure* officer directly from the county.

Bastrop County v. Hearn, 76 Tex. 563; *People, Dorsey, v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193; *Ward v. Marshall*, 96 Cal. 155; *State, Worrell, v. Carr*, 129 Ind. 44, 13 L. R. A. 177; *Andrews v. Portland*, 79 Me. 484; *Stadler v. Detroit*, 13 Mich. 346; *State, Cullen, v. Carr*, 3 Mo. App. 6; *Selby v. Portland*, 14 Or. 243; *Lee v. Wilmington*, 1 Marv. (Del.) 65; *Philadelphia v. Rink* (Pa.) 2 Atl. 505; *Memphis v. Woodward*, 12 Heisk. 499, 27 Am. Rep. 750; *Williams v. Clayton*, 6 Utah, 86; *Kendall v. Raybould*, 13 Utah, 226; *People, Morton, v. Tieman*, 30 Barb. 193; *People, Smith, v. Pease*, 27 N. Y. 56, 84 Am. Dec. 242; *People, Dennis, v. Brennan*, 30 How. Pr. 417; *Dolan v. New York*, 68 N. Y. 280, 23 Am. Rep. 168; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Fitzsimmons v. Brooklyn*, 102 N. Y. 536, 55 Am. Rep. 835; *Fylpaa v. Brown County*, 6 S. D. 634; *Scott v. Crump*, 106 Mich. 288; *Parker v. Dakota County Supers.* 4 Minn. 59.

Mr. Fenimore Chatterton for defendant.

Knight, J., delivered the opinion of the court:

At the general election held in 1896, plaintiff was a candidate for the office of county treasurer of Carbon county. The returns of the election, as canvassed, gave him twenty-seven votes less than Fred M. Baker, the opposing candidate; and a certificate of election was issued to said Baker, under which he duly qualified and assumed the duties of said office. Plaintiff, Rasmussen, instituted 45 L. R. A.

proceedings to contest the election of Baker within the time and as provided by law, and his said action came regularly to this court, and certain questions deemed material and important were determined here November 15, 1897 (38 L. R. A. 773); and thereafter, on December 22, 1897, and upon the questions so determined, the district court rendered judgment for this plaintiff, Rasmussen, the same being a judgment of ouster in his favor and against said Baker. The contention in that action was that certain naturalized citizens (and a sufficient number to produce the result found), who were unable to read the Constitution of the state in the English language, were permitted to vote upon proof of their ability to read the same in their native language correctly translated. After the judgment of the district court on December 22, 1897, said plaintiff, without opposition, proceeded to qualify as county treasurer, and on December 23, 1897, took the oath of office required, and presented his bond, which was thereafter, on January 6, 1898, by the board of county commissioners rejected; and, as no exception was taken nor objection made at the time or since to this act of the board, it is to be assumed that said action was as required by law. On February 1, 1898, said plaintiff presented a new bond, which was duly approved, and plaintiff assumed and discharged the duties of said office from thence on to the end of the term, and received the salary therefor. This action is brought to recover from the county the salary of said office from January 4, 1897, to February 1, 1898,—the period of time that said Fred M. Baker occupied the same and performed the duties thereof by virtue of the certificate of election as aforesaid,—and for which said services said Fred M. Baker had been fully paid by the county of Carbon.

This action, as appears from the foregoing statement, is one where a *de jure* officer seeks to recover from a county the salary of an office where the services incident to said office had been performed by a *de facto* officer and fully paid for by the county, and such payment is pleaded as a defense, as well as the admitted fact that the said *de jure* officer failed to take the oath of office until after judgment had been rendered, declaring the plaintiff to be such *de jure* officer, and that said plaintiff failed to present a good and sufficient bond, after filing his oath of office for more than one month. It will be observed that this action is absolutely free from fraud (and we call attention to that fact now once for all, as all of the well-considered cases bearing upon this subject admit that in a case such as we have here a different rule should be applied than where fraud is claimed and found). Among the long list of authorities to which we have been directed by the briefs herein, as well as a large number that we have found and examined, there is a marked distinction between cases like this where recovery is sought from the municipality or county after payment has been made to a *de facto* officer, and

where recovery is sought from the *de facto* officer for all or a part of the money so received. It is not necessary for us to discuss as to what constitutes an officer *de facto*, or one *de jure*, because the parties here come within the best description of those officers that we have found.

The six questions certified to us from the district court are as follows: "(1) Where, by reason of illegal votes having been received and counted for him, one who receives a minority of the legal votes cast for county treasurer is by the county canvassing board declared elected, and receives his certificate of election and qualifies, discharges the duties, and receives the salary of the office pending a contest against him by the candidate who receives a majority of the legal votes cast, is the latter, upon being adjudged entitled to the office from the beginning of the term, entitled also to receive from the county the salary from the beginning of the term for which he was elected? (2) Where, pending an election contest for the office of county treasurer, the several members of the board of the county commissioners, with individual knowledge, but not by reason of any formal notice to them, knew of the pendency of such contest, pay the current salary of the office to the incumbent, who is subsequently adjudged not to be entitled to the office and is ousted therefrom, is the successful contestant, upon being installed in office, entitled to receive from the county the salary of such office from the beginning of the term for which he was elected, he not having performed any of the duties of said office? (3) Where, pending an election contest for the office of county treasurer, the several members of the board of county commissioners, with the individual knowledge of the facts upon which the legality of certain votes cast for the incumbent in the number determinative of the right to the office are thereafter declared to be illegal, and the board under these circumstances pays the current salary of the office to such incumbent prior to the judgment in said contest, who is subsequently adjudged not to be entitled to the office and is ousted therefrom because of such illegal votes, is the successful contestant, upon being installed in office, entitled to receive from the county the salary of such office from the beginning of the term for which he was elected? (4) Where, in an election-contest case pending for the possession of the office of county treasurer, certain questions of law determinative of the merits of the case are reserved and certified to the supreme court and the answers and decision of said court are in favor of the contestant, and notice of such decision is given to the board of the county commissioners, which thereafter pays to the contestee and the incumbent of such office the current salary of such office, is the successful contestant, upon being installed in office, entitled to receive from the county the salary of such office for the time covered by the payment made subsequent to notice aforesaid? (5) Where the board of county commissioners, subsequent to judgment in 45 L. R. A.

favor of the contestant in an election-contest case for the possession of the office of county treasurer, and notice to it of such judgment, pays to the contestee and incumbent of such office, prior to the approval of the contestant's official bond, the current salary of the office, is the successful contestant, upon being installed in office, entitled to receive from the county the salary of such office for the period covered by the payment made after notice of judgment as aforesaid? (6) Is the payment of the salary of the office of county treasurer by the board of the county commissioners to the incumbent of such office pending an election contest against him for the possession of such office, a sufficient defense to an action by the successful contestant, after being installed in office, to recover from the county the salary of such office for the period covered by such payments, he not having performed any of the duties of said office?"

In answer to the first question we quote with approval, among others, from *State v. Johnson*, 17 Ark. 413: "To determine the result of the election, . . . we have but to ascertain who received the majority of the votes of the electors possessing the qualifications prescribed by those acts of the legislature to which we have before herein referred. The poll books of an election serve as conclusive evidence to the judges who preside at the polls to enable them to determine the result, as it is from these books alone that such judges can ascertain that fact. After they have been thus used, and are deposited and filed away as the law requires, they are simply memorials of what they contain, and intrinsically, as a medium of evidence of the qualification of the electors, they are only *prima facie* evidence of that fact. The proclamation and certificate of the judges who presided over the election, . . . declaring and making known that the appellee had received a majority of the electoral votes polled on that day for the office of mayor, were certainly not more potent than the original books from which the fact proclaimed and certified to was derived. The office of the proclamation was to inform the parties concerned of the present result, and that of the certificate and the abstract they were required to make out and send to the governor was to furnish him with evidence, *prima facie* or conclusive, as to him it makes no difference, whereon he might proceed to issue the commission to the person so appearing to him to have been elected. But at last, after all this has been done, and the party thus commissioned, he derives his authority as an officer, not from the proclamation of the judges, not from the certificates of elections, not from those abstracts made out for the governor, and not from the commission, but from the free choice and election of the people, not the people in the popular sense of those words, but from the people who were competent and qualified electors when the votes were polled and the election held [citing authorities]."

In 8 Am. & Eng. Enc. Law, at pages 808

et seq., will be found a discussion of the subjects embraced in this action and authorities more generally cited than in any other work that we have examined. Leaving out of consideration those where fraud is a factor and those where the proceeding is against a *de facto* officer, and those where the consideration of the manner of procedure are controlling elements, we are of the opinion expressed by the court in *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353: "A critical examination of the adjudged cases will show that the question involved is not so trammelled by authority that this court is precluded from adopting the rule which best accords with sound reason and a wise public policy." In this case (*Stuhr v. Curran*) the court holds the right of the *de facto* officer to retain the fees of the office received by him while in possession of the office, as against the *de jure* officer who sues to recover the same. The case of *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 108, holds that disbursing officers charged with the duty of paying official salaries have, in the exercise of that duty, a right to rely upon the apparent title of an officer *de facto*, and to treat him as an officer *de jure* without inquiring whether another has the better right, and that the officer *de jure*, when he recovers possession of the office by quo warranto, is entitled to receive from the disbursing officer so much of the salary as at that time has not been paid to the intruder.

A leading case, and often referred to as such, is *Wayne County Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382. Benoit and one Miller were candidates for the office of county treasurer. Miller was declared elected by the canvassers, and was commissioned, and entered upon the duties of the office January 1, 1867, and continued to perform such duties until November, when he was ousted by the judgment of the supreme court in an action brought by Benoit who then took the office and continued to serve the remainder of the term. In making final settlement, Benoit claimed the salary for the full term, including that portion while Miller performed the duties and received payment from the county for the same. And Benoit in his final settlement withheld a sum of money equal to the amount paid by the county to Miller. The board of county auditors refused to allow Benoit's claim, and brought action on his bond to recover the amount so withheld. The circuit court gave judgment for the county, and Benoit appealed. The supreme court says, among other things: "It seems very well settled that, as against the person who has kept him out of office by the intrusion, an action would lie for the injury. . . . Our statute has recognized the right to this redress." And the court decides that recovery cannot be had against the county. In this case, Justice Cooley filed a dissenting opinion, in which he holds that Miller was not entitled to receive payment from the county, being a *de facto* officer; and that, while a *de facto* officer acting as such can legally discharge

the duties of the office and bind private individuals, he cannot sue and recover fees or salary, and thereby deprive the *de jure* officer of the same. The case of *People, Dorsev, v. Smyth*, 28 Cal. 21, is referred to by Justice Cooley as follows: "This decision appears to me to be sustainable on the soundest reasons of public policy. . . . Public policy requires that municipal officers should be allowed to sanction or recognize the intrusion only so far as may be necessary to give the public the full benefit of protection which the rule regarding the acts of officers *de facto* was designed to afford." Justice Cooley contends in this opinion that, notwithstanding the statute of Michigan which gave Benoit the right to recover from Miller the salary he had collected as such *de facto* officer, Benoit should have the right to recover that amount from the county, and not be forced to look to Miller, who might be insolvent, and that payment to Miller was unwarranted upon legal principles which he presents and discusses learnedly, and his opinion in this case is many times referred to with approval. It is interesting to follow this case and cause of action in the supreme court as reported, and it is to be found next in *People, Benoit, v. Miller*, 24 Mich. 458, 9 Am. Rep. 131, a proceeding in quo warranto. Judgment for damages is opposed because the value of Miller's services was not allowed, and because Benoit's earnings, while kept out of the office, were not deducted from salary of the office during said time. In this decision the entire court, including Justice Cooley, concur; and, as several of the same questions are now before us, we quote: "It is claimed that Miller, having been in office during the preceding term, was bound to hold over until his successor was elected and qualified, and that, as Benoit did not qualify until after the judgment of ouster, Miller's right to the salary and his duty to hold over continued. It would be a sufficient answer to this to refer to the judgment already given, which is conclusive against any pretense of a lawful holding over. That would have been a complete defense to the original action, if there had been any foundation for the claim. But there is no foundation whatever for any such pretext. The defense in this case rested upon a new election and a title thereby certified by the proper authority to be in Miller and his taking steps to qualify. That action precluded Benoit from qualifying, and his attempt to do so would probably have been nugatory. He could not be compelled to tender his qualifying papers to officers who had already acted, or who had no evidence of his rights. The law expressly allows an officer ousted by another to qualify after he obtains judgment in his favor. . . . We do not find any reason or authority for holding that the good faith of the intruder can make any difference touching the pecuniary value of the office to the person kept out. . . . In such offices as the one now in question there are very few, if any, duties which cannot be performed by deputy. There are duties for which no specific payment is made and which

are compensated by the salary, and there are duties which are paid for by fees or other perquisites only earned by performing those specific duties. There may be reason for deducting from any official earnings the actual cost of obtaining them, which would have been entailed on any person who might have held the office. It is difficult to see how any such question could arise here, because all that expense is paid by the county. . . . The official salary is not made dependent on the amount of work actually done by the treasurer, and does not require his personal services to any considerable extent. He would not forfeit it by leaving the bulk, or possibly the whole, of his substantial duties to the deputy and clerks. He would not necessarily lose it even by misconduct, unless removed from office. It is given, no doubt, on the theory that a treasurer is worth so much to the county, but not upon any specific apportionment whereby the value of his time and sagacity and his character and his business knowledge can be determined separately. But, whatever may be the basis of the allowance, it is fixed upon the theory that it will usually be paid to a person who has been selected by the electors or appointing power as a desirable incumbent. The amount of personal labor done by the officer can form but a small part of his claim to the salary in such an office as this, and he may be much less competent than his deputies. But whether it be or be not important that this personal labor should be expended,—and in some offices it must be,—the inquiry here is, how far it can be regarded as proper to make the person who has been kept out of the office pay for the services of the wrongdoer. They are not services done for him personally. They are not services done at his request, or by his consent. They are services which it must be assumed he would have been willing to perform himself, if not prevented by the intruder. No rule of law permits one to make another his debtor in spite of his protest and against his will. . . . The money which Miller received from the county was paid to him because he was an officer *de facto*, and as the perquisites of office, and not for private services independent of official character. Having received it as official property, he must restore it as such. An intermeddler might as well charge a commission on rents collected of tenants without authority from the landlord, as an intruder into office claim pay for his personal services from the legal officer whom he has kept out. Miller's services were not rendered with any design of benefiting Benoit."

Other courts of high authority have announced the same conclusion that, where payment has been made to an officer *de facto* and before judgment of ouster, the *de jure* officer cannot recover from the city or county, and some courts have gone so far as to hold that this rule applies even where it is known that the *de facto* officer is insolvent and his title to the office is being contested. *Shaw v. Pima County* (Ariz.) 18 Pac. 273; *State, Vail, v. Clark*, 52 Mo. 508; *Smith v.*

New York, 37 N. Y. 518; *Westberg v. Kansas*, 64 Mo. 493; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Steubenville v. Culp*, 38 Ohio St. 23, 43 Am. Rep. 417; *Shannon v. Portsmouth*, 54 N. H. 183; *Chandler v. Hughes County*, 9 S. D. 28; *Fuller v. Roberts County*, 9 S. D. 219; *State, Greeley County, v. Milne*, 36 Neb. 301, 19 L. R. A. 689, and other cases. All through the authorities cited and those we shall hereafter refer to it is held that an officer *de facto*, as such only, cannot in any form of action recover from the county or city the fees of an office, although he may have performed the duties of the office. The authorities upon this proposition are more numerous than upon any other in point, and the courts holding otherwise are so far in the minority that it is not necessary to refer to them. There is no such office anywhere as a *de facto* office. It is the officer and not the office to which the term *de facto* is applied. *Norton v. Shelby County*, 118 U. S. 442, 30 L. ed. 186. One of the most condensed and instructive discussions we found, covering, as it seems to us, all of the contentions here in point, is Mr. Freeman's note to the case of *Andrews v. Portland* (Me.) 10 Am. St. Rep. 280, from which we quote: "The cases involving the right of an officer *de jure* to his salary, when the office is in possession of an officer *de facto*, are incapable of reconciliation. . . . These decisions have been placed partly upon the ground that the officer *de jure* had no property rights in the office, and partly upon the ground that his right to the salary or emoluments of his office was not dependent upon the office, but upon the actual performance of his services as a public official; and further that, while there was an officer *de facto* in actual possession of the office, the disbursing officers were not entitled to consider the question of who ought to be in such possession, nor to question the title in any other way than by a proceeding in quo warranto. It is believed that none of these grounds are well taken, and most courts which yet maintain the general rule have substantially admitted in subsequent cases that the grounds for it did not in fact exist. In the first place, it is now well settled that an officer *de facto* is not entitled to the salary of the office, and that, although he may faithfully discharge its duties, he cannot maintain any action against the city or county for the compensation to which he would be entitled if he were an officer *de jure*. *McCue v. Wapello County*, 56 Iowa, 698, 41 Am. Rep. 134; *Matthews v. Copian County Supers*, 53 Miss. 715, 24 Am. Rep. 715; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168. In the next place, if he has in fact received the emoluments of the office, he has no right whatever to retain them, and he may be compelled to account therefor to the officer *de jure* in any appropriate form of action. *Douglass v. State, Wright*, 31 Ind. 429; *Lawlor v. Alton*, Ir. Rep. 8 C. L. 160; *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52; *Wayne County Auditors v. Benoit*, 20

Mich. 176, 4 Am. Rep. 382; *Rule v. Tait*, 38 Kan. 765; *Bier v. Gorrell*, 30 W. Va. 95; *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *People, Benoit, v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Hunter v. Chandler*, 45 Mo. 452; *United States, Crawford, v. Addison*, 6 Wall. 291, 18 L. ed. 919; *State, Howerton, v. Tate*, 70 N. C. 161. If a judgment of ouster has been entered against an officer *de facto*, and salary is thereafter paid to him, the officer *de jure* may maintain an action therefor against the city or county, notwithstanding such payment. *McLeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600. If no part of the salary has been paid during the incumbency of an officer *de facto*, the officer *de jure*, although he performed none of the duties of the office, may maintain an action against the city and county for the salary and emoluments thereof. *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Comstock v. Grand Rapids*, 40 Mich. 397. If it is true, as must be admitted, that an officer *de jure*, though he performs none of the duties of the office, may maintain an action against the officer *de facto* for fees or salary actually collected by him, or against the city or county for salary accruing during the incumbency of the officer *de facto*, but not in fact paid to him, then it must be that the officer *de jure* has some property rights in the emoluments of the office, and that these rights are not dependent upon his performance of its duties, but upon his title to the office; and it is difficult to understand how the wrongful payment of his salary to a person not entitled to receive it can, in any respect, impair his right to recover it, as though no payment whatever had been made. Hence the principal case and cases in California and Tennessee maintain the doctrine against the weight of authority, but in harmony we think with judicial principles that the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to recover such salary from the city, county, or other public body charged with the duty of making its payment. *Memphis v. Woodward*, 12 Heisk. 409, 27 Am. Rep. 750; *Savage v. Pickard*, 14 Lea, 46; *People, Dorsey, v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 Cal. 193. The supreme court of Oregon has, however, decided that in no event can an officer *de jure* maintain an action to recover his salary while the office is in possession of an officer *de facto* whose right to the office has not been fully determined by an action brought expressly for that purpose. *Sciby v. Portland*, 14 Or. 243, 58 Am. Rep. 307. And in New Jersey an officer *de jure* cannot recover from an officer *de facto* the emoluments of office received by the latter while in discharge of its duties in good faith, and in the belief that he was entitled to the office and its emoluments. *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353." In addition to the cases cited by Mr. Freeman, *supra*, that support the doctrine that the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to re-

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cover such salary from the city, county, or other public body charged with the duty of making its payment, we find that several states since that time, and some prior thereto, have announced the same doctrine. In *Andreus v. Portland*, 79 Me. 484, the court says: "A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer *de facto* [citing a large number of authorities]. . . . Hence it was held in *Nichols v. MacLean*, 101 N. Y. 520, 54 Am. Rep. 730, after a careful examination of authorities, that the *de jure* officer, who was prevented from performing the duties of the office by an illegal removal might recover of the *de facto* officer, who performed the duties under color of an appointment, the salary which he had drawn while performing them. This result can be reached only on the ground that the *de facto* officer has no right to the emoluments of the office. But it is contended by the learned counsel for the defendant that, admitting the foregoing propositions to be well founded, still Decelle was exercising the duties of the office in fact, under color of title upon which the defendant might well act, before his legal right was decided, and be legally protected in paying the salary to him. We think this contention, when tested by the facts of the case and well-established legal principles, is unsupported by logic or sound reason. The city had full notice of the plaintiff's claim as the legal officer, and that the title to the office was in litigation. It must be held that it knew that the legal title to the office would draw with it the salary. May it assume to determine the question of legal right between the parties before decided by the court, pay to the one having no legal title, and then successfully set up its action in defense of the claim of the one having the legal right? May A, who holds a fund claimed by B and C, with full notice of the claim of each, elect to determine between them, and pay to B, who has a *prima facie* right, and set up the payment as a defense to the claim of C, who has the legal title? It is perfectly well settled that he cannot. If he elects, it is at his peril. He is not required to do so. He may await an action at law and then bring both claimants into court by bill of interpleader to litigate their title, or he may bring the bill at once without waiting for the commencement of an action at law. Here the city was in no peril. It might have refused to pay to either till the title to the office was determined, or by bill of interpleader it might have brought the parties into court to litigate their title to the salary. . . . We are aware that courts of high authority have sustained the doctrine contended for by the defendant. The doctrine of the court of appeals of New York now seems to be that a payment of the salary by the city to the officer *de facto* before the

title to the office is determined is a good defense to a claim by the legal officer, but that the legal officer may recover all of the salary not in fact paid before the right to the office is determined, although it accrued before the determination of the title. We do not find that that court has noticed the element of notice to the city by the legal officer of his claim before payment. Courts in some other states have followed the New York doctrine. Courts of high authority in several of the states have held that the officer having a legal title to the office may recover of the city the salary, notwithstanding it has been paid to the officer *de facto*. We have not attempted to analyze the cases and to try to reconcile them. They appear irreconcilable. Our court is uncommitted, and we have come to the conclusion which seems to us best supported by reason and sound legal principles." And in this case the judgment was for the *de jure* officer; allowing him to recover, notwithstanding the fact that the city had already paid a *de facto* officer.

Pennsylvania seems to have settled the question in one of the shortest opinions found, in the case of *Philadelphia v. Rink* (Pa.) 2 Atl. 505; and it is quite refreshing to find a court that, in view of the wide difference in the opinions of the courts upon the question (and we find that they were called to its attention), can dispose of the matter so briefly, and apparently with entire satisfaction as to the correctness of the result announced. This case is where Rink and Barr were candidates for election to the office of magistrate of the city. The judges of election certified that Barr had received a majority of fifteen votes. This was in February, 1880. Rink contested, the court found that he, and not Barr, was elected, the supreme court affirmed, and on April 13, 1883, Rink was commissioned and took the office. Barr took the oath of office and gave bond March 30, 1880, was commissioned by the governor, and acted as magistrate from the first Monday of April, 1880, to April 17, 1883, receiving the salary of a magistrate from the first Monday of April, 1880, to the first Monday of January, 1883. Rink brought an action against the city of Philadelphia to recover the salary for the time that Barr had held the office and been paid the salary, and was given judgment for \$10,297.50, and interest from April 15, 1884. In the opinion of the trial court, Ludlow, P. J., said: "The salary is annexed to the office of a magistrate, and to the person who holds the title, and not to a mere incumbent who has been legally declared to have been an intruder, and therefore only a *de facto* officer. *People, Dorsey, v. Smyth*, 28 Cal. 21; *Douglass v. State, Wright*, 31 Ind. 429. If there ever was a case in which 'prevention is equivalent to performance,' this is that case." From this judgment the city appealed, and one of the defenses, as shown by the case, was that the services for which judgment had been rendered had been paid for to the *de facto* officer; and we will quote the opinion in full on appeal: "In the con-

test between Barr and the defendant in error the court below decreed that, at the election held on the third Tuesday of February, 1880, the latter received the highest number of votes, and was duly and legally elected a magistrate in and for said city of Philadelphia. That decree was affirmed in this court. Thereupon he was duly commissioned by the governor to be a magistrate of said city, and giving and granting unto him full right and title, *inter alia*, 'to receive and to enjoy all and singular the emoluments to a magistrate lawfully belonging or in any wise appertaining by virtue of the Constitution and laws of this commonwealth, to have and to hold this commission and the office hereby granted unto you for the term of five years, to be computed from the first Monday of April, 1880.' That decree established the right of the defendant in error to the office and all of the emoluments thereof from the time his term legally commenced. It is no answer to say that he did not then take the oath or give the bond. He was denied the privilege of doing either. If he had gone through the form of then executing the papers, no effect could have been given to them prior to the decree in his favor. He was not kept out of the office by reason of any such omission, but by reason of the fact that it had been declared that Barr had received a larger number of votes, and the latter was actually occupying the office. The court correctly entered judgment in favor of the defendant in error on the reserved points. Judgment affirmed."

In *McCue v. Wapello County*, 56 Iowa, 698, 41 Am. Rep. 134, the court says: "The district court found that plaintiff was, during the time the services in question were rendered, sheriff *de facto*, acting in good faith under a claim of right to the office, and is therefore entitled to recover the compensation provided by law for such services. Here is the decisive error of the learned judge of the district court. The doctrines of the law applicable to officers *de facto* do not extend so far as to confer upon them all the rights and protection to which an officer *de jure* is entitled. The doctrines operate only for the protection of the public. They cannot be invoked to give him the emoluments of the office as against the officer *de jure*. Upon this very point we used the following language in *McCue v. Wapello County Circuit Ct.* 51 Iowa, 60, 67: 'It will be remembered that one exercising the power of an officer without lawful authority is regarded as an officer *de facto* not for his own protection or advantage, but for the protection of the public and those who are doing business with him. When his right to possession of the office is to be determined, he cannot be declared an officer *de jure* on the ground that he has been an officer *de facto*.' We may add that the right to the possession of an office carries with it the right to emoluments pertaining to the place. When an officer seeks to recover these emoluments, he must show his right to the possession of the office. The rule is based upon the ground

that the officer *de jure*, who has been ousted from his place by an intruder, has a property interest in the emoluments of the office, of which he cannot be deprived by one having no title thereto. This property right demands protection, and the officer *de facto* cannot recover emoluments to which the officer *de jure* is entitled. No such right intervenes when the acts of a *de facto* officer done in the discharge of the duties of the office are considered. The rights and protection of the public and all persons transacting business with the officer demand that such right be held valid. But, when the question involving the emoluments of the office are considered, the rights of the officer *de jure* forbid that the intruder be regarded as the officer. . . . The court below found that plaintiff held the office under a claim of right and in good faith, and that he was not a mere intruder. The good faith and claim of right of an officer *de facto* cannot affect the rights of the officer *de jure* to emoluments of the office, nor will these things deprive the incumbent of the character of an intruder. Good faith and claim of right are usually, if not always, exercised by *de facto* officers; if they be absent, he is criminally liable. Code, §§ 3962, 3963. The officer *de facto*, when the rights of the *de jure* officer are considered, must be regarded as an intruder, even though he claim the office in good faith. This conclusion is supported by the authorities just cited. We reach the very satisfactory conclusion that the plaintiff is not entitled as an officer *de facto* to recover the emoluments of the office; that Stewart, the officer *de jure*, is entitled to all of them; and that defendant is not liable in this action." In the above case the *de facto* officer was acting as sheriff of the county, and this action was brought, not only to recover the fees of the office during the time he was acting as such *de facto* officer, but also to recover money actually expended in the discharge of the duties of the office; and the court denied his right to recover either from the county, but says: "Doubtless he is entitled to recover from the officer *de jure*, Stewart, the compensation to which he is entitled by contract or by law."

The case of *People, Dorsey, v. Smyth*, 28 Cal. 21, is one often referred to in the authorities, and from it we quote: "The salary annexed to a public office is incident to the title to the office and not to its occupation and exercise. *People, Morton, v. Tieman*, 8 Abb. Pr. 359. In the case cited, the court said: 'The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office. An officer *de facto* may be protected in the performance of acts done in good faith, in the discharge of the duties of an office, under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public interests require that acts of public officers, who are such *de facto*, should be respected and held valid as to third persons who have an interest in them, and as concerns the public, in 45 L. R. A.

order to prevent a failure of justice. 2 Kent, Com. 295. But it does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office, without legal authority, as if he were an officer *de jure*. When an individual claims by action the office or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot, as against the public, be converted into a weapon of attack to secure the fruits of the usurpation and the incidents to the office.'" And in several cases since the one referred to California has maintained the same doctrine. *Burke v. Edgar*, 67 Cal. 182; *People, Culbertson, v. Potter*, 63 Cal. 127; *Ward v. Marshall*, 96 Cal. 155. In the case of *People, Dennis, v. Brennan*, 30 How. Pr. 417, Justice Barnard uses the following language: "These commissioners were not *de facto* officers, and the comptroller could have defended himself from payment to the *de facto* officers,—if they were so,—by denying their title to the office; but finally assuming these commissioners to have been *de facto* officers, and that defendant would be protected in his payment to them as against the city, what has this to do with the relator's claim? He is the *de jure* officer. He alone is entitled to the salary. He has done nothing to destroy his right. The money for him was by the city paid into its treasury. He seeks it from the treasury, and not from the comptroller. It is no defense to his claim for the comptroller to say he has made a mistake, and has paid it to the wrong person." In *State, Worrell, v. Carr*, 129 Ind. 44, 13 L. R. A. 177, the court says: "The legal officers are entitled to their salaries and money appropriated for conducting a department of state or a public institution should be drawn by the officer legally entitled to receive it, and not by any certain person, regardless of whether he has been legally elected or is in possession of the office or not; and it is not within the province of the legislature to declare in an appropriation bill who are, or who are not, the legally elected officers of any department. They probably may provide against the paying out of the money to any person other than the legally qualified and acting officer or officers, and subject the officer to a penalty for paying the same to any other than such officer or officers; but it cannot adjudicate as to who are the legal officers, and provide that payment shall be made to them and none other. The conclusion we have reached is well supported by the most recent and well-reasoned cases, although there is some irreconcilable conflict in the authorities, particularly in the earlier cases." This court quotes at considerable length and with approval from *Andrus v. Portland*, 79 Me. 484, and also from Mr. Freeman's note (Me.) 10 Am. St. Rep. 280, and also from Justice Cooley's dissenting opinion in *Wayne County Auditors v. Bznoit*, 20 Mich. 176, 4 Am. Rep. 382. Where an election is contested, the requirement to qualify within a prescribed time does not ap-

ply until the termination of the contest. *Pearson v. Wilson*, 57 Miss. 848; *Farwell v. Adams*, 112 Ill. 57; *People, Benoit, v. Miller*, 24 Mich. 458, 9 Am. Rep. 131.

Believing that we have clearly shown that a discussion of each case would prove almost interminable, and that we have given some of the best-considered cases on each side of the question, we are of the opinion that payment made to a *de facto* officer is no defense to an action brought by a *de jure* officer for the salary of an office to which he has been legally declared entitled from the commencement of the term, as in this case. We find one exception to this rule as stated, and that is where, as in this case, after having been legally declared entitled to the office and no opposition is made to the *de jure* officer, and he neglects to qualify by giving bond, although he takes the oath of office, and the office for that period is necessarily filled by a *de facto* officer, who has been paid for such services, the officer *de jure* cannot recover salary.

Answering the questions submitted for our decision, therefore, we say: To the first question, we answer in the affirmative, with the exception hereinafter stated; and we give the same answer to questions 2, 3, and 4. To the fifth question we answer that payment made by the county for services ren-

dered by the incumbent, the same being the salary of the office for the period after judgment in favor of the contestant up to the time the contestant filed his official bond and the same was approved, is a good defense to this action for the salary for that period, and that the contestant is not entitled to the salary of the office for that time. The contestant should have filed his bond within a reasonable time after the final determination of the contest. It appears that there was an opportunity for him to have presented a good and sufficient bond early in January. He was not prevented from doing so by the incumbent or by the board. He could not take his office until he had done so. Upon the principle of the adjudicated cases he should not be held entitled to the salary for the period when, by his own act and omission, he was not entitled to the office. Such reasonable time for the filing of the bond must be determined upon the facts of each case. It is therefore our opinion that from the time of the judgment of ouster until February 1st thereafter this plaintiff is not entitled to recover. With the exception last aforesaid, the sixth question is answered in the negative.

Potter, Ch. J., and Corn, J., concur.

TENNESSEE SUPREME COURT.

James RYAN, *Plff. in Err.*,

v.

LOUISVILLE AND NASHVILLE TERMINAL COMPANY.

(.....Tenn.....)

1. The question whether or not the use for which property is sought to be taken under the power of eminent domain is public is, in the last resort, for the courts.
2. The provision of a railroad terminal for the accommodation of all railroads concentrated at a city, "to facilitate the public convenience and the safety of the transmission of railroad passengers and freight," is a public use, to acquire necessary property for which the power of eminent domain may be exercised.
3. That the charter of a corporation organized to construct a union terminal for all railroads entering a city fixes no rates to be charged by it for the use of its tracks does not prevent the enterprise from being a public one.
4. An enterprise is not shown to be a private one merely by the fact that it was set on foot for the profit of the corporators.
5. A statute giving a corporation organized to furnish railroad terminal

facilities the right of eminent domain is not made unconstitutional as authorizing the taking of property for private purposes, by the fact that the corporation is authorized to maintain at its passenger station a hotel, restaurant, and news stand.

6. Provisions empowering railroad companies which contract with a terminal company to guarantee the principal and interest of bonds issued by such company, as well as other contracts, and to subscribe for its capital stock, are within a title "An Act to Amend an Act Entitled 'An Act to Provide for the Organization of Railroad Terminal Corporations, and to Define the Powers, Duties, and Liabilities Thereof.'"

(March 15, 1899.)

ERROR to the Circuit Court for Davidson County to review a judgment in favor of plaintiff in a proceeding to condemn certain real estate for the use of plaintiff under the right of eminent domain. *Affirmed.*

The facts are stated in the opinion.

Mr. James Ryan for plaintiff in error.
Messrs. J. M. Dickinson, Charles N. Burch, and Moore & McNally, for defendant in error:

A corporation organized to supply ade-

NOTE.—On the question of public purpose in the construction of a union railroad terminal the authorities are very fully presented in the 45 L. R. A.

briefs and opinion reported in this case. For a few such authorities, see also *note* to *Lyon v. McDonald* (Tex.) 9 L. R. A. 295.

quate terminal facilities for the use of railroads, under the enlarged needs and demands of modern times, is not granted an inconsistent or incongruous privilege in being permitted to maintain, at passenger stations, a place where passengers may obtain food and newspapers.

Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73.

Every intendment is made in favor of the validity of an act of the legislature, and he who attacks its validity must be able to put his finger on the fatal vice in it.

Stratton Claimants v. Morris Claimants, 89 Tenn. 497, 12 L. R. A. 70; *Cooley, Const. Lim.* 173; *Bell v. Bank of Nashville*, Peck (Tenn.) 209; *Luehrman v. Shelby County Tazing Dist.* 2 Lea, 438; *Hope v. Deaderick*, 8 Humph. 8, 47 Am. Dec. 507; *Demoville v. Davidson County*, 87 Tenn. 220.

Grounds acquired by eminent domain for depots and station houses by union depot companies organized under the Michigan union depot act (Mich. Pub. Laws 1881, p. 320; How. Stat. p. 888), are stamped with a public character and a trust for the public use, which cannot be divested by any act of the incorporators of the company.

Fort-Street Union Depot Co. v. Morton, 83 Mich. 265.

Where property is devoted to a use in which the public has an interest, it is affected with a public use, and is subject to regulation of rates, etc., under the public power.

Rippe v. Becker, 56 Minn. 108, 22 L. R. A. 857; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Brass v. North Dakota, Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670; *Stewart v. Great Northern R. Co.* 65 Minn. 515, 33 L. R. A. 427; *Randolph, Em. Dom.* § 21; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 28 L. ed. 173; *Central Union Teleph. Co. v. State, Falley*, 118 Ind. 194; *State, Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404; *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1.

Although the determination of the legislature is not conclusive that a purpose for which it directs property to be taken is a public use, yet it is conclusive, if the use is public, that a necessity exists which requires the property to be taken.

Moore v. Sanford, 151 Mass. 285, 7 L. R. A. 151.

The presumption is in favor of the public character of a use declared to be public by the legislature; and unless it is seen at the first blush that it is not possible for the use to be public, the courts cannot interfere.

Mills, Em. Dom. 2d ed. § 10.

The legislature may delegate to an officer or corporation the right to determine the

necessity of the exercise of the power of eminent domain.

State, Baltzell, v. Stewart, 74 Wis. 620, 6 L. R. A. 394; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434; *Harlem River & P. R. Co. v. Arnou*, 47 N. Y. Supp. 438; *Fletcher v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 339.

"What is a public use" within the constitutional prohibition against the taking of private property is a question for the court to determine in the light of present conditions and the demands of our present civilization.

Every presumption and reasonable intendment is to be made in favor of what the legislature has declared to be a "public use." *Mills, Em. Dom.* 2d ed. § 10.

What is a public use depends on the varying demands and needs of our social condition.

Paxton & H. Irrig. Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L. R. A. 853; *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 694, 23 Am. Dec. 756; *Stewart v. Great Northern R. Co.* 65 Minn. 515, 33 L. R. A. 427; *Rippe v. Becker*, 56 Minn. 108, 22 L. R. A. 857; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Brass v. North Dakota, Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670.

All improvements that may be made, if useful to the public, may be encouraged by the exercise of eminent domain.

Mills, Em. Dom. 2d ed. § 21; *Concord R. Co. v. Greely*, 17 N. H. 47; *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 534; *Finney v. Somerville*, 80 Pa. 59; *Re Staten Island Rapid Transit Co.* 103 N. Y. 251; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 382; *Spofford v. Bucksport & B. R. Co.* 66 Me. 26.

The fact that there will be a private benefit is not incompatible with the public use.

Randolph, Em. Dom. § 54.

The state may authorize the condemnation of land for passenger and freight stations.

Harlem River & P. R. Co. v. Arnou, 47 N. Y. Supp. 438; *Black, Const. Law*, §§ 124-126; *Randolph, Em. Dom.* §§ 170-184; *Mills, Em. Dom.* § 59; 3 *Elliott, Railroads*, pp. 1354, 1355, 1386.

The efficiency of a railroad is not secured by the construction of the main roadbed.

Randolph, Em. Dom. § 45; *Re New York C. & H. R. R. Co.* 77 N. Y. 248; *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. 103; *Giesy v. Cincinnati, W. & Z. R. Co.* 4 Ohio St. 308; *Hamilton v. Annapolis & E. Ridge R. Co.* 1 Md. 553; *State, New Haven & D. R. Co., v. Railroad Comrs.* 56 Conn. 308; *Fort-Street Union Depot Co. v. Morton*, 83 Mich. 265.

Land may be condemned for repair shops.

Chicago, B. & Q. R. Co. v. Wilson, 17 Ill. 123; *Low v. Galena & C. U. R. Co.* 18 Ill. 324; *Hannibal & St. J. R. Co. v. Muder*, 49 Mo. 165; *Southern P. R. Co. v. Raymond*, 53 Cal. 223.

A spur track terminating at private prop-

erty has been legitimated by the same reasoning that has been applied to a private road. It has been called a public use, if all may use it.

Randolph, Em. Dom. § 46; *Kettle River R. Co. v. Eastern R. Co.* 41 Minn. 461, 6 L. R. A. 111; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527; *South Chicago R. Co. v. Dia*, 100 Ill. 237; *Clarke v. Blackmar*, 47 N. Y. 150; *Fisher v. Chicago & S. R. Co.* 104 Ill. 323; *New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 63 N. Y. 326; *Getz's Appeal*, 10 W. N. C. 453; *Slocum's Appeal*, 12 W. N. C. 84; *Beckman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; 2 Kent, Com. 340; *Cooley*, Const. Lim. 6th ed. 654; *Phillips v. Watson*, 63 Iowa, 28; *Ex parte Bacot*, 36 S. C. 125, 16 L. R. A. 586.

The right to condemn under statute has also been sustained in the case of grain elevators, irrigation canals, schoolhouses and play grounds.

Stewart v. Great Northern R. Co. 65 Minn. 515, 33 L. R. A. 427; *Paxton & H. Irrig. Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 45 Neb. 884, 29 L. R. A. 853; *Salisbury v. Highland Twp. School Dist.* 101 Iowa, 556; *Black*, Const. Law, 406.

The use by the public of a waterway from the interior of the state to the Great Lakes for floating logs is a public use.

Re Burns, 155 N. Y. 23.

A railroad may provide for prospective as well as present business.

Harlem River & P. R. Co. v. Arnou, 47 N. Y. Supp. 438; *Fisher v. Chicago & S. R. Co.* 104 Ill. 323; *Central Branch U. P. R. Co. v. Atchison, T. & S. F. R. Co.* 26 Kan. 669; *Ewing v. Alabama & V. R. Co.* 68 Miss. 551. Also list of cases in note to *Crandall v. Des Moines, N. & W. R. Co.* 9 Am. & Eng. R. Cas. N. S. 424.

The provision that "said railroad company or companies may guarantee the principal and interest of such bonds as may be issued by said railroad terminal corporation, is directly connected with and germane to the main subject of the act.

Cannon v. Mathes, 8 Heisk. 504; *Luehrman v. Shelby County Tazewell Dist.* 2 Lea, 426; *State, Morrell, v. Fickle*, 3 Lea, 79; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 156; *Ex parte Griffin*, 88 Tenn. 550; *State v. Yardley*, 95 Tenn. 554, 34 L. R. A. 656.

A railroad company may guarantee the bonds of cities and counties which have been issued to aid the company to build its road.

Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; *Bonner v. New Orleans*, 2 Woods, 135; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 218.

A railroad corporation may guarantee the bonds of another railroad company, whose road it leases.

Low v. California P. R. Co. 52 Cal. 53.

An act to incorporate a railroad company may authorize counties to subscribe to its stock, or otherwise aid the construction of the road.

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Mahomet v. Quackenbush, 117 U. S. 503, 29 L. ed. 982; *Hope v. Gainesville*, 72 Ga. 246; *Connor v. Green Pond, W. & B. R. Co.* 23 S. C. 427; *Schuyler County Supers. v. People, Rock Island & A. R. Co.* 25 Ill. 181; *Cooley*, Const. Law, 6th ed. §§ 174, 175 et seq.; *Cannon v. Mathes*, 8 Heisk. 521.

When the title of a legislative act expresses a general subject or purpose which is single, all matters which are naturally and reasonably connected with it, and all measures which will or may facilitate the accomplishment of the purposes so stated are properly included in the act and are germane to its title.

State v. Yardley, 95 Tenn. 555, 34 L. R. A. 656; *Sutherland*, Stat. Constr. § 93; *Luehrman v. Shelby County Tazewell Dist.* 2 Lea, 428; *State, Morrell, v. Fickle*, 3 Lea, 82; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 156; *State v. Lasater*, 9 Baxt. 584; *Ragio v. State*, 86 Tenn. 272; *Illinois C. R. Co. v. Crider*, 91 Tenn. 494.

Every reasonable doubt must be resolved in favor of the legislative action.

Cole Mfg. Co. v. Falls, 90 Tenn. 469; *Sutherland*, Stat. Constr. § 332; *Cooley*, Const. Lim. 5th ed. 218; 3 Am. & Eng. Enc. Law, pp. 673, 674; *State, Morrell, v. Fickle*, 3 Lea, 81; *Garvin v. State*, 13 Lea, 162.

Beard, J., delivered the opinion of the court:

This is a proceeding instituted by the Louisville & Nashville Terminal Company, a corporation chartered and organized under chapter 11 of the Acts of the General Assembly of 1893, seeking an order of condemnation, under the laws of eminent domain, of certain real estate, the property of plaintiff in error, in the city of Nashville. The avowed purpose of this act was to authorize the creation of railroad terminal corporations, "to facilitate the public convenience and the safety of the transmission of railroad passengers and freight, and to prevent unnecessary expense, inconvenience, and loss to the public." To this end it is provided that a corporation organized under the act had the power "to acquire . . . at such place or places as shall be found expedient, such real estate as may be necessary on which to construct, operate, and maintain passenger stations, comprising passenger depots, office buildings, sheds, and storage yards; and freight stations, comprising freight depots, warehouses, offices, and freight yards, round houses, and machine shops; also main and side tracks, switches, crossovers, turnouts, and other terminal railroad facilities . . . suitable in size, location, and manner of construction to perform promptly and efficiently the work of receiving, delivering, and transferring all passengers and freight traffic of railroad companies with which it may enter into contracts for the use of its terminal facilities." The act conferred upon the corporation, when real estate required by it could not be obtained by purchase, the power to acquire it "by condemnation, in pursuance of the general law authorizing the con-

demnation of private property for works of internal improvement." After obtaining its charter, as the record discloses, the present company entered into an important contract with the municipal authorities of Nashville, by which there was conceded to it the right to "operate and extend existing railroad tracks, and to construct such additional tracks as it might see fit to, and construct and maintain a passenger station or stations, or depots for the handling of freight, and approaches to such passenger and freight stations and depots, over, under, along, and across . . . the streets, alleys, and roads of the city of Nashville," within prescribed limits, upon conditions which need not be mentioned, except that the contract was not to be operative unless the obligations assumed by the terminal company were first guaranteed by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga, & St. Louis Company, which guaranties, the record shows, have been made. Acting under the authority of its charter and this contract, the corporation began operations, and in carrying out its enterprise found, by the averments of the petition,—which, not being denied, are taken to be true,—that the property of the plaintiff in error was absolutely necessary in order to enable it to accomplish the purpose of its organization, and that it was situate within the limits defined by its contract with the city. Failing in its effort to purchase this property from plaintiff in error, it asked the aid of the court in condemning the same, in manner and form as the statutes prescribed. Over the objections of plaintiff in error, made by exceptions to the reports of the jury of view, the cause progressed to a judgment of condemnation, from which an appeal in the nature of a writ of error has been taken to this court.

While the questions made in this court could not, as a matter of proper practice, be raised on exceptions to the report of the jury of view, yet we think they arise upon the face of the petition, so that upon this appeal they may be considered and determined by us. No error is assigned on the ground of irregularity of these proceedings. The objections lie deeper than this. They challenge on constitutional grounds the corporate existence of defendant in error and, if it have a legal existence, then its right to exercise the right to condemn private property under the doctrine of eminent domain. While there are several assignments of error to the action of the court below, we think they are reducible to these two. We will deal with these objections in the inverse order of their statement.

1. Is the use contemplated by chapter 11 of the Acts of 1893 a public use? If so, then the defendant in error, so far as this question is concerned, is entitled on this record to the judgment of condemnation pronounced in the circuit court. That the legislature regarded the use as a public use, and by necessary implication so declared it, is evident. This, however, is not conclusive. The necessary

for and the expediency of the exercise of the right of eminent domain are questions political in their nature, and, when it has been once determined by the legislative branch of the government that they exist, this determination is conclusive. *Cooley, Const. Lim. 538; Anderson v. Turbeville, 6 Coldw. 161.* And while the legislature must, in the first instance, pass on the use and fix its character, and while its recognition of the use as a public necessity is entitled everywhere to the benefit of strong presumptions (*Edgewood R. Co.'s Appeal, 79 Pa. 257; Varner v. Martin, 21 W. Va. 534*), yet the duty is devolved on the courts in the last resort of determining whether the particular use is a public use, within the legal meaning of the term (*Mills, Em. Dom. § 10; Lewis, Em. Dom. § 158; 3 Elliott, Railroads, § 962*). The Constitution does not define a public use. It simply provides that no man's property shall be "taken or applied to public use . . . without just compensation being made therefor," clearly implying that it shall not be taken for a private use under any conditions. So far as we have discovered, other state Constitutions in this regard are similar to ours. The courts have equally avoided a definition, lest it prove an embarrassment in subsequent cases, and work mischief in practical application. *Lewis, Em. Dom. § 159.* They have not sought to fix a positive standard for the measurement of a public use, and in the nature of the subject possibly could not do so. *Paaton & H. Irrig. Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L. R. A. 853.* However, even with this lack, the subject is not at large. It has been so long and in such a variety of cases a matter of judicial inquiry, there is now little difficulty in assigning a particular case to its proper place, and confining the right of eminent domain within natural boundaries.

The term "public use" is a flexible one. It varies and expands with the growing needs of a more complex social order. Many improvements universally recognized as impressed with a public use were nonexistent a few years ago. The possibility of railroads was not dreamed of in a past not very remote, yet when they came the courts, recognizing the important part they were to perform in supplying a public want did not hesitate to take control of them as quasi governmental agents, and extend to them the right of eminent domain, in order to equip them thoroughly to discharge the duties to the community which followed their grant of franchises. This is equally true as to other appliances which now form important parts of a rapidly widening system of social and commercial intercommunication. So it may be said at the present time that "anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities" (*Stewart v. Great Northern R. Co. 65 Minn. 515, 33 L. R. A. 427*), and of which the general public, under reasonable regulations, will have a definite and fixed use, independ-

ent of the will of the party in whom title is vested, would be a public use. *Mills*, Em. Dom. § 11. A few cases taken from the many serving to illustrate this statement will be referred to. Grain elevators found so necessary in the handling and shipment of grain, and in its transfer from the producer to the consumer (*Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Brass v. North Dakota*, *Stoesser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670); the erection of passenger and freight stations (*Randolph*, Em. Dom. §§ 170, 184; *Mills*, Em. Dom. § 59); railroad repair shops (*Hannibal & St. J. R. Co. v. Muder*, 49 Mo. 165; *Southern P. R. Co. v. Raymond*, 53 Cal. 223); a spur track to a grain elevator and to a stock elevator (*Clarke v. Blackmar*, 47 N. Y. 150; *Fisher v. Chicago & S. R. Co.* 104 Ill. 323); the erection of a depot (*Giesy v. Cincinnati, W. & Z. R. Co.* 4 Ohio St. 308); the extension of telegraph and telephone lines intended for the public service (*State, Trenton & N. B. Turnp. Co., v. American & E. Commercial News Co.* 43 N. J. L. 381; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *New Orleans, M. & T. R. Co. v. Southern & A. Teleg. Co.* 53 Ala. 211; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403),—have been held the subjects of public use. Upon the authority of these cases, and many others of a similar character which might be referred to, we have no doubt the trial judge was right in holding the enterprise in question was impressed with a public use, unless it be, as is insisted by plaintiff in error, our own cases have laid down a different rule, which under the doctrine of *stare decisis*, we should adhere to. We will now examine these cases relied on to sustain this assignment of error.

The first of these is that of *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Dec. 546, in which it was sought to condemn land for the erection of a grist mill, a saw mill, and a paper mill. In disposing of the case this court said that, under the cover of a statute which made a grist mill a public mill, the property of a private citizen could not be taken, against his will, for a joint undertaking, when two of its parts—to wit, the saw mill and paper mill—were purely individual enterprises with which the public had no concern. This was the extent of the holding in that case. In *Clack v. White*, 2 Swan, 540, the court simply held that chapter 60 of the Acts of 1811, which conferred upon the county court the power to grant a private road where the lands of one person were surrounded by the lands of another, was unconstitutional and void in that it sought to take the property of one citizen, and apply it to the private advantage of another citizen. It is clear to us that these cases give no support to the contention of plaintiff in error, but only announce the uniformly accepted principle that in the face of this constitutional provision one man's property cannot be taken under the forms of law, and given to another.

The case, however, most relied on as establishing a rule peculiar to this state, is 45 L. R. A.

that of *Memphis Freight Co. v. Memphis*, 4 Coldw. 419. The act incorporating the Memphis Freight Company is found in §§ 13, 14, and 16 of chapter 79 of the Acts of 1865-66. By § 16 it was provided "that said corporation is hereby given the privileges of loading and unloading freights, . . . on or from steamboats and other water crafts that may touch at the port of Memphis, Tennessee; and for the purpose of carrying on said business said corporation is granted the right . . . to erect upon the summit of the east bank of the Mississippi river, in the city of Memphis, and between Poplar street and Beal street, such sheds, railroad tracks, . . . as may be necessary for the business of handling freights. Said corporation shall also have the right to lay down such railroad tracks from their sheds above referred to, to the margin of the Mississippi river, upon which to operate their cars." We think a cursory reading of this section, defining the purpose of the corporation, and fixing the limits of its powers, is sufficient to characterize this enterprise as exclusively private, lacking all color or pretense of public utility. The legislature evidently so regarded it, for it conferred no power of condemnation in its charter. This power was claimed by the company under § 1325 of the Code of 1858 (*Shannon's Code*, § 1844), which provides that "any person or corporation authorized by law to construct any railroad . . . may take real estate," etc. The railway tracks which the company was empowered to construct were the mere incidents of its business of handling and warehousing steamboat or barge freight. They were only to serve the convenience of the company. In them the public would not have a shadow of interest; over them not a pound of freight could be moved, or one individual pass, save with the consent of the corporation, or at its instance. The insistence, therefore, in that case, that the authority to lay down such tracks entitled the corporation to the benefit of a statutory provision which was passed to encourage the development of a great internal improvement system in this state,—including commercial railroads,—was to make a mockery of the legislative intent. Hence it is not remarkable that this court, finding the enterprise a private one of extremely limited extent, rejected this claim as unwarranted either by public policy or any sound rule of statutory construction. But that case established no new or unique rule in this state, as is now argued.

While this is true, we entirely agree with the counsel for plaintiff in error that the fact that an enterprise will result in some convenience to the public, conferring incidental benefits upon the public, by affording additional facilities for trade or manufacture, will not make the character of the use public. To this extent the argument of the opinion supports their contention, but no further. We agree the proposed improvement must go beyond that. It must in some way enlarge the resources, increase the industrial energies, promote the productive power of,

or afford increased facilities for, the rapid exchange of thought or trade, or otherwise answer the growing needs of the community as such, before the use becomes public and the agency controlling passes under governmental control. This proposition is in no way antagonized by that opinion. After a careful examination of these authorities, we fail to find in them any principle settled or rule announced that constrains this court to place itself out of line with the well-considered cases coming from courts of great eminence, some of which have been referred to.

On the other hand, we think the case of *Nashville & O. R. Co. v. Cowardin*, 11 Humph. 348, furnished strong support to the judgment of the court below. By its charter there was conferred expressly upon the Nashville & Chattanooga Railway power to appropriate by process of condemnation the lands of private owners for a roadbed or right of way. In that case an effort was made to condemn land for a depot, and the owner resisted upon the ground that the right of eminent domain was, by its charter, confined to roadway purposes, and that lands for a depot could be secured in no other way than by purchase. This was held to be unsound. In disposing of the contention, this court said, to effectuate the purpose contemplated by its charter,—that is, “the transportation or conveyance of persons, goods, merchandise, and produce over” the road,—there must be a place of receiving and delivering the freight carried or to be carried over it, and that land upon which to establish this place was as essential as the bed of the road, and in fact constituted a part of the road. It was therefore held entitled to condemn land sufficient for a depot. If it be true, then, that a depot erected by the Nashville & Chattanooga road was a public use, why should a union depot laid out and constructed for the accommodation of all the roads now concentrated at Nashville, where, for greater convenience, all travel and freight will be gathered, and to be used by these roads for no other purpose than this railroad would use its own depot, be any the less a public use? The rapid growth of population, the yearly increase in volume and value of commercial interests, the pressing necessity for the speedy handling, delivery, and transmission of freight to prevent accumulations, and often ruinous delays, the vast economy of time and money to shippers and the traveling community in the matter of transfers, are among the considerations which have multiplied these depots in cities where railroads centralize, and we are satisfied no improvement in railway intercommunication more nearly touches the public than this. *Fort-Street Union Depot Co. v. Morton*, 83 Mich. 265.

But it is said this is a private enterprise because the act on which the charter rests fixes no rates to be charged by the corporation for the use of its tracks, etc. This is immaterial. The corporation and its property, being affected by a public use, will be 45 L. R. A.

under governmental control, and the legislature may at any time fix rates and make more specific the duties clearly implied from the act of incorporation. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Brass v. North Dakota*, *Stoeser*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670. Again, it is argued that this is essentially a private undertaking because the act shows that it is set on foot for profit to the corporators. This, also, is immaterial. The authorities concur in holding that an enterprise organized to meet a public demand is not reduced in its character because the parties instituting it have primarily in view private profit; notwithstanding this, it is still impressed with a public use. *Mills*, Em. Dom. § 13; *Randolph*, Em. Dom. § 54; *Lewis*, Em. Dom. § 75. It follows that the assignments of error to the action of the trial judge in holding this to be a public use must be overruled.

2. We will now consider the constitutional objections urged to this act. It is insisted, in the first place, it is unconstitutional because it provides that a terminal corporation may keep at its passenger station an hotel or restaurant, or both, and also a news stand; thus converting the use which might otherwise be a public use into a private use. This objection is not well taken. By its terms the corporation is organized for terminal purposes only. The power of acquiring real estate by purchase or by condemnation is confined to these purposes. Among these, neither expressly nor by implication, is included that of keeping a hotel, restaurant, or news stand. It is only where such a corporation has acquired property to serve the objects of its creation that, in the construction of its passenger station, if it deems best, it may exercise the purely incidental right to provide these accommodations for the public. This neither renders the act unconstitutional nor converts the undertaking into a mere private enterprise.

It is next insisted the act in question is obnoxious to that part of § 17 of article 2 of the Constitution, which provides: “No bill shall become a law which embraces more than one subject; that subject to be expressed in the title.” This clause appears for the first time in the Constitution of 1870, and in 1872 it underwent a critical examination in *Cannon v. Mathes*, 8 Heisk. 504. In the opinion in that case an extensive quotation is made from Judge Cooley’s work on Constitutional Limitations, and there was expressed entire concurrence with the views of the author. This quotation is as follows: “The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. . . . The generality of a title is no objection to it so

long as it is not made a cover to legislation incongruous in itself, and which, by no fair intendment, can be considered as having a necessary or proper connection." This rule was applied in determining the validity of the act the subject of attack in that case. That was an act to raise revenue for the state, and was entitled "An Act to Fix the State Tax on Property," but by one of its provisions increased largely the tax on privileges. The constitutional attack was made in regard to this last provision, as being outside and beyond the title. But on the authority of Judge Cooley's text it was held that there was no incongruity in this legislation, and it was announced "that the true rule of the construction, as fully established by the authorities, is that any provision of the act, directly or indirectly relating to the subject expressed in the title, and having a natural connection thereto [therewith], and not foreign thereto, should be held to be embraced in it." This case has since been frequently cited and approved by this court. *Luehrman v. Shelby County Taxing Dist.* 2 Lea, 426; *State, Morrell, v. Fickle*, 3 Lea, 79; *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 156; *Ex parte Griffin*, 88 Tenn. 550; *Cole Mfg. Co. v. Falls*, 90 Tenn. 469; *State v. Yardley*, 95 Tenn. 554, 34 L. R. A. 656. Measured by this rule, does the caption or title of this act cover incongruous legislation? This caption is as follows: "An Act to Amend an Act Entitled 'An Act to Provide for the Organization of Railroad Terminal Corporations, and to Define the Powers, Duties, and Liabilities Thereof.'" The provisions in the act which it is urged violate the clause of the Constitution in question are found in the 3d section, and are those which empower railroad companies which enter into contract with a terminal company to guarantee the principal and interest of bonds issued by such company, as well as other contracts made by it in regard to its corporate business, and also to subscribe for, hold, and dispose of the capital stock or bonds which may be issued by the terminal corporation. The title gives clear notice to the legislature and the public that the object of the act is to provide for the organization of railroad terminal corporations, which shall be clothed with powers necessary to effectuate the purpose of their creation. There could be no mistake, even at a glance, that a company so organized was designed to, and from the nature of the case must, be identified with the operation of railroads having terminal points at the place where such corporation is instituted. Without this, a terminal company would have no excuse for existence, and, if organized, would serve only as a monument to the folly of its corporators. As might be anticipated from the reading of the title, the body of the act manifests the intimate relation which was contemplated

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between these terminal companies and such railroads. The plan thus devised for the increased accommodation of the public could not, as might well be assumed, be accomplished without the raising and expenditure of large sums of money. The legislature recognized this, and therefore authorized the company which organized under the act to borrow money as its necessities required, and to that end to issue its bonds, secured by mortgage on its property. But realizing that, even when so secured, these bonds might not find ready sale, and desiring, in view of the possible magnitude and the certain importance of the enterprise, to give the highest credit to these corporate securities in the money markets of the world, the act empowered the railroads interested in it to add the weight of their guaranty to them, and also to give aid by subscribing to and holding shares of its capital stock and bonds. What was more natural than that such a corporation, created to give increased facilities to these railroads, should look to them for aid in such an undertaking, and that these roads should be willing to furnish this aid? It was in view of this condition of mutual interest and interdependence that these provisions were embodied in the act. In support of their contention the learned counsel for plaintiff in error have pressed upon us a number of cases, including *Radio v. State*, 86 Tenn. 272, and *Third Nat. Bank v. Divine Grocery Co.* 97 Tenn. 603, 34 L. R. A. 445. All of these cases have been carefully examined, and we are unable to find in them anything to shake our confidence in the conclusion we have reached. Each one has features peculiar to itself, that were controlling in its determination. No one of them, adopting the language used in *Frazier v. East Tennessee, V. & G. R. Co.*, "contain any rule or principle for the construction of the constitutional clause in question in any way antagonistic to the well-settled doctrine heretofore frequently announced by this court." In addition, what was said in the *Frazier Case* may well be repeated here: "The subjects of legislation are infinite. The determination as to whether the several provisions of an act are congruous and germane becomes largely a question of fact. Particular decisions cannot often be controlling in determination of subsequent cases arising out of this constitutional provision." As each case is presented, the courts are bound to examine the act in question as a whole, and, applying to it the sound rule of construction announced in *Cannon v. Mathes*, 9 Heisk. 504, and their "own knowledge of affairs" (*Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 156), determine whether its provisions are congruous or not. After a careful review of the case at bar, we are satisfied with the conclusion reached in the court below.

The judgment is therefore affirmed.

VIRGINIA SUPREME COURT OF APPEALS.

William H. CARTER, *Plff. in Err.*,
v.
COMMONWEALTH of Virginia.

(96 Va. 791.)

1. Attempting to obtain a continuance of a case by means of false telegrams stating that a party is ill constitutes a contempt of court.
2. The inherent power of courts created by the Constitution to enforce respect and obedience by punishing contempts without a jury trial cannot be taken away by the legislature.

(March 16, 1899.)

ERROR to the Circuit Court for the City of Lynchburg to review a judgment fining defendant for contempt of court. *Affirmed.*

The facts are stated in the opinion.

Messrs. James E. Edmunds and E. W. Saunders, for plaintiff in error:

There is no subhead in the Code which renders petitioner's act a contempt punishable in a summary manner, and none in the late act.

Under the Code, petitioner could be proceeded against by warrant or indictment only.

If the new statute, which allows the court to try these cases, calling in a jury if one is demanded, is unconstitutional on the ground that it is an invasion of the inherent powers of the courts, then *a fortiori* are those statutes unconstitutional, which, like the provisions of the Code, forbid the courts to try such cases at all by process of attachment for contempt.

If petitioner was not liable to be proceeded against in a summary manner prior to the passage of the late act, and if the courts have recognized the authority of the legislature to enact those restrictions upon their powers found in the Code, then it follows, as a matter of logical necessity, that the recent statute *quoad* all such cases as the one in hand was not an unconstitutional exercise of legislative authority, but valid legislation, and binding upon the courts.

The regulations of the Code have been sustained by the courts of last resort in this state.

Com. v. Deskins, 4 Leigh, 685; *Wells v. Com.* 21 Gratt. 500.

Mr. A. J. Montague, Attorney General, for defendant in error:

There shall be a supreme court of appeals, circuit courts, and county courts. The jurisdiction of these tribunals, and the judges thereof, except so far as the same is con-

ferred by this Constitution, shall be regulated by law.

Va. Const. art. 6, § 1.

The inherent powers of a court created by the Constitution cannot be impaired or destroyed by legislative action.

Va. Const. art. 2.

The right and power of a court of record to punish for contempt of its authority, obstruction of, or disobedience or resistance to, its judgments, decrees, and the ordinary proceedings incident to the administration of justice, are inherent from the very nature of its organization, and are essential to its existence.

Wells v. Com. 21 Gratt. 503; *Com. v. Dandridge*, 2 Va. Cas. 408; 4 Bl. Com. 285; *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092; *Cartwright's Case*, 114 Mass. 238; *Watson v. Williams*, 36 Miss. 341; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Hale v. State*, 55 Ohio St. 210, 36 L. R. A. 254.

There is no limitation placed by the Constitution upon the power of the court to punish for contempts, and therefore the enactment must be subordinate to the constitutional right. The power to punish for contempt is born with the court.

Re Shortridge, 99 Cal. 526, 21 L. R. A. 753.

This inherent power was not given by the legislature, and therefore the legislature cannot take it away.

Hale v. State, 55 Ohio St. 210, 36 L. R. A. 254.

Keith, P., delivered the opinion of the court:

At its November term, 1897, the circuit court of the city of Lynchburg issued a rule against Carter, plaintiff in error, to appear before it on the first day of the next term to show cause why he should not be fined and attached for contempt, by attempting to obtain a continuance of the action of Grubbs against Carter by means of false telegrams. In answer to this rule he appeared and stated that he is a resident of the county of Nottingham, and that, having received a telegram from his attorney, J. Emory Hughes, that his case was pending, and he must come to Lynchburg on the next train, he wired in response, "Sick with typhoid fever, and can't come;" that this statement as to his health was false, and made without due consideration; that he had no idea of interfering with or impeding the course of justice; that he did not make the statement for the purpose of obtaining a continuance, and nothing was further from his mind; that no disrespect to the court was intended; and he prays that his fault may be overlooked.

When the matter came up for trial, Carter asked to be tried by a jury, which motion the court overruled, and, deeming his answer insufficient, entered a judgment against him for a fine of \$25 and costs, and that he be

NOTE.—The above case makes an important addition to the authorities on the legislative power to abridge the power of courts to punish for contempt, as to which see *Hale v. State* (Ohio) 36 L. R. A. 254, and *note*.
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imprisoned for the term of two days in the jail of the city of Lynchburg, and afterwards, until he pays his fine and costs: provided, that this latter period shall not exceed two months. To this judgment, Carter obtained a writ of error from one of the judges of this court, and the errors assigned by him are: First, that upon the facts as shown in the record he was not guilty of a contempt; secondly, that the court erred in refusing to have a jury impaneled for his trial.

We are of opinion that, upon the facts shown, Carter was guilty of a contempt. The effort to obtain a continuance of his cause by means of a statement as to his health, which he knew to be false, tended directly to impede and obstruct the administration of justice. It is true that with respect to conduct or language, where the intent with which a thing is said or done gives color and character to the act or words, a disclaimer of any purpose to be guilty of a contempt, or to destroy or impair the authority due to the court, is a good defense (Rap. Contempt, § 115); but this is true only of language or acts of doubtful import, and which may reasonably bear two constructions. In the case before us there could have been but one motive, and that to influence the action of the court with respect to a case before it by means of a statement known and admitted to be false. We pass, therefore, to the consideration of the next error assigned. This presents a question of the utmost gravity, which has been argued with the ability which its importance demands, and has received from us our best consideration.

By an act of assembly passed in 1830-31 (see Sess. Acts, p. 48), the legislature undertook to enumerate and to classify contempts of court, and to prescribe the manner in which they should be punished. This act appears in the Code of 1849 as §§ 24 and 25, chap. 194, as follows:

"Sec. 24. The courts and the judges, and justices thereof, may issue attachments for contempts, and punish them summarily, only in the cases following:

"First, misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice.

"Secondly, violence or threats of violence to a judge, justice, or officer of the court, or to a juror, witness, or party going to, attending, or returning from the court, for or in respect of any act or proceeding had or to be had in such court.

"Thirdly, misbehavior of an officer of the court, in his official character.

"Fourthly, disobedience or resistance of an officer of the court, juror, witness, or other person, to any lawful process, judgment, decree, or order of the said court."

"Sec. 25. No court shall, without a jury, for any such contempt as is mentioned . . . impose a fine exceeding \$50, or imprisonment more than ten days. But in any such case the court may impanel a jury (without an indictment, information, or any formal pleading), to ascertain the fine or imprisonment proper to be inflicted, and may give judgment according to the verdict."

This act was continued in force, without amendment, until the session of 1897-98, p. 548, when it was amended so as to read as follows:

"1. Be it enacted by the general assembly of Virginia, that section three thousand seven hundred and sixty-eight of the Code of Virginia be amended and re-enacted so as to read as follows:

"Sec. 3768. The courts and judges may issue attachments for contempt, and punish them summarily, only in the following cases, which are hereby declared to be direct contempts, all other contempts being indirect contempts.

"First. Misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

"Second. Violence or threats of violence to a judge or officer of the court or to a juror, witness, or party going to, attending, or returning from, the court, for or in respect of any act or proceeding had or to be had in such court.

"Third. Misbehavior of an officer of the court in his official character.

"Fourth. Disobedience or resistance of an officer of the court, juror, or witness to any lawful process, judgment, decree, or order of the said court.

"When the court adjudges a party guilty of a direct contempt it shall make an entry of record, in which shall be specified the conduct constituting such contempt, and shall certify the matter of extenuation or defense set up by the accused, and the evidence submitted by him and the sentence of the court."

"Subsection.

"Proceedings in Cases of Indirect Contempt. Upon the return of an officer on process, or upon an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person may be arrested and brought before the court, and thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt shall be filed, and the accused required to answer the same, by an order which shall fix the time therefor and also the time and place for hearing the matter. A copy of this order shall be served upon the accused, and upon a proper showing the court may extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt.

"After the answer of the accused, or if he fail or refuse to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed according to the rules governing the trial of criminal cases, and the accused shall be entitled to compulsory process for his witnesses, and to be confronted with the witnesses against him.

"Such trial shall be by the court, or, upon

the application of the accused, a trial by jury shall be had, as in any case of a misdemeanor.

"If the jury find the accused guilty of contempt they shall fix the amount of his punishment by their verdict.

"The testimony taken on the trial of any case of contempt shall be preserved on motion of the accused, and any judgment of conviction therefor may be reviewed on writ of error from the circuit court having jurisdiction, if the judgment is by a county court, or on writ of error from the supreme court of appeals, if the judgment is by a circuit or corporation court. In the appellate court the judgment of the trial court shall be affirmed, reversed, or modified, as justice may require. If the writ of error to the judgment of a county court is refused by the circuit court having jurisdiction, application may then be made to the court of appeals.

"2. All acts and parts of acts, so far as they conflict with this act, are, to that extent, hereby repealed."

Being of opinion that the defendant was guilty of contempt, we shall not attempt any classification of it as a direct or indirect contempt. If it were a direct contempt then its punishment was without doubt to be ascertained and fixed by the court, without the intervention of a jury, by the terms of the law which the plaintiff in error himself invokes. If it were a contempt not within that classification, then it is incumbent upon us to consider whether it was within the power of the legislature to deprive the court of jurisdiction to punish it without the intervention of a jury.

Counsel for plaintiff in error insist that the question has already been decided by this court in the case of *Com. v. Deskins*, 4 Leigh, 685, and again in *Wells v. Com.* 21 Gratt. 500.

The latter case may be disposed of by the statement that this court reversed the judgment of the circuit court upon the facts, and held that the acts proved against Wells did not constitute a contempt of court.

With respect to the case of *Com. v. Deskins* it appears that it arose and was decided under the Constitution of 1829-30. In the fifth article of that instrument it is provided that "the judicial power shall be vested in a supreme court of appeals, in such superior courts as the legislature may from time to time ordain and establish, and the judges thereof, in the county courts, and in justices of the peace. The legislature may also vest such jurisdiction as shall be deemed necessary in corporation courts, and in the magistrates who may belong to the corporate body. The jurisdiction of these tribunals, and of the judges thereof, shall be regulated by law."

The Constitution did not create the courts nor clothe them with jurisdiction, but the courts themselves were established by the legislature, and their jurisdiction was regulated by law. In this respect to the Constitution of 1829-30 was only less general in its terms 45 L. R. A.

than the first organic instrument adopted in 1776.

The Constitution of 1850, art. 6, § 1, with respect to the judiciary department, provides: "There shall be a supreme court of appeals, district courts, and circuit courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this Constitution, shall be regulated by law."

Article 6, § 1, of the Constitution now in force, provides: "There shall be a supreme court of appeals, circuit courts, and county courts. The jurisdiction of these tribunals, and of the judges thereof, except so far as the same is conferred by this Constitution, shall be regulated by law." In a subsequent portion of the instrument, corporation courts are also provided for the cities of the state. These courts do not derive their existence from the legislature. They are called into being by the Constitution itself, the same authority which creates the legislature and the whole framework of state government.

What was the nature and character of the tribunals thus instituted? Our conception of courts, and of their powers and functions, comes to us through that great system of English jurisprudence known as the "common law," which we have adopted and incorporated into the body of our laws.

That the English courts have exercised the power in question from the remotest period does not admit of doubt. Said Chief Justice Wilmot: "The power which the courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt acted in the face of the court; and the issuing of attachments by the supreme court of justice in Westminster Hall for contempts out of court stands on the same immemorial usage which supports the whole fabric of the common law. It is as much the *lex terre*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever. I have examined very carefully to see if I could find out any vestiges of its introduction, but can find none. It is as ancient as any other part of the common law. There is no priority or posteriority to be found about it. It cannot, therefore, be said to invade the common law. It acts in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. Truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation as trial by jury. It is a constitutional remedy in particular cases, and the judges in those cases are as much bound to give an activity to this part of the law as to any other." 3 Campbell, Lives of Chief Justices, p. 153.

In *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259, it was held that "certain implied powers must necessarily result to our courts of justice from the nature of their institu-

tion. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute."

In *Wells v. Com.* 21 Gratt. 503, it was said: "The power to fine and imprison for contempt is incident to every court of record. The courts, *ex necessitate rei* have the power of protecting the administration of justice, with a promptitude calculated to meet the exigency of the particular case."

It is unnecessary, however, to multiply authority upon this point, for we understand it to have been conceded by counsel for plaintiff in error that the power to punish contempts is inherent in all courts; but the contention is that it may be regulated by legislative action, and we are prepared to concede that it is proper for the legislature to regulate the exercise of the power so long as it confines itself within limits consistent with the preservation of the authority of courts to enforce such respect and obedience as are necessary to their vigor and efficiency.

Now, the contention of the plaintiff in error is that the act here punished was not a contempt under the statute of 1830-31, and that in order to hold it punishable summarily, it is necessary to hold that the statute referred to is unconstitutional. There has been no adjudication upon that statute, to our knowledge, since the adoption of the Constitution of 1861; for in the case of *Wells v. Com.* 21 Gratt. 503, Wells was, as we have seen, acquitted of the offense. So far, therefore, as the statute is to be considered as declaratory of the powers existent in the courts established by the Constitution, it is free from objection; so far as it is a reasonable regulation of the power vested in the courts, we have no disposition to question it; but if it is to be construed as a negation of the power of the court to punish a contempt, whether by excluding it from its enumeration and classification of acts which may be summarily dealt with by the court, or by taking from the courts the power to punish at all even those acts enumerated as contempts, we are constrained to hold that the legislature has transcended the powers prescribed to it by the Constitution.

It was contended by counsel for plaintiff in error that, inasmuch as the act of 1897-98 merely transferred the punishment of contempts from the court to a jury, and even made acts punishable as contempts not embraced within the act of 1830-31, it was not obnoxious to the objection that it interfered with or diminished the power of the court to protect itself.

To this view we cannot assent. It is not a question of the degree or extent of the punishment inflicted. It may be that juries would punish a given offense with more severity than the court; but yet the jury is a 45 L. R. A.

tribunal separate and distinct from the court. The power to punish for contempts is inherent in the courts, and is conferred upon them by the Constitution by the very act of their creation. It is a trust confided and a duty imposed upon us by the sovereign people, which we cannot surrender or suffer to be impaired without being recreant to our duty.

Upon the point made by counsel for plaintiff in error, that the offense under consideration, if not embraced within the category of direct contempts by the act of 1897-98, neither was it by that of 1830-31, we cannot do better than to quote the language of the supreme court of Arkansas, in *State v. Morrill*, 18 Ark. at page 390:

"The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the Constitution. If it could, it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic framework of both the Federal and state institutions, and a favorite theory in the government of the American people. As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts, the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect; but to say that it is absolutely binding upon the courts would be to concede that the courts have no constitutional and inherent power to punish any class of contempts, but that the whole subject is under the control of the legislative department; because, if the general assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and devest them of power to punish any contempt."

Reliance was placed by counsel for plaintiff in error upon a class of cases of which *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205, may be considered typical. In that case Robinson had in the most summary manner, without the opportunity of defense, been stricken from the roll of attorneys by the district court for the western district of Arkansas. He applied to the supreme court for a mandamus, which is the appropriate remedy to restore an attorney who has been disbarred; and that court held, Mr. Justice Field delivering the opinion, that "the power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of

justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831," and the court declared that there could be no question as to its application to the circuit and district courts. "These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is therefore to them the law specifying the cases in which summary punishment for contempts may be inflicted."

Turning to the Constitution of the United States, we find that it declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." This language is the equivalent of that found in our Constitution prior to that of 1851, hereinbefore quoted. The inferior Federal courts and their jurisdiction are the creatures of Congress, and not of the Constitution."

It may be remarked, also, with respect to the case of *Ex parte Robinson*, that although the United States statute of 1831 carefully enumerates the subjects for which courts may punish summarily for contempt, that enumeration is so comprehensive as to afford complete protection to the courts in the performance of their duties, and contains no limitation whatever upon the power to punish in the enumerated cases; and that, while punishment which courts may inflict is limited to fine and imprisonment, their discretion is without limit as to the amount of the fine or the duration of the imprisonment. The courts of the United States will never be embarrassed by the decision in *Ex parte Robinson*; for, while the power to disbar an attorney is denied in that case as a proper punishment for contempt, the jurisdiction of the courts to disbar, after citation to appear and notice of the ground of complaint against, and an opportunity for explanation and defense, is fully recognized.

It were an unprofitable task to attempt to review within the limits of an opinion all the adjudged cases to which our attention has been called, and which, with very many others, have been considered by us. For the benefit of those who may feel themselves moved to a further investigation of this subject, we cite, without comment, the following cases:

State v. Frew, 24 W. Va. 416, 49 Am. Rep. 257; *Hale v. State*, 55 Ohio St. 210, 36 L. R. A. 254; *Re Shorridge*, 99 Cal. 526, 21 L. R. A. 755; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *Holman v. State*, 105 Ind. 513; *State v. Knight*, 3 S. D. 509; *State v. Galloway*, 5 Coldw. 326, 98 Am. Dec. 404; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Baldwin v. State*, 126 Ind. 24; *Arnold v. Com.* 80 Ky. 300, 44 Am. Rep. 480; *Ex parte Crenshaw*, 80 Mo. 447; *Hughes v. People*, 5 45 L. R. A.

Colo. 445; *Wyatt v. People*, 17 Colo. 252; *Langdon v. Wayne Circuit Ct. Judges*, 76 Mich. 367; and *Ex parte Schenck*, 65 N. C. 353.

In public apprehension, the legislature is deemed in a peculiar sense the agent and representative of the people. It is true, it constitutes the most numerous branch of the government, and the brief terms for which its members are elected, and the fact that they are directly voted for by the people, give color to and encourage this opinion; but a moment's reflection should serve to dispel it. In our system of government all power and authority are derived from the people. They have seen fit, by organic law, to distribute the powers of government among three great co-ordinate departments,—the executive, the legislative, and the judicial. The Constitution of the state, which is the law to all, declares in the 7th section of the 1st article that "the legislative, executive, and judicial powers should be separate and distinct." This is a quotation from the Bill of Rights,—an instrument which should never be mentioned, save with the reverence due to the great charters of our liberties. Of such importance is this principle deemed that it is repeated and constitutes a distinct article, which declares that "the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others; nor shall any person exercise the power of more than one of them at the same time, except as hereinafter provided." Va. Const. art. 2. Whoever, therefore, belongs to either one of these great departments is an agent and servant of a common master: and each and all represent a part of the sovereignty of the state, so long as they move within the appropriate spheres prescribed to them by the organic law. A court and the judge thereof, is as much an agent and servant of the people as any other officer of government, and he is bound by the duty and obligation which he owes to the commonwealth to cherish, defend, and transmit unimpaired to his successors the office with which the commonwealth has seen fit to honor him. A judge, therefore, in vindicating the dignity and authority of the court over which he presides, is discharging a solemn duty owed in his official character, and is not engaged in a personal and private controversy.

Speaking upon this subject, the supreme court of West Virginia in *State v. Frew*, 24 W. Va., at page 477, 49 Am. Rep. 257, uses the following language:

"Having thus shown that this court has the power to punish for contempts it must not be overlooked that this power can be justified by necessity alone, and should rarely be exercised, and never, except when the necessity is plain and unmistakable. It is not given for the private advantage of the judges who sit in the court, but to preserve to them that respect and regard of which courts cannot be deprived and maintain their use-

fulness. It is given that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the rights of the parties or bias the minds of the judges—that the court may command that respect and sanctity so essential to make the law itself respected—and that the streams of justice may be kept pure and uncorrupted. . . . The public have a profound interest in the good name and fame of their courts of justice and especially of the courts of last resort. Everything that affects the well-being of organized society, the rights of property, and the life and liberty of the citizen is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired.

. . . We know full well that respect to courts or judges cannot be compelled. 'Respect is the voluntary tribute of the people to worth, virtue, and intelligence, and while these are found on the judgment seat, so long, and no longer, will courts retain the public confidence.' But the people have placed the judge in a position in which he unavoidably comes in conflict with the jealousies and resentments of those upon whose interest he has to act; his character, virtue, and intelligence, however pure and unselfish, are not always a protection against the prejudices and passions of such as conceive themselves injured by his legitimate and proper official acts; and, when assailed by such, if he may not punish them as a court, he will be reduced to the alternative of either submitting tamely to contumely and insult, or to resenting it by force, or resorting to the doubtful remedy of an action at law."

As was said by Judge Dade in *Dandridge's Case*, 2 Va. Cas. 408: "In such a state of things it would rest in the discretion of every party in court to force the judge either to shrink from his duty or to incur the degradation of his authority, which must unavoidably result from the adoption of either of the above alternatives. To suppose that the personal character of the judge would be a sufficient guaranty against this is to imagine a state of society which would render the office of the judge wholly unnecessary."

The enumeration of subjects punishable as direct contempts in the act under consideration seems to embrace almost every conceivable form of that offense which can occur in the presence of, or in proximity to, the court; that is to say, under circumstances likely to arouse the passion or prejudice of the judge, and disturb that equanimity essential to calm and wise judicial action. The court may punish summarily, not only all such offenses, but for disobedience or resistance to any lawful process, judgment, decree, or order; its officers, jurors, and witnesses may also thus be punished; and only the parties to the suit are entitled to a trial by jury. Thus we see that offenses of a nature personal to the court are to be punished by the court while those which interest suitors are punishable only by a jury. So that suitors, having obtained a judgment or decree, after long and expen-

sive litigation, find the court powerless to secure to them its fruition and enjoyment, and, unless their antagonist chance to be a law-abiding citizen, discover that their success has only begotten another controversy. Ours is a law-abiding community, and good citizens will, without compulsion, respect the lawful orders of their courts; but in every society there are those who obey the laws only because there is behind them a force they dare not resist. Is it wise or beneficent legislation which accepts the obedience of the good citizen, but is powerless to enforce the law against the recalcitrant? Under this law, the authority of the courts would be reduced to a mere "power of contention."

We are fully aware of the delicate duty involved in holding a statute to be unconstitutional, and we fully recognize that it should never be done, except in the case of a plain deviation from the organic law.

"The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it. But the courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action, and, in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to fender judgments or decrees without jurisdiction." Cooley, Const. Lim. 6th ed. p. 192.

"In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." See *Lindsay v. Charleston Comrs.* 2 Bay, 38, 61; *People, Tucker, v. Rucker*, 5 Colo. 455.

Reading the Constitution of the state in the light of the decisions of eminent courts which we have consulted, we feel warranted in the following conclusions:

That in the courts created by the Constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated, but cannot be destroyed, or so far diminished as to be rendered ineffectual, by legislative enactment; that it is a power necessarily resident in, and to be exercised by, the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; that, while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation

courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred.

It was suggested in argument that to maintain the position that to intrust juries with the power to punish for contempts would impair the efficiency and dignity of courts disclosed a want of confidence in that time-honored institution. May it not be said in reply that to take from courts a jurisdiction which they have possessed from their foundation betrays a want of confidence in them wholly unwarranted by experience? The history of this court, and indeed of all the courts of this commonwealth, shows the jealous care with which they have ever defended and maintained the just authority and respect due to juries as an agency in the administration of justice; but our duty, as we conceive it, requires us not to be less firm in vindicating the rightful authority and power of the courts.

We cannot more properly conclude this opinion than by a quotation from a great English judge: "It is, therefore, a rule founded on the reason of the common law that all contempts to the process of the court, to its judges, jurors, officers, and ministers, when acting in the due discharge of their respective duties, whether such contempts be by direct obstruction, or consequentially,—that is to

say, whether they be by act or writing,—are punishable by the court itself, and may be abated instantaneously as nuisances to public justice.

"There are those who object to attachments as being contrary, in popular Constitutions, to first principles. To this it may briefly be replied that they are the first of all principles, being founded on that which founds government and constitutes law. They are the principles of self-defense; the vindication, not only of the authority, but of the very power of acting in a court. It is in vain that the law has the right to act, if there be a power above the law which has a right to resist; the law would then be but the right of anarchy and the power of contention." Holt, Libel, chap. 9.

Whatever opinion may be entertained of some of his predecessors, Chief Justice Holt was no servile minion of arbitrary power. He was an actor in that great revolution which ended forever in Great Britain the pernicious dogma of the divine right of kings, which first recognized the will of the people as the only rightful source of government, and established the independence of the judiciary as one of the surest bulwarks of free institutions.

The judgment of the Circuit Court is affirmed.

PENNSYLVANIA SUPREME COURT.

Re Estate of Marmaduke C. COPE, Deceased.

(191 Pa. 1.)

1. The exemption of \$5,000 in each estate from the Pennsylvania direct inheritance tax act of May 12, 1897, imposing a two per cent tax on all personal property which shall pass by will or by the intestate law, after deducting debts and costs of administration, is in violation of Const. art. 9, §§ 1, 2, requiring all taxes to be uniform upon the same class of subjects, and prohibiting exemptions other than those therein specified, since the act does not profess to be anything less than a tax law.
2. An act amending or supplementing the laws regulating succession to estates of decedents, which imposes a burden on so much of any estate only as is in excess of \$5,000, and leaves the law unchanged as

to the residue, is a special law prohibited by Const. art. 3, § 7.

(April 24, 1899.)

APPEAL by the Commonwealth from a decree of the Orphans' Court for Philadelphia County dismissing exceptions filed to the adjudication of the auditing judge in the estate of Marmaduke C. Cope, deceased, which resulted in refusal to give effect to the statute taxing direct inheritances. *Affirmed.*

The facts are stated in the opinion.

Messrs. Francis A. Osbourn and John P. Elkin, with Mr. Henry C. McCormick, Attorney General, for the Commonwealth:

The act is not unconstitutional because it contains an exemption of property from taxation not enumerated in § 1 of article 9 of the Constitution.

The reasonable and rational construction of § 1 of article 9 is that no property, except such as is therein designated, can be taken entirely out of the list of taxable subjects.

The constitutional provision did not mean

NOTE.—For other cases respecting the inequality of collateral inheritance taxes, see *State, Schwartz, v. Ferris* (Ohio) 30 L. R. A. 218; and *State, Gelsthorpe, v. Furnell* (Mont.) 39 L. R. A. 170.
45 L. R. A.

that the legislature may not exempt a particular kind of property from a particular kind of tax.

Property may be exempt from one kind of tax, but subject to another form of taxation.

Hawes Mfg. Co.'s Appeal, 1 Monaghan, 353; *Com. v. Germania Brewing Co.* 145 Pa. 83.

A large number of the revenue-producing statutes contain exemptions in one form or another.

Exemptions of the kind referred to have always been favored by the court.

Minot v. Winthrop, 162 Mass. 113, 26 L. R. A. 259.

In collateral and direct inheritance tax statutes, exemptions have always been favored by law-making bodies, and have generally been sustained by the courts.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 282, 42 L. ed. 1037.

It does not offend against that provision of the Constitution which requires uniformity of taxation.

Com. v. Delaware Division Canal Co. 123 Pa. 594, 2 L. R. A. 798; *Orcutt's Appeal*, 97 Pa. 179; *Com. v. Brush Electric Light Co.* 145 Pa. 147; *Com. v. Merchants' & Mfrs. Nat. Bank*, 168 Pa. 309.

The act may be passed under the power to regulate the transmission of estates.

United States v. Perkins, 163 U. S. 627, 41 L. ed. 287; *Com. v. Gilpin*, 3 Pa. Dist. R. 711; *Com. v. Herman*, 16 W. N. C. 212; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *State v. Alston*, 94 Tenn. 674, 28 L. R. A. 178; *Minot v. Winthrop*, 162 Mass. 113, 26 L. R. A. 259; *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 636; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 375; *Kochersperger v. Drake*, 167 Ill. 122, 41 L. R. A. 446; *Eyre v. Jacob*, 14 Gratt. 430, 73 Am. Dec. 367; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Re Swift*, 137 N. Y. 83, 18 L. R. A. 709; *Pullen v. Wake County Comrs.* 66 N. C. 363; *Peters v. Lynchburg*, 76 Va. 927; *Schoolfield v. Lynchburg*, 78 Va. 366; *Minter's Estate*, 28 W. N. C. 182.

The right to inherit or succeed to property is the creature of the civil or municipal laws, and is in all respects regulated by them.

2 Bl. Com. pp. 10-13; *Strode v. Com.* 52 Pa. 181; *Clymer v. Com.* 52 Pa. 185.

The act does not change the law of descent or succession, and is not special legislation.

Re McPherson, 104 N. Y. 306, 58 Am. Rep. 502; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709; *Re Merriam*, 141 N. Y. 484; *Wallace v. Myers*, 38 Fed. Rep. 184, 4 L. R. A. 171; *Re Hoffman*, 143 N. Y. 327; *Re Inheritance Tax*, 23 Colo. 492; *The Inheritance Tax*, by Max West, Finance, 95, 102 *et seq.*; *Dos Passos, Inheritance Tax Law*, chap. 2, § 8, p. 31.

Sterrett, Ch. J., delivered the opinion of the court:

This appeal challenges the validity of the decree of the court below, in which the act of May 12, 1897 (Pub. Laws, 56), entitled "An Act Taxing Gifts, Legacies, and Inheritances

in Certain Cases, and Providing for the Collection Thereof," was adjudged unconstitutional and void. Section 1 of the act declares "that from and after the passage of this act all personal property of whatsoever kind and nature which shall pass by will, or by the intestate law of this state, from any person who may be seized or possessed of the same,

... shall be, and the same is hereby made subject to a tax of \$2 on every \$100 of the clear value of such personal property, after deducting the debts of the decedent and costs of administration, . . . to be paid for the use of the Commonwealth; and all heirs, legatees, devisees, administrators, executors, and trustees shall only be discharged from liability for the amount of such taxes . . . by paying the same for the use aforesaid as hereinafter directed; provided, that personal property to the amount of \$5,000 shall be exempt from the payment of this tax in all estates; and provided further, that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this act shall be liable to the tax imposed by this law, as well as the estates of persons who die hereafter." The last-quoted proviso appears to have been added, by way of amendment, to the first section of the bill while it was under consideration, with the view of so enlarging (by improper use of a proviso) the scope of that section as to bring within its operation undistributed portions of all estates of persons theretofore deceased. Inasmuch as the testator, in the case now under consideration, died September 5, 1897,—nearly five months after the passage of the act above cited,—the retroactive provision of said proviso is not involved, and requires no further notice in this case. In other cases, however, which have been argued, the commonwealth's claims are based upon the retroactive operation of said proviso. In disposing of them, it may not be amiss to consider the retroactive effect of the proviso.

The manifest effect of the first above quoted proviso is to effectually exclude from the operation of the taxing provisions of the act "personal property to the amount of \$5,000 . . . in all estates." To that extent the operation of the act is restricted and qualified. It is further restricted and qualified by § 16, which provides: "This act shall be known as the direct inheritance tax law, and shall not be held to change, modify, or alter the existing law in reference to the collection of collateral-inheritance taxes, it being the intention of this act to impose a direct inheritance tax on all estates or parts of estates not subject to the act or acts providing for the collection of collateral-inheritance taxes." The intervening §§ 2 to 15, inclusive, are devoted to what may be called the administrative provisions of the act. The second declares: "If the said tax shall be paid within three months after the death of the decedent, a discount of 5 per cent shall be made and allowed, and if the said tax is not paid at the end of one year from the death of the decedent, interest at the rate of 6 per centum per annum shall be charged for such year; and after the expiration of one year

from the death of the decedent, interest shall be charged at the rate of 12 per centum per annum on such tax," etc. The proviso to § 5 declares "that all taxes imposed by this act shall be a lien upon the personal property of the estate on which the tax is imposed, or upon the proceeds arising from the sale of such property from the time the said tax is due and payable, and shall continue a lien until said tax is paid and receipted for by the proper officer of the commonwealth." As defined and limited by the act itself, the tax sought to be charged and collected under its provisions is imposed, in express terms, on "all personal property of whatsoever kind and nature, which shall (hereafter) pass by will, or by the intestate laws of this state," from the respective owners thereof, upon their decease, and upon all property of the same kind, which had theretofore passed, in the same manner, from the owners thereof, and was not "actually distributed and paid to the persons entitled thereto prior to the passage of this act;" but exempting, however, from said tax, "in all estates," personal property to the amount of \$5,000, and excepting from the operation of the act all personal property that is "subject to the act or acts providing for the collection of collateral-inheritance taxes."

As already stated, Marmaduke C. Cope, the testator in this case, died nearly five months after the passage of the act, and in due course his executor's account was filed and confirmed, showing \$917,519.88, net balance of personal property for distribution. The learned auditing judge of the court below rejected the commonwealth's claim on the fund for state tax, under the provisions of the so-called "direct-inheritance tax law" in question on the ground that in *Blight's Estate*, 6 Pa. Dist. R. 459, *Portuondo's Estate*, 6 Pa. Dist. R. 462, and other cases involving the same question, the said court had theretofore declared the said law unconstitutional and void. Exceptions to said adjudication having been filed by the commonwealth, the same were duly considered and dismissed by the court in banc, which, in an opinion by its learned president, confirmed the adjudication, and decreed distribution accordingly. Hence this appeal by the commonwealth.

Substantially, the only question involved in the five specifications of error is this: Did the learned court below err in deciding that the act in question is unconstitutional? In our opinion it did not. As to the character of the act, there cannot be any doubt. That it is an act imposing taxes on the personal property therein specified is too plain for discussion. To hold otherwise would be a perversion of the plain meaning of the words employed in entitling the act and specifying its provisions. As we have seen, its title declares it to be "An Act Taxing Gifts, Legacies," etc., and providing for the collection thereof. Section 16 declares that it shall be "known as the direct-inheritance tax law." The "personal property" specified in the act is, in express words, "made subject to the tax," etc. Section 1. The second proviso to that section expressly de-

clares "that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this act shall be liable to the tax imposed by this law, as well as the estates of persons who die hereafter." Section 5 declares: "All taxes imposed by this act shall be a lien upon the personal property of the estate on which the tax is imposed, or upon the proceeds arising from the sale of such property," etc. It is also an act exempting "from the payment of this tax, in all estates," personal property specified therein to the amount of \$5,000.

The act in question has none of the features of an intestate law, or of an act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face, and in all its provisions it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an intestate law and a wills act, under the operation of one or other of which the personal property intended by its provisions to be subjected to taxation would pass from the then, as well as subsequent, owners thereof, to others, or had theretofore passed and become vested in others prior to the date of the act under consideration.

Having thus seen that the act in question is essentially and avowedly a "tax law" imposing a state tax on certain specified personal property, and providing for the collection thereof, let us briefly inquire whether it offends against the fundamental principles of taxation, or the provisions of our Constitution relating thereto. If it does, our manifest duty is to support and defend the latter by declaring the act unconstitutional. *Perkins v. Philadelphia*, 156 Pa. 554. In that case, it was well said, *inter alia*, by our Brother Dean: "Every department of the government is bound by its [the Constitution's] provisions, but especially is this court, for on it is the duty of judicially determining any violation of it." It is of the very essence of taxation that it should be relatively equal and uniform, and, where the burden is common, there should be a common contribution to discharge it. *Cooley, Const. Law*, *495. In his treatise on Taxation, 2d ed. pp. 2, 3, the same learned author says: "In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests on fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially. . . . Equality in the imposition of the burden is of the very essence of the right, and, though absolute equality and absolute justice may not be attainable, the adoption of some rule tending to that end is indispensable. Equality, as far as practicable, and security of property against irresponsible power, are

principles which underlie the power of taxation as declared ends and principles of fundamental laws." Desty, Taxn. 29, and cases there cited. As was well said by Mr. Justice Brewer in his dissenting opinion in *Maggoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 301, 42 L. ed. 1037, "Equality in right, in protection, and in burden, is the thought which has run through the life of this nation and its constitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation, does not prove its unconstitutionality. *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236. But when a tax law directly, necessarily, and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality, thus intentionally created, can find any constitutional justification."

Further citation of authorities in support of these fundamental principles is unnecessary. In nearly every state in the Union they are more or less carefully guarded against specific transgressions by constitutional restrictions and limitations. Our Constitution (art. 9, §§ 1, 2) declares: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax; . . . but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity. All laws exempting property from taxation, other than the property above enumerated, shall be void." The language of § 1, as to what the rule of uniformity shall embrace, is as broad and comprehensive as it could possibly have been made. The words "all taxes" must necessarily be construed to include property tax, inheritance tax, succession tax, and all other kinds of tax the subjects of which are susceptible of just and proper classification. By necessary implication, the first clause of that section recognizes the authority of the legislature to justly and fairly, but never arbitrarily, classify those subjects of taxation with the view of effecting relative equality of burdens. A pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, and illegal. For example, a division of personal property into three classes, with the view of imposing a different tax rate on each,—class 1 consisting of personal property exceeding in value the sum of \$100,000, class 2 consisting of personal property exceeding in value \$20,000 and not exceeding \$100,000, and class 3 consisting of personal property not exceeding in value \$20,000,—would be so manifestly arbitrary and illegal that no one would attempt to justify it. The next clause of § 1 expressly authorizes the legislature to exempt from taxation four specified classes or kinds of property. This specific delega-

tion of authority to exempt impliedly prohibits express exemption from taxation of any other property, but to place this matter beyond the reach of doubt, it is expressly ordained in § 2 that "all laws exempting property from taxation, other than the property above enumerated, shall be void." These limitations on the power of the legislature mean something. They are plainly intended to secure, as far as possible, uniformity and relative equality of taxation, by prohibiting generally the exemption of a certain part of any recognized class of property, and subjecting the residue to a tax that should be borne uniformly by the entire class, and by guarding against any other device that necessarily or intentionally infringes on the established rules of uniformity and relative equality, which as we have seen, underlie every just system of taxation. In any view that can reasonably be taken of these limitations, it must be manifest to any reflecting mind that the act in question offends against them by undertaking to wholly exempt from taxation the personal property of a very large percentage of decedents' estates, and imposes increased and unequal burdens on the residue of the same class of property. If the authority to exempt, etc., which was assumed and exercised by the legislature in this case, is sanctioned by this court, the constitutional rule of uniformity virtually becomes a dead letter, and, in lieu of the will of the people as plainly declared in the fundamental law of the state, the unrestrained will of the legislature becomes the supreme law on that subject. If the legislature had authority, under the Constitution, to do what was done in this case, they had like authority to reverse their order of taxation, etc., and thus impose the tax on personal property amounting in value to \$5,000 and less, and exempt therefrom all property of same recognized class in excess of that sum; and consequently they have like authority, in every case, to establish any other arbitrary ratio between the amount in value of property to be taxed and that which shall be exempt therefrom, in any class of subjects.

The commonwealth's contention is that the "\$2 on every \$100 of the clear value of such personal property," in excess of \$5,000, is not a tax according to the true intent and meaning of article 9, §§ 1, 2, of the Constitution, above quoted; that, independently of the taxing power, the legislature was fully empowered to pass the act in question, and hence it is not within the inhibition of article 9 of the Constitution; that in the language of *Dos Passos Inheritance Tax Law*, chap. 2, § 8, "such taxes are nothing more than a burden, bonus, excise, or assessment, as they have been variously defined, imposed by the government upon the passing, devolution, transmission, or privilege of taking or receiving property under wills and intestate laws, whether such property passes to collateral or lineal heirs." These propositions are predicated of the assumed principle that the right to inherit or succeed to property is not a natural, but merely a civil, right (1 Sharswood's Bl. Com. 398,

399); and hence the commonwealth, acting through its lawmaking power, may assert its sovereign right to take and appropriate to its own use such portion or portions of the estates, real, personal, and mixed, of every decedent, as the legislature in its wisdom may consider necessary and proper. They also assume that the people of this state, in their fundamental law, have placed no restriction on legislative power in that regard, without pausing to consider the soundness, as well as the scope, of the principle thus broadly asserted, but conceding, for argument's sake merely, that the legislature has the power, under our Constitution, to so change the law of descent and succession as to give the commonwealth a certain portion of every decedent's estate, or otherwise to regulate the transmission or devolution of such estate, it does not by any means follow that the direct inheritance tax law under consideration is such an act. As we have seen, the act does not profess to be a supplement to, or an amendment of, our laws relating to the estates of testates or intestates, but quite the reverse. There is nothing in its title or its text to indicate anything else than that it was intended to be a tax law imposing a tax of 2 per cent on the personal property of decedents therein specified, within the scope of article 9 of the Constitution. But assuming, for argument's sake only, that it is otherwise,—that it was in fact intended to be an act supplementary to, or amendatory of, existing laws regulating the succession to estates of decedents,—we think it clearly offends against that clause of article 3, § 7, of the Constitution, which declares: "The general assembly shall not pass any local or special law . . . changing the law of descent or succession." As our laws of descent and succession stood prior to the passage of the direct inheritance tax law, the personal property specified in said act was never subject to any "burden, bonus, excise, or assessment" whatever. The pre-existing law of succession is changed by that act, in that it imposes a burden on so much of said property as is in excess of \$5,000, and leaves it unchanged as to the residue. It is therefore a special, and not a general, act, because it does thus impose a burden on a part of said property, and declares that, in all estates, personal property not exceeding \$5,000 in value shall be exempt from said burden. It thus changes the law of succession as to part of the property specified therein, and attaches a condition to the right of succession which is neither general nor uniform, in that the burden is not imposed upon all distributees or all estates of decedents, but only upon a portion of them arbitrarily selected, while others in precisely the same class are exempted there-

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from. As to classification, it is very clear that \$5,000 in value of the personal property specified in the act is precisely the same kind as \$50,000 (or any other sum) in value of said property. The money value of any given kind of property, such as that specified in the act, can never be made a legal basis of subdivision or classification for the purpose of imposing unequal burdens on either of such classes, or wholly exempting either of them from any burden. On the commonwealth's own assumption, therefore, the act is a special law changing the law of succession, and is clearly forbidden by article 3, § 7, of the Constitution.

In the absence of reliable data, the practical operation of the \$5,000 exemption proviso cannot be definitely stated, but it would perhaps be safe to say that, outside of the large centers of population, from 90 to 95 per cent of the estates of decedents administered by the orphans' court from year to year do not separately represent personal property exceeding in value the sum of \$5,000; so that probably not more than from 5 to 10 per cent of said estates therein administered are subject to the 2 per cent direct inheritance tax. Whatever the percentage of such estates may be,—whether more or less than 5 to 10 per cent,—it conclusively shows the special character of the act in question. It also illustrates the injustice and inequality that must result from such special legislation. If the exempted personal property were subjected to the same tax rate that is required to be paid on personal property in excess of \$5,000, it would yield to the commonwealth an average of about \$50 on each decedent's estate,—a sum that is by no means insignificant when the aggregate number of such estates is taken into consideration.

Appellant's suggestion, that we have a precedent for exemption in the proviso to our collateral inheritance tax law, has no force when we recall the fact that said proviso was enacted in 1826 (Pub. Laws, 227), long before the adoption of our present Constitution containing the limitations on the powers of the legislature which we have been considering. No such limitations existed in 1826, when the proviso to our collateral inheritance tax law was enacted, and, of course, it was a valid enactment, which has never been repealed or modified.

There are other points of minor importance to which reference might be made, but enough has been said to show that, in any view that can be reasonably taken of the act in question, it is unconstitutional and void.

Decree affirmed, and appeal dismissed, at appellant's costs.

IOWA SUPREME COURT.

BENTON COUNTY SAVINGS BANK of
Norway

v.

Joseph BODDICKER *et al.*, *Appts.*

(105 Iowa, 548.)

1. The breach of a condition on which sureties sign a bond, that it will not be delivered until other sureties have signed it, will not prevent them from being liable to the obligee, if he received the bond in good faith for a sufficient consideration, without knowledge or notice of the condition.
2. The burden of proof is upon the surety who claims that the bond was delivered in violation of a condition as to procuring additional sureties, with the knowledge of the obligee.
3. A creditor who gives false information, or withholds information without sufficient cause from a surety, thus inducing him to refrain from taking steps to protect himself, is liable for the loss which is thus caused.

NOTE.—Conditional execution of contract under parol agreement that it shall not take effect until others have signed it.

I. Scope of the subject.

II. Bonds.

- a. Rule that nonperformance of condition vitiates.
- b. Rule that validity depends upon knowledge or notice.
- c. Rule when bond is joint.
- d. What a sufficient condition.
- e. Knowledge of or notice to obligee.
 1. Effect of.
 2. Sufficiency of.
 3. Evidence of.
- f. Waiver and estoppel.
- g. Particular classes of bonds.
 1. Application of general rules.
 2. Bonds for payment of debts.
 3. Bonds of contractors.
 4. Bonds of employees.
 5. Appeal bonds.
 6. Bonds in attachment, execution, etc.
 7. Bail bonds.
 8. Revenue bonds.
 9. Official bonds, generally.
 10. Bonds of sheriffs, deputies, constables, etc.
 11. Treasurers' bonds.
 12. Collectors' bonds.
 13. Guardians' bonds.
 14. Bonds of executors and administrators.
 15. Miscellaneous unclassified bonds.

III. Conveyances.

IV. Ordinary contracts or agreements.

V. Negotiable instruments.

- a. Conflict of authority as to.
- b. Rule that failure to perform condition vitiates instrument.
- c. Rule that failure to perform is no defense.
- d. The condition; sufficiency and waiver.
- e. Notice of condition.

VI. Non-negotiable notes.

I. Scope of the subject.

Questions with relation to the effect of a condition that a contract shall not take effect un-

4. A bond conditioned to pay the full amount of the indebtedness of a firm, but which recites an intention to indemnify against all losses by reason of the failure of the firm to pay indebtedness then owing or afterward contracted, is not limited to the indebtedness then existing.

5. A bond taken by a savings bank in excess of the amount which it is authorized to take by Acts 15th Gen. Assem. chap. 60, § 18, limiting the amount of money that may be loaned to any person or firm, is not for that reason void,—especially when it is not limited to indebtedness for borrowed money.

6. Knowledge of such facts as would cause a person of reasonable prudence to investigate and discover that the delivery of a bond was not authorized would be sufficient to charge one with notice that the bond was illegal.

(May 19, 1898.)

APPEAL by defendants from a judgment of the District Court for Benton County

til others sign arise in connection with all classes of contracts, including bonds, deeds, leases, general contracts, and negotiable instruments. And some conflict of authority has arisen in connection with each subject. The different results in the two classes of cases would seem to arise from a different conception of the principles of agency as applied to cases of this class. On the one hand, the courts seem to have regarded the person to whom a written instrument is delivered to be finally delivered to the other party upon being signed by others, as a special agent, the limit to whose authority must be ascertained, so that a delivery without the performance of the condition would pass no title. But, on the other hand, the courts in the other class of cases have seemed to take the ground that the depository, especially if he be a party to the instrument, is a general agent, and that delivery is within the apparent scope of his authority, and that therefore a delivery by him will be binding on the signers though the condition has not been performed.

II. Bonds.

a. Rule that nonperformance of condition vitiates.

Quite a respectable showing of cases, both in number and weight, have adopted the unqualified rule that the performance of a condition attached to the execution of a bond, that others shall sign, is imperative and necessary to render it valid and binding. Under this rule a bond may be delivered to a co-obligor upon condition that it shall become the deed of the person signing, only when another person signs it as cosurety, and it will not be operative as his deed until such condition is performed. *Bibb v. Reid*, 3 Ala. 88; *Pawling v. United States*, 4 Cranch, 210, 2 L. ed. 601; *Smith v. Kirkland*, 81 Ala. 345; *Wright v. Lang*, 66 Ala. 389; *Duncan v. United States*, 7 Pet. 435, 8 L. ed. 739.

And a surety on a bond putting it in escrow may stipulate that it shall not be delivered until other persons, or a given number of other persons, not named or otherwise identified, shall have signed it as sureties. *White Sewing Mach. Co. v. Saxon* (Ala.) 25 So. 784.

in favor of plaintiff in an action brought to enforce a bond. *Reversed.*

The facts are stated in the opinion.

Messrs. Heins & Heins for appellant.

Messrs. Thomas H. Wilner for appellee.

Robinson, J., delivered the opinion of the court:

In January, 1881, the plaintiff was organized as a corporation by virtue of chapter 60 of the Acts of the 15th General Assembly for the purpose of transacting business as a savings bank at Norway, in Benton county. Its capital stock, at first but \$10,000, was, in the year 1887, increased to \$15,000. The firm of G. A. Miller & Sons was engaged at Norway in selling coal, lumber, and agricultural implements, and borrowed money of the plaintiff. In the first part of the year 1891 the firm was indebted to the plaintiff to the amount of about \$6,000, and upon the demand of the plaintiff executed and delivered

to it the instrument in suit, of which the following is a copy:

Know all men by these presents that we, G. A. Miller & Sons, as principals, and Joseph Boddicker and V. A. Thoman, as sureties, of Benton county, Iowa, are held and firmly bound unto the Benton County Savings Bank of Norway, Benton county, Iowa, in the sum of five thousand (\$5,000) dollars, to be paid to the said Benton County Savings Bank or its assigns; to the payment of which we bind ourselves, and each of us, our heirs and legal representatives, firmly by these presents. It is the intention and purpose of this instrument or obligation to fully protect and indemnify the said Benton County Savings Bank or its assigns against any and all losses by reason of the failure of the said G. A. Miller & Sons to pay their indebtedness now owing (or which may be contracted hereafter) to the said Benton County Savings Bank. The condition of the above obli-

A surety signing a bond on express condition that all named in the body of the bond shall sign it is released if one of them does not sign, and his name is erased from the bond. *State v. Churchill*, 48 Ark. 426.

And where a surety hands a bond signed by him to the principal therein, expressly stipulating, and the principal promising, that it shall not be delivered until two other names are obtained to it, it is not an absolute delivery but a conditional one under which the surety will not become liable until such signatures are obtained. *Warfel v. Frantz*, 76 Pa. 88.

And a surety on a bond, who executes it upon the express stipulation that it shall not be delivered until twelve names are obtained thereto, putting it in the hands of the agent of the obligee as an escrow, is not liable thereon, and the bond is never legally delivered, where the condition is not performed. *Fertig v. Bucher*, 3 Pa. 308.

So, a bond signed by two sureties and left by them with the principal obligor with the understanding and upon the condition that it was not to be delivered to the obligee and they were not to be bound by it until and unless four or five other good men should sign it, is not binding on the sureties signing where the bond was delivered in violation of the condition. *White Sewing Mach. Co. v. Saxon* (Ala.) 25 So. 784.

And a provision in a bond that each one signing it is bound according to the purport of it without any regard to any understanding that another person should also sign it, and the person to whom it is intrusted has absolute authority to deliver it, does not validate the bond, where it is inoperative and invalid because delivered by the sureties signing to the principal obligor upon condition that four or five other good men sign, and delivered by him to the obligee in violation of such condition, as the stipulation, being a part of the bond, never became operative on the sureties conditionally delivering it. *Ibid.*

So, one who signs a bond and delivers it to another upon condition that it shall not be negotiated until he signs it, which condition is not performed, is not rendered liable thereon by the fact that the proceeds of the bond went to pay an existing indebtedness of the person who should have signed, for which the person signing was liable. *Fales v. Filley*, 2 Mo. App. 345.

And a surety on a bond may insist on compliance with a condition accompanying his signature, that others should sign as cosureties, 45 L. R. A.

and such condition will not be satisfied by a subsequent ratification of the signature which, previous to his execution, had been written thereon by an unauthorized person. *Morton v. Harvey* (Neb.) 77 N. W. 808; *Middleboro Nat. Bank v. Richards*, 55 Neb. 682.

And where a bond is delivered by sureties either to a third person not a party thereto, or to the principal or any other obligor, upon condition that the same shall not take effect as their bond unless it shall be executed by another person whose name is recited therein as co-obligor, and such condition is not complied with, the sureties signing are not bound by the bond whether the condition was known to the obligee or not, and it is also without effect as against another surety who afterwards executed it without condition. *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 740.

But see *infra*, II. b.

The rule that when one of two innocent persons must suffer, he who has employed the agent and enabled him to commit a fraud should be the loser rather than a stranger, is not deemed in this class of cases to apply to a case of the delivery of a bond by sureties signing it to the principal debtor upon condition that he obtain the signature of another thereto as a cosurety, and the delivery of the bond by the principal debtor without obtaining such signature, so as to render the sureties signing liable, the position of the obligee being rather that of one who takes a security to which the party giving it had no title. *People v. Bostwick*, 43 Barb. 9.

And Arkansas act No. 55, of 1891, § 2, providing that it shall not be a defense in favor of a surety on any bond or obligation that he became surety thereon on condition that the principal obligor should obtain the cosuretyship of other persons before the instrument should be delivered, does not apply to a bond existing at the time of its enactment, and only affects bonds subsequently made. *State v. Wallis* (Ark.) 20 S. W. 811.

So, under this rule it is competent to show in an action on a bond that it was never completely executed because it was to have been signed by other persons besides those who signed it and that they did not do so. *Clarke v. Williams*, 61 Minn. 12.

And proof that persons subscribing a bond as sureties thereon did so upon condition that other persons named in it as sureties would sign it, is not incompetent as designed to vary the terms of a written instrument, but is admissible

gation is such that, if the said G. A. Miller & Sons shall pay the full amount of their indebtedness to the said Benton County Savings Bank, then this obligation to be void and of none effect; otherwise to remain in full force and virtue.

G. A. Miller & Sons.
Joseph Boddicker.
V. A. Thoman.

On the 31st day of January, 1898, the plaintiff commenced this action against the firm of G. A. Miller & Co. and its members to recover the amount due on certain promissory notes, and against the sureties to recover the amount of the bond. The action was aided by attachment which was issued against the property of the firm and its members. In April, 1898, judgment was rendered against all the defendants excepting the sureties on the bond for the sum of \$14,620.55, an

to show that there never was a complete execution of such instrument. *Ibid.*

And the defense in an action on a bond that it was to have been signed by two others, and that the signature thereto was made upon condition that the others should sign, which was not done, may be made under a plea of payment with leave. *Sharp v. United States*, 4 Watts, 21, 28 Am. Dec. 676.

And the sureties on a bond may, under a special plea of *non est factum* when issue is taken thereon, show in defense that they signed it and left it with their principal as an escrow to be delivered only on the express condition that other named persons should also sign it as cosureties with them, and that such condition was not performed. *Wright v. Lang*, 68 Ala. 398.

So, where a person executes a bond and delivers it to another as his deed, and the person to whom it is delivered subsequently hands it back to him and requests him to procure the signatures of certain other persons, he thereby constitutes the former his agent for the purpose of obtaining such signatures, and a party afterwards signing and delivering the bond under such circumstances to the agent upon condition can prove, under a plea of *non est factum* by the agent or by himself, the fact of agency and the condition upon which the delivery was made to the agent, and the condition made known to the agent at the time of delivery is notice to the principal which will bind him. *Newlin v. Beard*, 6 W. Va. 110.

If the rule of principal and agent is to be applied to a case of a delivery of a bond to the obligee therein named by the principal debtor to whom it had been intrusted by the sureties thereon for the purpose of securing the signature of another person as cosurety on condition that it should not be delivered until such signature had been obtained, which condition was violated, the sureties would be bound only by authorized acts; and where delivery was to be conditional, and the condition had not happened, delivery was unauthorized. *People v. Bostwick*, 43 Barb. 9.

For the present New York rule, which seems to have been greatly altered, if not diametrically reversed, see later New York cases set forth below in the note, and particularly in *infra*, II. b.

b. Rule that validity depends upon knowledge or notice.

By the weight of authority, however, known 45 L. R. A.

attorney's fee, and costs, and a special execution was ordered against certain town lots. Thereafter, by order of the court, a separate petition setting out the claims of the plaintiff upon the bond was filed, and to that the sureties Boddicker and Thoman filed an answer. The verdict and judgment against them were for the full amount of the bond.

1. The defendants claim that each of them signed the bond upon the express condition that before it should be delivered and take effect it should also be signed by three other men of good financial responsibility; also that Boddicker signed the bond on that condition, and notified the plaintiff of that fact before the bond was delivered, and that Thoman signed after Boddicker did, and relying upon his signature. There was evidence which tended to support these claims. The court charged the jury that the burden was on the defendants to show that the plaintiff

edge or notice of the condition or agreement that others shall sign is made the criterion of the validity of the bond.

Under this rule the fact that a bond was signed by a surety upon condition that others should sign it as cosureties with him, and that such condition was not performed, does not affect the rights of the obligee unless he had notice of the agreement before he accepted the bond. *Hall v. Smith*, 14 Bush, 604; *Whitaker v. Crutcher*, 5 Bush, 621; *Doorley v. Farmers' & M. Lumber Co.* 4 Kan. App. 98.

And it is no defense for a surety in a bond that he signed it on condition that it should also be executed by another person as cosurety before it should be delivered, and that it was delivered to the obligee in violation of such condition, where it does not appear that the obligee had notice of the condition. *Comstock v. Gage*, 91 Ill. 328.

And in the absence of notice or knowledge evidence tending to prove the agreement is inadmissible in an action on the bond. *Whitaker v. Crutcher*, 5 Bush, 621. And see *Rhode v. McLean*, 101 Ill. 467, *infra*, II. g. 5.

And an answer in an action on a bond, alleging that the defendant signed it on condition that others named should also sign before the bond should be delivered, and that such others did not sign, is insufficient where it does not show that the plaintiff had notice of the condition. *Hart v. Mead Investment Co.* 53 Neb. 153.

So, where a surety signs an instrument apparently perfect and complete, and hands it to his principal to be finally delivered to the obligee when it shall be executed by certain others as cosureties, and then only, and the principal, without complying with the condition, delivers the instrument to the obligee, who has no notice, actual or constructive, of the condition, and takes it in good faith, the surety will be bound. *State, Griswold, v. Blair*, 32 Ind. 314; *Garvey v. Marks*, 134 Mo. 1.

Where there is nothing upon the face of a paper indicating that other cosureties were expected to become parties thereto, and no fact is brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man to have made inquiry before accepting the security, the fault cannot be said to rest upon the obligee if other persons were expected to become cosureties but the instrument was delivered by the principal without such others joining. *Deardorff v. Foresman*, 24 Ind. 481.

had knowledge or notice of the condition on which the bond was signed, if it was signed on the condition alleged, before it was delivered, or before any credits had been extended or benefits conferred by virtue thereof; and of that portion of the charge the appellants complain. The answer alleges that the plaintiff had the knowledge or notice specified before the bond was delivered, but the appellants insist that upon proof of the fact that the bond was executed on the condition stated a presumption that the plaintiff took the bond with knowledge of the condition was created, and that the burden of rebutting that presumption, and showing that the bond was taken in good faith, was upon the plaintiff. It is a rule of general application that the holder of negotiable paper which is payable to bearer or is indorsed in blank is presumed to be its bona fide owner, but that, when fraud or other illegality in the incep-

tion of the paper is shown, the burden is shifted to the holder to show that he acquired and holds it in good faith. *Union Nat. Bank v. Barber*, 56 Iowa, 559, and authorities therein cited; *Bank of Monroe v. Anderson Bros. Mfg. & R. Co.* 65 Iowa, 692, 701; *Lane v. Krekle*, 22 Iowa, 399; *Bennett State Bank v. Schloesser*, 101 Iowa, 571; *First Nat. Bank v. Holan*, 63 Minn. 525; *Bank of Montreal v. Richter*, 55 Minn. 362; 1 Am. & Eng. Enc. Law, 2d ed. p. 369; Tiedeman, Com. Paper, § 303. And when an alteration in an indorser's contract is shown the burden is on the holder of the note to show the sufficiency of the indorsement. *Robinson v. Reed*, 46 Iowa, 219. The rule of these cases applies notwithstanding the fact that in actions by persons not payees of such paper it is necessary to plead in defense that the plaintiffs are not good-faith holders of the paper in suit. *Lane v.*

In the above case *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601, *supra*, II. a, was distinguished upon the ground that in that case the representative of the government had notice on the face of the instrument that the same was not complete, not having been executed by all the parties whose names appeared upon its face as co-obligors. And *United States v. Lefler*, 11 Pet. 86, 9 L. ed. 642, *infra*, II. g, 12, was limited, the court saying that the only question for consideration was as to the competency of the witnesses to prove a conditional execution.

When a surety intrusts a bond to the principal obligor in perfect form with his own name attached as surety, and there is nothing upon the paper to indicate that any other persons are expected to sign it in order to give it full validity against all the parties, he makes such principal his agent to deliver the same to the obligee, and if the principal under such circumstances gives assurance to the surety in regard to procuring other co-sureties or performing any other condition before he delivers the bond, which he fails to perform, the surety giving confidence to such assurance must stand the hazard of its performance. *Deardorff v. Foreman*, 24 Ind. 481.

A bond which is perfect on its face, and apparently executed by all whose names appear therein, which purports to be signed and delivered by the several obligors and is actually delivered by the principal without a stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be signed by other persons who did not sign, where the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, providing he has been induced upon the faith of such bond to act to his own prejudice. *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Bangs v. Bangs*, 41 Hun, 41; *Dunn v. Garrett*, 93 Tenn. 650; *Gwyn v. Patterson*, 72 N. C. 189.

In *Bangs v. Bangs*, 41 Hun, 41, *supra*, *Grimwood v. Wilson*, 31 Hun, 215, *infra*, II. g, 5, was explained and limited, the court saying that the announcement of the rule that an instrument not under seal may be delivered upon conditions, the observance of which as between the parties is essential to its validity, may be regarded as the extent to which the court intended to go; And *People v. Bostwick*, 43 Barb. 9, 32 N. Y. 445, *supra*, II. a, was criticised, 45 L. R. A.

but distinguished on the ground that in that case the bond was delivered to the proper officer, who was told at the time that another person would call and sign it, and he replied that it was good enough as it was.

And in *Dunn v. Garrett*, 93 Tenn. 650, *supra*, *Majors v. McNeilly*, 7 Helsk. 294, *infra*, VI., was distinguished upon the ground that that was a case in which the note in question had been placed in the possession of the payee upon an understanding with such payee that it was conditionally delivered.

And *Carriek v. French*, 7 Humph. 459, *supra*, III., was limited and explained, the court saying that it simply holds that, to make out an estoppel, the evidence must clearly show that the surety signed on an express condition, and not on a casual statement of the principal obligee that he intended to procure other sureties, even if it appears that the statement was an inducement to the surety so signing. And *Quarles v. Governor*, 10 Humph. 122, *infra*, II. g, 12, was criticised, the court saying that it may be this case was rested by the court upon the ground that the clerk of the court who took the bond from the surety with full knowledge of the condition attached was the statutory agent of the payee of the bond, and that notice to him was notice to his principal; but unless this be so we do not believe the case to be reconcilable with the best-considered authorities.

And in that case it was said that what was said in *Perry v. Patterson*, 5 Humph. 133, 42 Am. Dec. 424, *infra*, V. b, with reference to the receipt of the note by the attorney without knowledge that it had been conditionally executed, was unnecessary to the determination of the case, and therefore not binding as authority. And it was said that the authority of *People v. Bostwick*, 32 N. Y. 445, *infra*, II. g, 2, was much weakened, if not effectually destroyed, by the doubt as to its soundness suggested in *Russell v. Freer*, 56 N. Y. 67, *infra*, II. g, 12; and *Smith v. Kirkland*, 81 Ala. 345, *supra*, II. a, and *Crawford v. Foster*, 6 Ga. 202, 50 Am. Dec. 327, *infra*, II. g, 10, holding the same rule were also disapproved. And it was said that while it is true that *Jordan v. Jordan*, 10 Lea, 124, 43 Am. Rep. 294, *infra*, V. c, finally rests upon the fact that the note sued on was negotiable, and passed, for value, without notice and before maturity, into the hands of the payee, yet the reasoning and illustration of the opinion embrace both negotiable and non-negotiable paper.

So, in *State, McCarty, v. Pepper*, 31 Ind. 76,

Krekle, 22 Iowa, 399; *Sillyman v. King*, 36 Iowa, 207, 214. These rules have been applied to purchasers of real property whose titles were assailed. *Rush v. Mitchell*, 71 Iowa, 333; *Gardner v. Harly*, 72 Iowa, 518; *Merrill v. Tobin*, 82 Iowa, 529; *Sillyman v. King*, 36 Iowa, 207, 214. In this case there has not been any transfer of the instrument alleged to have been wrongfully delivered, and it is not a negotiable instrument. Therefore the rules which protect the bona fide owners of negotiable instruments are not in all respects applicable. We cannot, however, assent to the claim of the defendants that, if the bond in suit was delivered in violation of an agreement to the effect that it should not be delivered until three additional sureties should sign it, no recovery can be had thereon, even though the plaintiff took it without knowledge or notice of the agreement. The case of *Johnston v. Cole*, 102

Iowa, 109, involved the validity of a contractor's bond, on which recovery was sought against a surety named Cole. He pleaded as a defense that the bond was not to be delivered unless it should be signed by another surety, and the jury found specially that he did not deliver the bond nor authorize its delivery without the signature of another surety. We held, under the issues tendered and the special finding, that the invalidity of the bond had been established, and called attention to the fact that the issues did not bring in question the legal effect of the delivery made; and that the answer pleaded an affirmative defense, the sufficiency of which was not in any manner questioned. Whether the bona fide holder of such a bond might, in any event, be entitled to recover upon it as against the surety who had not authorized its delivery, and upon whom rested the burden of proof as to the good faith of the

it was said that where the surety signs an instrument complete on its face, and delivers it to the principal to pass over to the obligee, if he imposes any condition upon its delivery, he must rely upon the principal to execute that condition, as he has made him his agent for the general purpose of the delivery, and the obligee accepts an instrument perfect in form and execution, which comes to him from the person who should have possession of it for the purpose of such delivery, and the entire transaction, so far as the obligee is involved, is according to the ordinary and natural course, and if he departs from the ordinary course of procedure by circumscribing the general authority by a condition unknown to the obligee, a fraud is accomplished, and he who has trusted his principal with the insignia of general authority to make the delivery must stand the hazard he has incurred.

d. What a sufficient condition.

The requirement that others shall sign must amount to a condition that the bond shall not take effect without its performance, as distinguished from a mere expectation that others shall sign.

Thus, the failure of the principal to execute a joint and several bond does not invalidate the same as to a surety unless there was an express agreement that the bond should not be valid until so executed. *Douglas County v. Bardon*, 79 Wis. 641.

And a bond signed and sealed by a surety, and delivered without any condition or reservation, is binding upon him, although it was executed under the expectation that it would be signed by others, where such others did not sign it. *Haaskins v. Lombard*, 16 Me. 142, 33 Am. Dec. 645; *New York County Mut. F. Ins. Co. v. Broosk*, 51 Me. 506.

And the fact that a surety on a bond signed it with the expectation that his partner would also sign it as surety, which for some reason he failed to do, will not relieve the one who signed from liability. *Whitaker v. Richards*, 134 Pa. 191, 7 L. R. A. 740.

And an understanding between a surety on an executor's bond, and the executor at whose request he signed it, that other designated persons would execute it as cosureties, his signature having been made with the expectation that they would do so, will not be deemed to amount to an express agreement, and he will be deemed to be estopped to set it up in defense, where the bond was perfect on its face, and was in fact delivered by principal and surety to the obligee therein named, and had been duly approved and letters testamentary issued thereon. *Berkey v. Judd*, 34 Minn. 398. And see *Russell v. Freer*, 56 N. Y. 87, *infra*, II. g. 12.

So, where a bond was presented to a person for signature as surety and the name of another person was written in the body of the bond as cosurety, and the principal informed him that such other person would sign, whereupon he signed with the expectation that the other would do so, he is liable thereon, though the other never executed it and another person executed it in his place, where there was no agreement that he should sign, and the delivery of the bond was not conditional upon such signature. *Reed v. McGregor*, 62 Minn. 94.

And one who signs a joint and several bond cannot excuse himself from liability upon the ground that it appears on the face of the bond

e. Rule when bond is joint.

If a bond, in form a joint obligation, is signed by a surety on condition that others are to become parties to the instrument in the same capacity, and the bond is delivered without compliance with the condition, the instrument is ineffective as to the party who so signed it, unless the obligee was ignorant of the condition prior to the delivery or unless the signer waived the condition subsequent to execution. *Morton v. Harvey* (Neb.) 77 N. W. 808; *Middleboro Nat. Bank v. Richards*, 55 Neb. 682; *Mullen v. Morris*, 43 Neb. 596; *Clarke v. Williams*, 61 Minn. 12.

When a bond purports to be a joint bond of all the parties named in it, but is not signed by one of them, it will be presumed from its face, in the absence of evidence to the contrary, that the party thus named, but not signing, was intended to be bound along with the others, and a separate verdict cannot be found against him. *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749.

And where a bond which is in form a joint obligation is delivered to the obligee without being executed by all the persons named in the body thereof as obligors, it is sufficient to put the obligee upon inquiry whether those who signed consented to its being delivered without the signature of the others. *Mullen v. Morris*, 43 Neb. 596.

As to presumption that all were expected to sign, see *Sacramento v. Dunlap*, 14 Cal. 423, *infra*, II. g. 9.
45 L. R. A.

holder, were questions not decided in that case. In *Daniels v. Gower*, 54 Iowa, 319, a recovery was sought against the sureties on a non-negotiable promissory note. Three of the sureties signed the note when it was in the hands of one Stoller, with the agreement that it should not be delivered unless the signature of one Blajok should be obtained. It was held that if Stoller was not the agent of the plaintiff, and the note was delivered without the knowledge and consent of the three sureties, in violation of the condition upon which it had been placed in the hands of Stoller, the sureties would not be liable. The correctness of that decision was questioned in *Taylor County v. King*, 73 Iowa, 153, and the fact was pointed out that it rested in part upon the supposed authority of *Pepper v. State, Harvey*, 22 Ind. 399, 85 Am. Dec. 430, which has been overruled in *State, McCarty, v. Pepper*, 31 Ind. 76, and in

part upon the case of *Ayres v. Milroy*, 53 Mo. 516, 14 Am. Rep. 465, which was examined and questioned, if not distinguished, in *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440. The case of *People v. Bostwick*, 32 N. Y. 445, tends to sustain the doctrine of *Daniels v. Gower*, but was questioned in *Russell v. Freer*, 56 N. Y. 67, although it was cited in *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131. In some cases a distinction has been suggested between official bonds and other non-negotiable instruments, based upon grounds of public policy. *Carroll County v. Ruggles*, 69 Iowa, 269, 58 Am. Rep. 223; *Taylor County v. King*, 73 Iowa, 153. But, although there are a few authorities which support the rule of *Daniels v. Gower*, the greater number do not. See *Butler v. United States*, 21 Wall. 272, 22 L. ed. 614; *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491; *White v. Duggan*, 140 Mass. 18, 54 Am. Rep.

that it was intended to be signed by others who did not sign, unless he declared at the time that he would not be bound unless such signatures were obtained. *Los Angeles v. Mellus*, 59 Cal. 444; *Cutter v. Whittemore*, 10 Mass. 442. And see *Goodyear Dental Vulcanite Co. v. Bacon*, 148 Mass. 542, *infra*, II. g. 4; *Grim v. Jackson Twp. School Directors*, 51 Pa. 219; *People v. Stacy*, 74 Cal. 373, *infra*, II. g. 12; *State, Barnes, v. Lewis*, 78 N. C. 188, 21 Am. Rep. 461, *infra*, II. g. 13.

In *Los Angeles v. Mellus*, 59 Cal. 444, *supra*, *Sacramento v. Dunlap*, 14 Cal. 421, *infra*, II. g. 9, was distinguished upon the ground that the instrument in that case was a joint bond only, and was not joint and several.

One who executes a joint and several bond, but does not intend to become bound thereon until all others named in it have signed it, must protect himself by delivering it as an escrow only. *Loew v. Stocker*, 68 Pa. 226.

No condition can be added to the execution by several obligors that the bond shall be executed by all the persons named in it before it becomes binding upon any of them, where it is a several as well as a joint obligation. *Ibid.*

And where a bond or deed or other written instrument is executed by a portion only of those who appear in the body of the instrument as parties, the question whether those who executed it are bound, depends upon the circumstances under which the instrument was delivered, and if it appears that at the time of the delivery by any party whose signature is affixed anything was said indicating that such party did not intend to be bound unless other parties also signed, the delivery will be considered as not absolute, but in escrow only. *Chouteau v. Suydam*, 21 N. Y. 179.

While sureties who sign a bond in which they and the principal debtor are named as parties are bound though the principal debtor did not sign, when there is nothing to prevent it from operating without his signature, they would not be liable if they had expressly declared when they signed that they would not be bound except in the event of its execution by him. *Parker v. Bradley*, 2 Hill, 584.

But an instruction in an action on a bond in which the defense was that it was signed on condition that it should be signed by another as cosurety with the signer, but that it was delivered without such signature, that such must have been the understanding of the plaintiff as well as of the defendants, is not error, though an instruction that such must have been the 45 L. R. A.

agreement of the parties would have been a better form of expression. *Garvey v. Marks*, 134 Mo. 1.

And it has been held that a surety signing a bond for the release of property attached in which three persons are named as principals, and the bond is signed by but one of the principals, is not bound, in the absence of evidence, to destroy the presumption that he expected the three persons named as principals to be bound as such, and to show that he would have recourse against them if he paid the amount. *Clements v. Cassilly*, 4 La. Ann. 880.

The question whether the delivery of a bond was absolute or conditional upon the signature of other persons is one of fact for the determination of the jury. *Warfel v. Frantz*, 76 Pa. 88.

And if one of the obligors at the time of executing a bond, in the presence of some of the other obligors, says: We acknowledge this instrument but others are to sign it,—it is evidence from which the jury may infer a delivery in escrow, by the obligors who were present. *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601.

A bond or single bill for the payment of money, perfect on its face, however, which is delivered by the obligor directly to the obligee upon condition that another person should execute it, is valid and binding upon the person signing, though the condition is not complied with, as a deed cannot be delivered as an escrow to the grantee or obligee, and parol evidence of the condition is inadmissible in an action thereon. *Miller v. Fletcher*, 27 Gratt. 407, 21 Am. Rep. 356; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

And a conditional delivery by a surety on an undertaking to secure the performance of a contract of dissolution of a partnership, to the principal will not make the paper a mere escrow so as to release the surety from liability in case of nonperformance of a condition that others should sign with the principal, as a delivery of the paper, to constitute an escrow, must have been made to a third person, and not to a co-obligor, whether the instrument is assignable or not. *Millett v. Parker*, 2 Met. (Ky.) 608.

In that case *Carwell v. Renick*, 7 J. J. Marsh. 281, *infra*, II. g. 10, was distinguished upon the ground that the delivery of the bond in that case was made to the clerk of the county court, it being an official bond, and the question there was whether the delivery to the clerk of the court was a delivery to the obligee.

437; *Ordinary of State v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49; *Russell v. Freer*, 56 N. Y. 67; *State v. Peck*, 53 Me. 284; *State, McCarty, v. Pepper*, 31 Ind. 76; *McCormick v. Bay City*, 23 Mich. 457; *Millett v. Parker*, 2 Met. (Ky.) 608; *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, and cases therein cited; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780; *Jordan v. Jordan*, 10 Lea, 124, 43 Am. Rep. 294; *Tiddall v. Halley*, 48 Cal. 613; *Chicago v. Gage*, 95 Ill. 613, 35 Am. Rep. 182. The ground upon which some of these decisions are based is that, where sureties have placed in the hands of their principal an instrument which purports to be valid and complete, they are estopped to assert, as against an innocent holder for value, that they did not execute it. In this case, if the testimony

for the plaintiff be credible, the defendants executed what purported to be a valid bond, complete excepting that the names of the sureties were not inserted, and intrusted it to the principal. He delivered it wrongfully, it is said, but the plaintiff had no knowledge of that fact, nor of any circumstances which should have caused it to inquire as to the condition on which the bond was signed. We do not think that, in the absence of such knowledge, the plaintiff refrained at its peril from making inquiry as to the signing of the bond. It is a rule of general application that when one of two innocent parties must suffer loss it should fall upon the one whose acts caused it. *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49. We reach the conclusion that the doctrine of *Daniels v. Goucer*, which we have considered, is contrary to reason and the weight of authority, and so far as the case announces

There is a substantial distinction between the delivery of a bond to a stranger, to be delivered to the obligee after having been signed by others, and a delivery to the principal obligee by one who signs it as surety, as a third person would be a mere custodian having a naked special agency, and the obligee, finding the paper in the hands of such a person, is bound to find out his authority and how he obtained possession of it. *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640.

To constitute an escrow it is necessary that the writing be delivered to a third person to be held by him until the condition upon which it was to become absolute shall be complied with, and the delivery of the bond by the obligor to the obligee, though coupled with a condition that the signature of another surety should be procured, will not be regarded as a delivery in escrow, as a delivery to the obligee renders the condition void and the bond absolute. *Johnson v. Branch*, 11 Humph. 521.

Where an instrument is delivered directly to the obligee the delivery cannot be regarded as conditional in respect to the party who makes it unless the condition is made known to the obligee, and, although the face of the paper indicates that it was intended originally that other persons should sign it, the obligee has a right to infer from the unconditional delivery that the original intention had been relinquished by the party who made the delivery. *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749.

But where an instrument indicates on its face that others were to execute it besides those who did so, it may be shown by extrinsic evidence that the delivery, though made to the grantee or obligee, was conditional upon the execution of the instrument by the other parties, and not absolute. *Ibid.*

And a delivery of a bond to a clerk of the court, who was authorized to receive it, on condition that it should become the signer's act and deed when another named person signed it as cosurety with him, is not necessarily a delivery to the obligee which cannot be made in escrow merely. *Whitaker v. Crutcher*, 5 Bush, 621.

And where an instrument is delivered upon condition that others shall sign it, which condition is made known to the obligee, his assent to it will be presumed from the acceptance of the instrument, and he will not be allowed to repudiate the condition thus assented to and treat the delivery as absolute and unconditional. *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749.

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So, a plea in an action on a bond against a surety thereon, that it was signed by him upon condition that twelve or fifteen other good men should sign it, which was not done, and that unless such number of persons did sign it was not to be considered his deed, is bad on demurrer, as it admits the signature to the bond, and does not deny that the same was delivered to the obligee, as when so signed and delivered it would become absolute. *State, Barrell, v. Chrisman*, 2 Ind. 126.

And a special plea of *non est factum* in an action on a bond, averring that the instrument was delivered upon condition that it should be signed by another person, which condition had not been performed, is fatally defective where it does not allege to whom the delivery was made. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

See also, as to conditional delivery to the obligee. *Graves v. Tucker*, 10 Smedes & M. 9, *infra*, II. g. 11. And for an apparently contrary case, see *Knight v. Hurlbut*, 74 Ill. 133, *infra*, V. b.

e. Knowledge of or notice to obligee.

1. Effect of.

One who signed a bond as surety with the understanding that other persons were to sign it as cosureties with him, and that the bond was not to be delivered or used until it had been signed by such other parties, is not liable thereon, where it was delivered without such signature and without his consent, and the understanding that additional names should be procured was known and assented to by the obligee. *Garvin v. Mobley*, 1 Bush, 48; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371.

In *Garvin v. Mobley*, 1 Bush, 48, *supra*, *Hubble v. Murphy*, 1 Duv. 278, *infra*, V. d, was distinguished upon the ground that in the former case the surety did not deliver the bond to the obligee or authorize its delivery unless the additional names should first be affixed to it, but in the latter case the note was delivered by the surety to the payee upon the parol agreement of the latter to obtain the signature of another person thereto.

So, a bond apparently perfect and complete may be avoided by parol proof that the obligee at the time he received it from the principal obligor had notice that other persons were to sign it in order to make the instrument effectual as to those who did sign it; but evidence of notice to the obligee where there is nothing on the

that doctrine it is overruled. If it be shown that the bond was delivered by the principal in violation of the condition on which it was signed by the sureties, nevertheless the plaintiff may recover if it show that it received the bond in good faith, for a sufficient consideration, without knowledge or notice of the condition upon which the defendants signed it.

2. The defendants state that, being ignorant of the financial standing of G. A. Miller & Sons, they applied to the plaintiff, a short time before this action was commenced, for information, and were then assured by the plaintiff that the firm was solvent, and in good financial condition; that the plaintiff knew that the statements were false; that the defendants believed them to be true, and relied upon them, and in consequence refrained from taking measures to secure themselves which they would have taken but for the false representations made as stated.

In view of the fact that what evidence will be given on another trial of this case is uncertain, we content ourselves with saying on this branch of the case that as the contract of suretyship is, as a rule, for the benefit of the creditor, he is, in dealing with the surety, to observe the utmost good faith, and if he fail to do so, without a sufficient excuse for his neglect, the surety will be discharged to the extent to which he suffers by reason of the lack of good faith on the part of the creditor. If the surety applies to the creditor for information respecting the principal which the creditor has, and may properly give, but which he withholds without sufficient cause, or if he knowingly give false information, he, and not the surety, should suffer the loss occasioned by the wrong. See *Bank of Monroe v. Anderson Bros. Min. & R. Co.* 65 Iowa, 692; *Rouley v. Jewett*, 56 Iowa, 492; *Auchampaugh v. Schmidt*, 77

face of the paper to put him on inquiry ought to be very clear and satisfactory. *Nash v. Fugate*, 32 Gratt. 505, 34 Am. Rep. 780.

And a bond is invalid and of no effect where the principal debtor delivered it to the obligee with the statement that there were two other obligors who were in fact sureties, and that the person signing it had signed with the understanding and agreement that they were also to sign it. *Stuart v. Livesay*, 4 W. Va. 45.

So, if there is anything on the face of a bond, or in the attending circumstances, to apprise the person to whom it is given that it was delivered by the sureties to the obligor to be delivered to the obligee only upon condition that others should sign, which condition has not been complied with, the sureties may plead the failure to comply with such condition as a defense to an action on the bond. *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Middleboro Nat. Bank v. Richards*, 55 Neb. 682; *Henry & C. Co. v. Fisherdlck*, 37 Neb. 207.

And a bond so written that it appears upon its face that it was contemplated by the parties that it should be signed by several is not binding upon a surety signing who at the time annexed a reservation or condition to his act that it should not be binding upon him unless it was signed by the others. *Haskins v. Lombard*, 16 Me. 142, 33 Am. Dec. 645.

And one who signs a bond and delivers it to another upon condition that it is not to be negotiated until signed by him, is not liable thereon, even when the bond is in the hands of an innocent holder, where the fact appears upon its face that the signature of the person to whom it was delivered was essential to its completion. *Fales v. Filley*, 2 Mo. App. 345.

But see *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749, *supra*, II. a.

2. Sufficiency of.

The question as to the effect of the appearance in the body of a bond of names of persons who did not sign it, as notice that it was executed by those who did sign upon condition that the persons named should also sign, has given rise to some contrariety of opinion.

Thus, upon the one hand, the rule has been laid down that where a bond shows upon its face that it has been signed by a part only of the sureties therein named, it is itself sufficient notice to the obligee that it was signed by those who signed upon condition that the sureties therein named were to execute it. *Hall v. Smith*, 14 Bush, 604; *State v. Wallis* (Ark.) 45 L. R. A.

20 S. W. 811; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491.

If a bond is so written that it appears that several were expected to sign it the obligee takes it with notice that the obligors who did sign it can set up in defense the want of execution by the others if they agreed to become bound only on condition that the other cosureties joined in the execution. *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491.

And the obligee in a bond which purports in the body thereof to be signed by the principal and his sureties, but which when delivered is not signed by the principal, is chargeable with notice that it is imperfect, and the sureties thereon may show that they did not consent to its delivery before being signed by the principal. *Wild Cat Branch v. Ball*, 45 Ind. 213; *Parker v. Bradley*, 2 Hill, 584.

And where the name of a surety, although in the body of the instrument and as signed by him, is erased and so appears to a reader thereof, the alteration is such as to put the obligee upon notice as against a surety who signed upon the express condition that all named in the body of the bond should also sign. *State v. Churchill*, 48 Ark. 426; *Henry & C. Co. v. Fisherdlck*, 37 Neb. 207.

Upon the other hand, however, the rule is laid down by cases perhaps equally numerous and authoritative that the fact that the name of a second person appears in a bond as surety is not of itself notice that the instrument is incomplete without his signature, and that the delivery thereof by a surety who signed it was conditioned upon its being signed by the other surety. *State, Barnes v. Lewis*, 73 N. C. 186, 21 Am. Rep. 461; *Blume v. Bowman*, 24 N. C. (2 Ired. L.) 338.

And that there is no presumption that a bond not signed by all the persons named therein as obligors, which is delivered to the obligee, is not to be considered binding upon those signing until executed by all the obligors named in the body thereof, and that it is for those who executed it to show that they were not to be bound unless it was executed by the others. *Mullen v. Morris*, 43 Neb. 596.

Thus, the fact that a bond was prepared for six obligors, and was executed by only five of them, does not raise an inference that it is incomplete and not binding on those who did execute it, where it contains a declaration that the principal had become surety for another person on the promise of the six persons named in it

Iowa, 13; *Wolf v. Madden*, 82 Iowa, 114; *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254; *Brandt, Suretyship*, 611.

3. The evidence tended to show that the time of paying some of the indebtedness of G. A. Miller & Sons which existed when the bond in suit was given was afterwards extended, and that new indebtedness was thereafter contracted; and it is insisted that the bond does not cover either class of indebtedness. The bond, in terms, covers the indebtedness of the firm which it owed to the plaintiff at the time the bond was given, or which should be thereafter contracted. It is true, the third paragraph of the bond recited that the condition of the bond is that the firm "shall pay the full amount of their indebtedness" to the plaintiff, and that paragraph, taken alone, might well be said to refer only to indebtedness existing when the bond was given; but all the provisions of

the bond must be construed together, and when that is done it is clear that the bond was intended to secure the payment of the indebtedness of the firm to the plaintiff which existed at the time the bond was given, and also that which should be created by contract thereafter. The provisions were sufficiently broad to include renewals of existing debts as well as those which should otherwise accrue, for a continuance of the business of the firm was evidently contemplated, and contracts for the extension of existing debts were as much within the scope and purpose of the bond as were those which should be thereafter created. We do not think that the case of *Crapo v. Brown*, 40 Iowa, 487, nor other authorities cited by the appellants, are in conflict with the conclusion we reach, as each was made to depend upon the terms of the obligation construed, and none were like the bond in suit.

that they would indemnify him. *Keyser v. Keen*, 17 Pa. 330.

And the possession of a bond by the obligee is prima facie evidence of delivery though it was drawn for the signatures of four, three being sureties of the fourth, and was signed only by the principal and two sureties. *Grim v. Jackson Twp. School Directors*, 51 Pa. 219.

And the fact that the name of a person who did not execute a bond is inserted in the body of it as one of the obligors, and a seal is left for his name, is not of itself evidence to show that those who did sign, seal, and deliver it, delivered it only as an escrow upon condition that the person whose name was thus inserted should also execute it. *Towns v. Kellett*, 11 Ga. 289; *Comstock v. Gage*, 91 Ill. 328.

And see also *Fertig v. Bucher*, 3 Pa. 308, *supra*, II. a.; *Loew v. Stocker*, 68 Pa. 226, *supra*, II. d.; *Chouteau v. Suydam*, 21 N. Y. 179, *supra*, II. d.

So, the fact that while a bond, perfect in form and apparently duly executed by all whose names appear thereon, but which has on it scrolls to which no names are attached, is on its face an incomplete and imperfect instrument, may be a circumstance to be considered in connection with other evidence tending to show that the obligee had actual knowledge of the agreement, it is not of itself sufficient to put him upon inquiry, or even to create suspicion of the existence of such an agreement. *Nash v. Fugate*, 32 Gratt. 595, 34 Am. Rep. 780.

And the fact that three seals were affixed to a covenant without any names written before them is not sufficient to rebut the presumption of delivery thereof arising from the fact that it was in the hands of the obligee, or to show that those who did sign it did not intend that it should be delivered until other persons had signed it. *Williams v. Springs*, 20 N. C. (7 Ired. L.) 384.

But a bond required by law to be executed by two sureties is invalid where only one surety executes it, and is not binding upon him. *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371.

And the testimony of one of the payees in a joint and several promissory note that within a few days after the transfer of the note he took it for the purpose of endeavoring to get the signatures of other parties, who were to, but had not, signed it, sufficiently tends to show that the payee from whom he obtained it knew of the incompleteness of the note when transferred to him, to require the case to be given to 45 L. R. A.

the jury on the question of notice to the payee that the note was obtained by fraudulent representations, and was not to be delivered or in force unless twenty solvent persons signed it. *Ward v. Johnson*, 57 Minn. 301.

As to notice from fact that bond was joint in form, see *Mullen v. Morris*, 43 Neb. 596, *supra*, II. c.

3. Evidence of.

Evidence in an action upon a bond that at the time of the delivery thereof to the obligee by the principal debtor it was stated to him that the obligors who had signed as sureties did so upon the understanding and agreement that certain other parties were also to sign it, is admissible under a plea of *non est factum*. *Stuart v. Livesay*, 4 W. Va. 45.

And evidence that a creditor was to call on a proposed surety on a bond for his indebtedness, and that the proposed surety was informed of an arrangement by which a surety previously signing did so on condition that he would become cosurety, is admissible in an action against the sureties signing the bond. *Miller v. Stem*, 12 Pa. 383.

So, the obligor in a bond is a competent witness in an action thereon to prove that it was delivered to him by the sureties upon condition that it should not be operative until another person had signed it, which condition was not performed, where he had been released from liability by the sureties. *Bibb v. Reid*, 3 Ala. 88.

And the burden of proof of notice to the obligee, as well as of a conditional delivery of the bond, rests with the surety alleging it. *Gibbs v. Johnson*, 63 Mich. 671; *Chouteau v. Suydam*, 21 N. Y. 179.

And the plaintiff makes his case by proving the execution of the bond and introducing it in evidence. *Gibbs v. Johnson*, 63 Mich. 671.

And the burden rests with the party who has signed and delivered an instrument to establish that the delivery was intended to be in escrow, and that it was conditional upon other persons also executing it. *Chouteau v. Suydam*, 21 N. Y. 179.

1. Waiver and estoppel.

A surety on a bond may waive a condition that others shall sign it, or estop himself to assert such condition.

Thus, while a surety who signs a bond upon condition that it shall be signed by other designated persons, which condition is not performed,

4. It is urged that there was no consideration for the bond, but without sufficient reason. Although G. A. Miller & Sons were owing more than the amount of the bond when it was given, yet it applied to future as well as to existing indebtedness, and the evidence shows that new debts were contracted after the bond was given. It is also said that the debts the firm was permitted to incur were largely in excess of the amount permitted by the bond; but that did not purport to limit the amount of indebtedness the principal might incur, but only the amount which the bond should secure.

5. Section 18 of chapter 60 of the Acts of the 15th General Assembly provides that "the total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed 20 per cent. of the capital stock actually paid in; provided: that the discount of bona fide bills of exchange drawn

against actually existing value and the discount of commercial or business paper actually owned by the person or persons, corporation or firm negotiating the same shall not be considered money borrowed." As the capital stock of the plaintiff was but \$15,000, the amount of the bond was \$2,000 in excess of the sum which the plaintiff was authorized to lend to the firm, and the amount of its debts to the plaintiff when this action was commenced was nearly five times that which it was authorized to borrow of the plaintiff. It is argued that the firm and the plaintiff violated the law in creating the debt, and that the sureties are thereby discharged. It is true that every contract must be construed with respect to the law applicable to it, and that contracts in violation of law are void; but it does not appear that the bond was designed to accomplish or to promote an illegal purpose. It was not restricted to indebtedness which should have been or should be thereafter incurred for borrowed money, and the prohibition of the statute is

is liable thereon, if he permits the delivery of the bond before such condition is performed, and is chargeable with notice of its delivery if he permits the principal to act under it without objection, he is estopped from setting up a non-performance of such condition in avoidance of his liability. *Smith v. Kirkland*, 81 Ala. 347; *Wright v. Lang*, 66 Ala. 389.

And sureties signing a bond and placing it in the hands of the principal obligor to be delivered to the obligee only on condition that four or five others shall sign, who have knowledge that it was delivered in violation of such condition, and fail to repudiate it, and continue while the business for which the bond was given to secure is being carried on to allow the obligee to rest upon the supposed security of the bond, so acquiesce in and ratify the wrongful delivery of the instrument as to estop them from insisting on their nonliability in an action on the bond. *White Sewing Mach. Co. v. Saxon* (Ala.) 25 So. 784.

And where one of several sureties named in a bond neglects or refuses to sign it, and all the others sign and deliver the bond to the obligees without insisting upon its execution by such other named surety as a condition of its becoming operative, or any notice to the obligee to that effect, it takes effect immediately upon its delivery, and such delivery may be deemed a waiver of any such condition. *Van Norman v. Barbeau*, 54 Minn. 388. And see *Berkey v. Judd*, 34 Minn. 393, *supra*, II. d.

The possession of a bond by the obligee is prima facie evidence of its delivery, and the acquiescence in his retention thereof by the sureties without afterwards speaking to him upon the subject is strong evidence, either that the delivery was unconditional, or if it was conditioned upon the signature by others as cosureties, that they had waived such condition. *Comstock v. Gage*, 91 Ill. 328. And see *Towns v. Kellett*, 11 Ga. 289, *supra*, II. e. 2; *Johnson v. Weatherwax*, 9 Kan. 75, *infra*, II. g. 6.

While no obligation is incurred by signing a bond on condition that it shall be signed by another until the condition happens, the delivery of a bond, as well as its signatures by the party, is a question of fact for the jury; and where the surety acknowledged and delivered the bond unconditionally, and the legal question arising from the delivery is not stated in the bill of exceptions, the court on appeal will 45 L. R. A.

not declare the bond invalid. *Duncan v. United States*, 7 Pet. 435, 8 L. ed. 739.

But where several names are written as co-obligors in a bond, one of them signing it does so upon an implied understanding that he could, in case of being held responsible, not only have his right to contribution, but a further right to have it capable of proof and enforcement, according to the terms of the contract as it purports to be drawn up, and he has a right to insist that he will not be bound except upon his own terms, reasonable or unreasonable; and if it is claimed that he has waived his rights to determine as to the terms upon which he will stand and become estopped from relying upon them, the burden of proof of showing such waiver or estoppel rests with the other party. *Johnston v. Kimball Twp.* 39 Mich. 187, 33 Am. Rep. 372.

In the above case *McCormick v. Bay City*, 23 Mich. 457, *infra*, II. g. 15, was distinguished upon the ground that there the surety signed a bond which had not the names of other obligors inserted, and which when completed and filled had nothing suspicious on its face, while here the bond shows on its face that the principal has not signed a paper in which he is positively set forth as the person whose signature is to be that of the primary debtor, whose fellow obligors only promise that he shall do his duty.

The rule that it is a good defense to an action on a bond against a surety that he intrusted it with the principal obligor as an escrow with authority to deliver it only on the express condition that other named persons should join as sureties in its execution prior to such delivery, and that it was delivered in violation of such condition, does not apply where the surety having knowledge or notice of the delivery of the bond suffers the principal to act under it to the prejudice of the obligee so as to waive the condition and estop him from insisting upon the defense. *Smith v. Kirkland*, 81 Ala. 345.

And the act of sureties on a bond, who had signed upon the condition and agreement that other named persons should also sign, in taking security to protect themselves against loss, is not a ratification of the delivery of the bond without the signature of such other persons or a waiver of objection thereto, where they were ignorant at that time of the fact that such other persons had not signed. *Henry & C. Co. v. Fisherlick*, 37 Neb. 207.

against liabilities for money borrowed. It will be noticed that the statute does not make a loan of money in excess of the per-centum named void, and the general rule applicable to loans of that character is that they are not void, the prohibition of the statute being intended as a rule for the government of the bank. *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Mills County Nat. Bank v. Perry*, 72 Iowa, 15; *Pangborn v. Westlake*, 36 Iowa, 546; *Bank of Cadiz v. Slemmons*, 34 Ohio St. 142, 32 Am. Rep. 364; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190; *O'Hara v. Second Nat. Bank*, 77 Pa. 96; *Farmington Sav. Bank v. Fall*, 71 Me. 49; 27 Am. & Eng. Enc. Law, pp. 380, 381. Since it does not appear that the bond was given for an illegal purpose, and the plaintiff can enforce as against G. A. Miller & Sons the full amount of their debts, we are of the opinion that the defendants may be liable in this action for the full amount of the bond in suit.

And knowledge of persons signing a bond as surety and delivering it to the principal obligor to be delivered to the obligee only after it is signed by four or five others, that the principal obligor had begun to carry on the business which the bond was given to secure, does not put them upon notice that the bond had been delivered to the obligee in violation of the condition, so that their failure to assert its invalidity on account thereof would estop them to set it up as a defense in an action on the bond. *White Sewing Mach. Co. v. Saxon (Ala.)* 25 So. 784.

The right of the surety to waive a condition that others shall sign the bond is also recognized in the cases set forth *supra*, II. c.

And see also *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491, *infra*, II. g, 8; *State v. McGonigle*, 101 Mo. 353, 8 L. R. A. 735, *infra*, II. g, 9; *Ashkum v. Lake*, 12 Ill. App. 25, *infra*, II. g, 15.

g. Particular classes of bonds.

1. Application of general rules.

The general rules above given apply generally to all kinds of bonds, though modified, perhaps, in some cases by the peculiar nature of particular classes of bonds; and of course the same conflict of opinion existing with reference to the general rules arises in their application to particular cases and particular classes of instruments.

And as the decisions on this subject given below consist of applications of the rules above given, the two subjects should be considered together as making one complete whole, the general rules above given as furnishing the foundation, and decisions with reference to particular classes as supplementing it and furnishing the application and illustration.

2. Bonds for payment of debts.

The rule is adopted, on the one hand, that a condition agreed to by a surety in a bond or sealed note for the payment of money and the obligee therein or his agent that it should be signed by another named person as cosurety, is valid, and its nonperformance will render the bond or note void as to such surety. *Goff v. Bankston*, 35 Miss. 518.

And that a bond for the payment of money, 45 L. R. A.

6. The twelfth paragraph of the charge given by the court in effect authorized the jury to find for the plaintiff, even though the bond was delivered in violation of the condition on which it was signed by the defendants, if the plaintiff did not have "express notice" that its delivery was unauthorized. We think that in giving that portion of the charge the court erred. If the bond was delivered in violation of the condition on which the defendants signed it, knowledge of such facts as would have caused a person of reasonable prudence to investigate and discover that the delivery was not authorized would have been sufficient to charge the plaintiff with notice that the bond was illegal. The conclusions we have expressed dispose of the controlling questions presented for our consideration and of those which are likely to arise on another trial.

For the errors which we have pointed out, the judgment of the District Court is reversed.

Rehearing denied.

executed by the surety and delivered by him to the principal to be delivered by him to the obligee upon condition that he procure the signature thereto of a specified person named therein as cosurety, is not binding upon the surety so executing it, and cannot be given in evidence against him in an action on the bond, where it appears on its face that it was never executed by the person named as cosurety. *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400.

In the above case *Austen v. Howard*, 7 Taunt. 27, 1 J. B. Moore, 68, was distinguished upon the ground that it did not involve the question of delivery, but attention was called to the fact that in the same book, p. 327, when the same case was again before the court, one of the judges said that if the defendant had pleaded that he delivered the bond in question as an escrow he doubted whether he would not have succeeded in escaping liability.

So, under this rule one who becomes surety on condition that another will become a cosurety is discharged if the creditor fails to procure the execution of the instrument by the proposed cosurety. *Miller v. Stem*, 12 Pa. 383.

And a plea in an action upon a bond for the payment of money purporting to have been made by the principal and two others as sureties, to a creditor, by which the sureties jointly and severally covenanted to repay the creditor moneys advanced to the principal, that the surety executed the indenture on the faith that a third surety should join therein and execute it, which he never did, is bad on demurrer. *Cumberlege v. Lawson*, 1 C. B. N. S. 709, 40 Eng. L. & Eq. 228.

And a bond for the repayment of money borrowed, executed by several persons as sureties and intrusted to one of the cosureties with the understanding that it was not to be used until it should be signed by another person as cosurety, and upon the express condition that such person should also execute it, has no legal existence as a bond against the persons signing as sureties, where it was transferred and delivered in violation of the agreement, such third person never having executed it. *People v. Bostwick*, 32 N. Y. 445, 43 Barb. 9.

And a surety who executed a deed for the repayment of moneys to be advanced to the principal debtor upon the understanding that it was to be executed by another as cosurety,

and that the money would not be advanced until the deed was so executed, is entitled to be discharged in equity from every part of the debt, and to an injunction to restrain all proceedings under it, where it was never done and no notice of the failure of the other to execute was given to the executing surety until the principal debtor had made default and become insolvent. *Evans v. Bremridg*, 8 De G. M. & G. 100, 25 L. J. Ch. N. S. 384, 2 Jur. N. S. 311, 2 Kay & J. 174, 35 Eng. L. & Eq. 397, 25 L. J. Ch. N. S. 102, 2 Jur. N. S. 134.

So, in *Warfel v. Frantz*, 76 Pa. 88, it was held that a surety on a bond for borrowed money which he was not induced to sign by false representations or misstatements is liable thereon as such for the amount thereof, though it was not signed by one of the sureties named therein, unless the delivery was conditional and only to become absolute upon obtaining such signature.

And in *Danker v. Atwood*, 119 Mass. 146, it was held that a bond for the payment of money containing the name of the principal followed by a blank before the words "as sureties," and signed by the principal and another, shows that the second person signed as surety, and he is bound by it unless it appears that at the time of executing it he understood that it was to be executed by other persons as cosureties with him.

Upon the other hand, however, it has been held that where a surety signs a bond for the payment of money, complete in all its forms and provisions, and intrusts it to the principal debtor for delivery to the obligee upon condition that it shall be first signed by others, he is liable thereon though it is not so signed, the question in such case being not what was the power conferred as to delivery, but what was the power the obligee had a right to suppose was conferred, as the principal obligor had certainly an apparent authority to deliver it. *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640.

And that a surety on a bond for the payment of money, which was signed by nine others, cannot defend an action thereon upon the ground that the bond was signed upon condition that before it should be delivered to the obligee it should be executed by twenty persons including certain specified ones, which condition was violated, where the condition was not made known to the obligee and there was nothing in the appearance of the bond to indicate that it was not complete. *Ibid*.

In the above case *People v. Bostwick*, 32 N. Y. 445, *supra*, and *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400, *supra*, were criticised and explained, the court saying that in them, and a large majority of the cases relied on to sustain the opposing view, it appeared that the obligee either had notice of the condition or there was something in the transaction or on the face of the instrument to put him upon inquiry.

Within this rule where twenty-one out of thirty-seven stockholders of a railroad company sign and deliver a bond for the payment of a sum of money to three of their number, and it appears on the face of the instrument that the bond was to be binding upon such as should sign it, and that each should become responsible when he signed it, parol evidence is not admissible to show an agreement that it was not to be binding on any until all had signed. *Black v. Shreve*, 13 N. J. Eq. 456.

And a bond stating the names of nineteen of the stockholders of a railroad company, reciting that the company had borrowed a sum of money, and covenanting that the persons whose names are thereunto subscribed will, in case the company fails to pay, sustain an equal portion

of the loss, expressly provides that each shall become responsible when he signs, and excludes parol proof that none are to be responsible until all the stockholders have signed. *Ibid*.

And where a surety on a bond given to the state as security for a bank depository signs, it before another surety, whose name precedes his in the body of the bond but is forged thereto, and the name of the same person, as well as that of another whose name appears before that of the complaining party in the body of the bond, appears as having signed an affidavit that they were worth a certain sum to which the names were also forged, and the complaining party intrusts the bonds to the president of the bank as an escrow not to be delivered until such sureties execute the bond, but the president of the bank delivers it with all the signatures apparently genuine thereon, such surety is liable thereon, there being nothing on the face of the bond or in the attending circumstances to apprise the taker that such further signature was called for to complete the instrument. *Mathis v. Morgan*, 72 Ga. 517, 58 Am. Ren. 847.

3. Bonds of contractors.

The rule has been laid down that a bond given as security for the faithful performance of a building contract, which was signed by the surety upon the express agreement that it was not to be delivered unless another designated person should become a cosurety thereon with him, is of no validity against him where such other person's signature was not obtained. *Johnston v. Cole*, 102 Iowa, 109.

But it has been held, upon the other hand, that a condition imposed by sureties in a bond given to secure the performance of a building contract that another person named should also sign as surety before they should be held liable thereon must be known to the obligee to render it effective against him. *Owen v. Udall*, 30 Neb. 14.

And a covenant upon a contract to build a mill in which there were five parties, which was so drawn as to give either party a right of action against either of the other parties in severalty, is binding upon those who signed, though it is not signed by all, on the principle that no instrument can be deemed an escrow when delivered to the party entitled to receive it and claiming an interest under it. *Scott v. Whipple*, 5 Me. 336.

So, the fact that the principal in a bond given by a contractor under the Kansas statute relating to mechanics' liens procured the signature of a surety upon the promise that he would afterwards obtain the signature of another surety, which was not done, will not relieve the surety from obligation on a bond delivered, approved, and filed as required by law. *Riase v. Hopkins Planing Mill Co.* 55 Kan. 518.

And where a contractor building a house is required by the owner to furnish security against mechanics' liens by subcontractors as a condition for the advancement of money upon the contract, and pursuant to such requirement he procures the subcontractors to sign a bond on representation that it will not be binding unless all the subcontractors sign it, and the signatures of a part of such subcontractors are not obtained, the bond will still be binding upon those who sign, as the contractor cannot be regarded as the agent of the owner and therefore authorized to make such representation, as he was acting for himself upon notice that he would not receive any more money without security, and not for the owner. *Bugger v. Cresswell* (Pa.) 12 Atl. 829.

4. Bonds of employees.

A surety on a bond given by a collecting agent to secure the faithful performance of his trust is liable thereon though he signed it on the promise of the agent that he would procure the signature of another designated person as cosurety, which he failed to do, where the existence of such promise was unknown to the person to whom the bond was given. *New York County Mut. F. Ins. Co. v. Brooks*, 51 Me. 506.

And the sureties on such bond are not released by the fact that the name of a responsible person signed thereto at the time was a forgery, where they imposed no conditions limiting the legal effect of their signatures. *Ibid.*

So, the sureties on a bond of an express agent, given for the faithful discharge of his duties, are bound thereon though they delivered the bond to the agent as an escrow to be held by him until he procured the signatures of two other designated persons whose signatures were never procured, and the bond was delivered without them, where it was perfect in form, and there was nothing to show that the persons receiving it had any knowledge of such agreement. *Webb v. Baird*, 27 Ind. 368, 89 Am. Dec. 507.

And the violation of an agreement between an agent and a surety on his bond to secure the repayment of moneys coming to his hands as such agent, that the agent should procure the signature of another person as cosurety thereon, and its delivery by the agent without having obtained such signature, are no defense in an action on the bond against the surety for moneys appropriated by the agent, where the bond was regular on its face and contained nothing calculated to suggest that it was incomplete. *Singer Mfg. Co. v. Drummond*, 40 Hun, 260.

In the above case *People v. Bostwick*, 43 Barb. 9, 32 N. Y. 445, *supra*, II. a. and II. g. 2, was distinguished upon the ground that in that case the creditor had notice that another person was to sign, which was sufficient to put him upon inquiry as to the rights of those who had signed. And *Grimwood v. Wilson*, 31 Hun, 215, *infra*, II. g. 5, was distinguished upon the ground that in that case the undertaking did not have the number of sureties required by law, which was a sufficient circumstance to put the obligee upon inquiry.

So, in *Goodyear Dental Vulcanite Co. v. Bacon*, 148 Mass. 542, a recovery was had by a corporation upon a bond given by its treasurer for the faithful performance of his duties, which purported to have been executed by the principal and three sureties, but which was executed by only two sureties; but it does not appear whether there was an agreement or understanding that a third person should execute it, or whether the question of the effect of his failure to execute was raised.

Upon the other hand, however, it has been held that evidence in an action upon a bond given by a person employed as a collector against a surety therein, in which the defense was that the bond was signed by the defendant under an agreement with the plaintiff that it should not take effect or be considered as executed or delivered until another designated person signed it as a cosurety, which was never done, and that the bond was presented to him for signature by a bookkeeper of the plaintiff after he had been informed through the telephone by a person claiming to be a member of the plaintiff's company, that the bond was ready and that the others had signed it, and that the bond when presented to him and signed by him was so folded as to conceal the place

of his former signature and where the others should have signed,—is sufficient, though contradicted in part, to sustain a verdict in favor of the surety. *Deering v. Shumplik*, 67 Minn. 348.

5. Appeal bonds.

With reference to appeal bonds, a failure to conform to the requirement of the statute would seem to have been usually regarded as sufficient to put the respondent upon inquiry as to whether or not conditions had been annexed to the delivery.

Thus, the respondent in an appeal in which a bond is given by the appellant the sureties on which signed upon the express condition that the appellant was also to sign, which condition was not performed, is chargeable with notice of the defect in the bond, the statute requiring its execution by the appellant and two sureties. *Ney v. Orr*, 2 Mont. 559.

And an appeal bond signed by the sureties and delivered to the judge with express directions that the same be not filed until it was signed by the appellant, which direction the judge promised to heed but filed the bond without doing so, shows upon its face that the sureties undertook to pay any judgment the court might render against the appellant, he being liable with them upon the bond, if he did not pay it, and they are not liable thereon in the absence of his signature. *Ibid.*

So, an action cannot be maintained upon an appeal bond against a surety thereon who signed it and left it with the appellant with the agreement and understanding that it was not to be delivered to the mayor or used until it should be signed by other designated persons, where it was afterwards signed by one of them but not by the other, and the other's name was erased, though it was approved by the mayor and he had no notice of the condition upon which it was signed other than that conveyed by the erasure. *Allen v. Marney*, 65 Ind. 398, 32 Am. Rep. 73.

And a surety in an undertaking on appeal under a statute requiring two sureties, who signs it upon condition that another person will become a cosurety with him, is not bound by a delivery thereof in violation of the condition, and the fact that the appellant had signed it is of no effect, as the appellant cannot be regarded as a surety. *Grimwood v. Wilson*, 31 Hun, 215.

But while one who agrees to join another as his surety on an appeal bond, and executes and delivers the bond as an escrow on condition that another also shall join in and execute it as cosurety, which is not done, will be released from all liability on the bond, he will not be released where such third person actually executes the bond, although it is done after the expiration of the four days within which appeals are allowed to be entered. *Riley v. Johnson*, 10 Ga. 419.

And, upon the other hand, it has been held that the fact that sureties on an appeal bond signed it on condition that it was not to be used unless signed by other parties who did not sign, and that it was used contrary to such condition, is no defense unless the obligee in the bond was chargeable with notice of such condition, and the exclusion of evidence that it was signed on such condition, in an action on the bond, is not error where the obligee was not chargeable with such notice. *Rhode v. McLean*, 101 Ill. 467.

And the facts that a party to an action in which a corporation was the appellant executed an appeal bond as president of the corporation, and signed it also individually as surety, with

the understanding and belief that others were to sign as cosureties with him before it was filed, and that it was filed without being signed by such other sureties, are no defense to an action against him as surety on such bond. *Byers v. Gilmore*, 10 Colo. App. 79.

In the above case it was said that *People v. Boetwick*, 32 N. Y. 445, *supra*, II. g. 2, has been questioned by a later decision of the same court. And *Allen v. Marney*, 65 Ind. 399, 32 Am. Rep. 73, *supra*, was distinguished on the ground that in that case the names of three sureties were inserted in the bond, and that two signed, and upon doing so expressly instructed the principal not to deliver the bond until he had secured the signatures of all, while in the present case the wrong, if any, was perpetrated by the surety himself upon himself, and there was no agreement between the parties as to the execution of the bond or as to its delivery or nondelivery.

Within this rule no agreement between the principal and surety in a supersedeas bond that it is not to become the surety's act and deed until it is signed by another named person as cosurety with him can affect the obligee's right to recover thereon unless the obligee or clerk who took the bond was informed of the condition at the time of its execution. *Whitaker v. Crutcher*, 5 Bush, 821.

But a surety on such a bond, which was delivered to the clerk of the court authorized to receive it upon condition that it should become his act and deed only when another named surety signed it as cosurety with him, is not liable thereon where such other did not sign, if the clerk was apprised when he took it of the condition upon which it was delivered. *Ibid.*

6. Bonds in attachment, execution, etc.

The fact that a person's name appeared in an attachment bond given for the release of attached property, and had been erased and another name put in its place, upon which bond the property is discharged, is sufficient to put the plaintiff in the attachment suit upon inquiry as to the authority to deliver the bond thus altered. *Hessell v. Johnson*, 63 Mich. 623.

And where a surety in an attachment bond signs upon condition that another designated person is to sign, and such person afterwards refuses to do so and another signs in his place, the fact that his name was in the bond is sufficient notice to put the parties to whom it was given on inquiry as to the right to deliver the bond. *Ibid.*

In an action on an attachment bond against a surety thereon, in which it is claimed that the surety executed it on condition that another designated person would also execute it, however, the exclusion of another bond offered in evidence, which was executed at the same time, is not error where the surety was permitted to testify without objection that he signed the two bonds together, and that he took up the other bond first and saw the proposed surety's name therein and supposed it was also in the one in suit, as such evidence would have no tendency to prove the knowledge of the plaintiff or his agent. *Gibbs v. Johnson*, 63 Mich. 671.

So, one who signed an attachment bond for the release of attached property upon the express understanding and condition that it was to be signed also by a designated person as cosurety, which condition was made known to the plaintiff's attorney, after which such person refused to sign and another signed in his place, is not liable thereon because as to him there had never been any delivery of the bond. *Hessell v. Johnson*, 63 Mich. 623.
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And if it was accepted with notice that its delivery was not authorized, and the property discharged with that notice, the surety cannot be held liable on the ground that he is in fault for not having given further notice. *Ibid.*

And where a surety signed an attachment bond for the release of property seized upon condition that another designated person would sign it as cosurety with him, and notified the attorney for the plaintiff in the attachment suit of such condition, and the name of such person was stricken out and another name taken in its place without the consent of the signer, he was a good defense to an action thereon. *Gibbs v. Johnson*, 63 Mich. 671.

A surety on a bond given to indemnify a sheriff for selling under execution, however, is not relieved from liability where the bond is joint and several because the name of one of the co-obligors was affixed to it by a person who assumed without authority to seal and deliver the bond as his attorney in fact. *Loew v. Stocker*, 68 Pa. 226.

And one who executes a forthcoming bond in attachment as surety thereon in favor of the sheriff and in his presence without saying anything will be deemed to have created thereby an absolute obligation, and will not be permitted to claim that he signed it only upon condition that another person should also sign as cosurety. *Johnson v. Weatherwax*, 9 Kan. 75.

But forthcoming bonds signed by a surety and delivered to the principal as an escrow to be signed by another surety are void unless so signed by the other surety. *Sessions v. Jones*, 6 How. (Miss.) 123.

And where a person agrees to join the principal as his surety in a forthcoming bond, and executes and delivers it as an escrow upon condition that another designated person shall execute it as cosurety, and such other person agrees to join as surety, and executes and delivers the bond as an escrow upon condition that a second designated person shall also execute it as cosurety, and such second designated person never executes it, neither of the parties so executing it are liable thereon. *King v. Smith*, 2 Leigh, 157.

A replevin bond required by statute to be given with two or more sureties is not void because actually signed and delivered by one only, and the obligor cannot avoid his liability by showing that he was induced to execute it by the fraud of one of his co-obligors in which the obligee had no participation. *Bigelow v. Comegys*, 5 Ohio St. 256.

And it is no defense that a replevin bond purporting to have been entered into by two sureties was executed by one only. *Austen v. Howard*, 7 Taunt. 27, 1 J. B. Moore, 68.

But the fact that a replevin bond recites two other principal parties beside the one signing, and that such others do not sign it, does not affect the validity of the bond against the principal and the sureties signing, where it does not appear that the sureties signed on condition that the other persons named as principal should also sign, and the principal signing was the person actually replevying the property. *McLeod Artesian Well Co. v. Craig* (Tex. Civ. App.) 43 S. W. 934.

7. Bail bonds.

Where a bail bond is taken on the arrest of a defendant on a capias under an agreement that it is to be inoperative unless other or additional bail is procured by the defendant, and the defendant is permitted to go at large, the bond has no legal existence where such additional bail is not secured, and the officer making the arrest may retake the defendant before the

return of the process. *Bronson v. Noyes*, 7 Wend. 188.

And the rule is the same where the agreement was that it should be considered only as security for the forthcoming of the defendant on the day succeeding the arrest unless other or additional bail be given, and when such other or additional bail is not given, the officer making the arrest may retake the defendant. *Ibid*.

And a justice has no authority to approve a bond given to answer a charge of abduction, where the surety thereon signed it with the express understanding and agreement between himself and his cosureties and the justice that it should not be accepted or approved or used in any manner until it was signed by another designated person whose name was inserted therein as obligor, but who in fact never signed it, as such an approval would be a fraud upon his rights, and in such case the bond would be a nullity as to him. *People v. Cleaver*, 74 Ill. App. 210.

An undertaking to release a debtor from imprisonment under Kansas Code of Civil Procedure, § 512, however, entitling a debtor to prison bounds upon executing an undertaking with one or more sufficient sureties, which runs in the name of the debtor as principal and two others as sureties and is executed by the sureties alone, is not so incomplete as to render it absolutely void, but is a good obligation against the sureties. *Hickman v. Fargo*, 1 Kan. App. 695.

8. Revenue bonds.

One who signs a bond given for the issuance of a license to the owners of a still used for distilling spirituous liquors purporting to be a joint and several bond and intended to be signed by two others besides himself has a right to believe that such others will sign, and his signature is conditioned thereon, and he cannot be held liable thereon in case of their failure to sign unless it be shown that such execution by them had been dispensed with by him. *Sharp v. United States*, 4 Watts, 21, 28 Am. Dec. 676.

And a surety on a distiller's bond conditioned for his faithful compliance with all the requirements of law in relation to distilled spirits, who signs upon the promise of the principal to procure the signature of another designated person as cosurety thereon, and delivers the bond to him for the purpose of getting such signature, is not liable thereon where the principal delivers the bond without procuring such signature, and the person to whom it is delivered has full notice of such agreement and that it is to be signed by another. *United States v. Hammond*, 4 Blas. 283.

The rule that sureties on a revenue bond are estopped to set up a condition that they were not to be bound unless another shared the responsibility, where they did not inform the revenue officer of the condition, does not apply where the additional sureties to be procured are named on the face of the bond. *Dair v. United States*, 16 Wall. 1, 21 L. ed. 491.

But sureties in a revenue bond cannot defeat a recovery thereon on the ground that they did not intend to be bound unless another shared the responsibility, where they did not inform the revenue officer to whom the bond was given of this condition, as their omission to do so estopped them from setting it up. *Ibid*.

9. Official bonds generally.

The prevailing rule would seem to be that a presentation of an official bond in the body of which certain names are inserted as obligors

to a person for signature as surety thereon amounts to a representation that the persons named in it will sign it before delivery, and if he signs it and a part of the persons so named do not do so, it is not binding upon him. *Pepper v. State*, Harvey, 22 Ind. 399, 85 Am. Dec. 430.

Each signer of an official bond which is the joint obligation of the principal and sureties, and which is not several, is presumed to have signed upon the understanding that all the others named as obligors would also sign. *Sacramento v. Dunlap*, 14 Cal. 423.

In the above case *Parker v. Bradley*, 2 Hill, 584, *supra*, II. c. 2, and *Cutter v. Whittemore*, 10 Mass. 442, *supra*, II. d, were distinguished upon the ground that in the case at bar the instrument is in form a joint bond only, and not joint and several.

Where a principal proposes certain names as his sureties on his official bond, and such names are approved by the court, each of the sureties, as he signs, has a legal and moral right to expect and rely upon the officer to see that each approved party shall sign it and not regard it as an executed and delivered obligation until so perfected, and the sureties who do sign are under no obligation or duty to see that the other approved parties signed, and in case of their failure to do so it is invalid against them. *Fletcher v. Leight*, 4 Bush, 303.

And one who upon being solicited to sign an official bond as surety by a person having no connection with the bond, authorizes such person to sign his name, provided two other named persons first execute it, is not bound as surety thereon where such person signs his name to the bond without procuring the execution thereof by the other designated persons. *Bagot v. State*, Dennison, 33 Ind. 262.

But a surety on an official bond who delivered it to the principal upon an agreement between them that another person not named in the instrument should be procured as a surety before it should be delivered to the obligee, cannot set up such agreement and its violation as a defense in an action on the bond, where it was received by the obligee without notice of the condition or of any circumstance putting him upon inquiry. *Mowbray v. State*, Peru, 88 Ind. 324.

And a bond of an officer which is presented to a county board and approved by it binds all parties who sign it as sureties notwithstanding the fact that they may have signed the instrument upon the condition that they should not be bound unless previous signers consented to its being signed by them, where the board had no notice of the condition of signing and there was nothing to raise the duty of inquiry on their part as to the manner of the execution of the bond. *Stoner v. Keith County*, 48 Neb. 270.

And the rule that the sureties on an official bond cannot defend against an action thereon on the ground that they signed it on condition that others should sign, which condition was not fulfilled, where it was left with the officer authorized to receive it, is especially applicable where several years have elapsed during which the sureties failed to inform themselves, or even make inquiry, as to whether the condition had been performed, and the officer had received his commission and acted in his office in consequence of the filing of the bond. *Lewis v. Gordon County Comrs*, 70 Ga. 486.

So, the knowledge of one member of a county board at the time of the approval of an official bond by them that it was signed upon the condition that previous signers should consent to its being signed by subsequent signers, not shown to have been imparted to the board, is not

knowledge of or notice to the board of such fact. *Stoner v. Keith County*, 48 Neb. 279.

And the knowledge of the mayor of a city of the fact that an official bond given by a city officer was signed by sureties on condition that it should not be delivered and executed unless certain other persons should sign it, who did not in fact sign, will not bind the city so as to release the sureties from liability, though it was his duty as mayor to approve the bond, where he had signed the bond as surety, as the fact that he was a party to the bond would preclude him from acting officially in approving it. *Stevenson v. Bay City*, 26 Mich. 44.

10. Bonds of sheriffs, deputies, constables, etc.

The general rule has been laid down, that a bond of a sheriff conditioned for the faithful discharge of the duties of the office, signed by sureties upon the understanding and condition that it was to be signed by other designated parties as cosureties, but which was delivered without such signature, is invalid, and the fact that it was so signed may be shown by parol. *Crawford v. Foster*, 6 Ga. 202, 50 Am. Dec. 327.

And that the burden of proof rests with the commonwealth in an action upon the bond of a sheriff for the county revenue and public dues, to prove the signature of each of the sureties on the bond, and where it fails to introduce evidence of the genuineness of the signatures of a part of the signers, it is not binding for any purpose on the other sureties named therein. *Com. v. Campbell*, 20 Ky. L. Rep. 54.

Upon the other hand, however, it has been held that the fact that the sureties on the bond of a sheriff executed it upon condition that another should become cosurety with them, and that such other never signed, is not a defense in an action on such bond where they delivered it to the sheriff, as the sheriff is the agent of the state, and the delivery therefore was to the state, the obligee therein named, and the bond cannot be delivered to the obligee as an escrow. *Brown v. State*, 18 Tex. App. 328.

And that the fact that a surety signed the official bond of a sheriff upon the express condition and stipulation stated to the principal that such principal should procure twelve other responsible men to execute such bond as cosureties with him, which the principal failed to do, is no defense in an action against him upon the bond, and an answer setting up such facts is bad on demurrer. *State, Lakey, v. Garton*, 32 Ind. 1, 2 Am. Rep. 315.

So, it has been held that sureties signing the bond of a deputy sheriff upon the condition and agreement that all the other parties named therein are to sign it before delivery to the obligee are not bound thereby until executed by the parties named, unless they waive the right to such execution or consent to the delivery to the obligee without it. *Hall v. Smith*, 14 Bush, 604.

And that where a bond given by a deputy sheriff to the sheriff as security for the proper performance of his duties contains in the obligatory part the names of several persons as sureties, if a part of the sureties sign with an understanding and on condition that it is not to be delivered until signed by the others, it is not effectual as to those who did sign without a compliance with the condition. *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698.

And the fact that such a bond contains the names of other obligors than those who signed it, and is delivered without their signatures, is sufficient to put the sheriff upon inquiry as to whether those who had signed it consented to its delivery without the signatures of the others. *Ibid.*
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But the contrary rule has also been held, that though some of the persons named in the penalty of the bond of a deputy sheriff did not sign it, those who did sign are to be considered obligors, and as being bound thereby. *Cox v. Thomas*, 9 Gratt. 312.

So, it has been held that while the sureties signing a bond of a deputy sheriff upon condition that the principal will procure the signature of others, which condition is not performed, does not bind them unless they consent to the substitution of others in the place of those who were named but did not sign, if the principal strikes out the names of the sureties who did not sign and inserts the names of those who did sign in their place before delivery and without the knowledge or consent of the obligee, all have the right to presume that the change and substitution are made with the knowledge and consent of the sureties originally named who signed it, and in such case all who signed are bound thereby. *Hall v. Smith*, 14 Bush, 604.

And a bond reciting that the sheriff has admitted the above-bound—, leaving a blank space for the names, as his deputies, which has nothing on its face to indicate that all named in the penalty were not appointed as deputies, works an estoppel upon an obligor who sealed and delivered it in that shape, to deny execution by him, and to assert that two of the persons whose names were inserted in the penal part of the bond did not sign it, and that one who signed it is not named in the body of the instrument. *Cox v. Thomas*, 9 Gratt. 312.

So, a constable's bond signed by several as sureties and delivered by them to a third person to be delivered to the obligee when executed by others as sureties does not become operative until the condition is performed. *Robertson v. Coker*, 11 Ala. 466.

And a plea in an action against the sureties on a jailer's official bond, that it was to be delivered as an escrow to be binding only when executed by another, and that such other never executed it, sets forth a good defense. *Carawell v. Renick*, 7 J. J. Marsh. 281.

But a private agreement between the principal and a surety on a constable's bond in the nature of a condition that it was to be signed by certain other persons named before it was to be delivered to the county court, and the failure to procure such signatures, will not affect the rights of the public where the bond was delivered and accepted without notice of the condition, and there was nothing on the face of the bond to give notice. *Amls v. Marks*, 3 Lea, 568.

A special plea of *non est factum* is necessary to a defense in an action upon a deputy sheriff's bond upon the ground that it was signed by a surety upon condition that others should sign it, and a general plea of *non est factum* cannot be considered. *Hall v. Smith*, 14 Bush, 604.

And the fact that there was an understanding between a division court bailiff and the surety on his bond executed under Con. Stat. U. C. chap. 19, § 25, that the principal should also execute the bond, which he failed to do, is not an answer in an action thereon by the party for whose benefit the security was designed, and who for the first time became a quasi party to it, when he had occasion to resort to it for indemnity against the default of the bailiff. *Miller v. Tunis*, 10 U. C. C. P. 423.

11. Treasurer's bonds.

The rule that a failure to procure the signature of a surety when others signed on condition that such proposed surety should sign with them vitiates the bond, applies to the

bonds of treasurers in Indiana, and some of the other states,—at least where the fact that all the proposed sureties had not executed appears on the face of the bond.

Thus, persons signing the official bond of a county treasurer on the representation by the treasurer that he would have a designated number of other names on the bond, upon condition that such other signatures shall be procured, are not bound thereby where they are not so procured. *Pepper v. State, Harvey, 22 Ind. 399, 85 Am. Dec. 430.*

And the presentation of a treasurer's bond to a person requested to sign as surety, already signed by another person, is an effective representation that the previous signer was to be a co-obligor, and where he is discharged from liability subsequent signers are not bound. *Ibid.*

Each surety signing a treasurer's bond has a right to rely upon the fact, appearing thereon, that he was entering into a contract in which certain other men whose names were there signed were jointly bound with him, and that when they were discharged or not bound, as it would increase his liability. It would no longer be his contract, and in such case he would not be bound thereon. *Ibid.*

An official bond of a county treasurer signed by a surety upon the express agreement with the principal that the signatures of other designated persons were to be obtained thereon, and that he was to retain the bond in his hands as an escrow not to be delivered unless the other parties also executed it, cannot be deemed to have been fully executed and delivered, and is of no validity against the surety, where the name of one of the designated parties was forged thereon. *Linn County v. Farris, 52 Mo. 75, 14 Am. Rep. 389.*

It is the approval of the bond of a county treasurer by the tribunal designated by law to superintend its execution which completes its execution and delivery and makes it obligatory, and where the county judge is charged with the duty, and he approves the proposed names and individuals as sureties on the bond, and directs the clerk to prepare the bond, he cannot waive the signature or approve or accept the bond until all the sureties named sign it. *Blanton v. Com. 91 Va. 1.*

But a surety on the official bond of a county treasurer, who signs and delivers it to the principal obligor upon condition that others not named in the instrument shall sign it before its delivery to the obligee, cannot escape liability thereon on the ground that it was so delivered upon condition, and that the condition was not complied with, where it was received by the obligee without notice of the condition or circumstances which should have put him upon inquiry. *State, McCarty, v. Pepper, 31 Ind. 76.*

And the principal obligor in a county treasurer's official bond is not the agent of the board of county commissioners in procuring its execution so as to charge it with notice that it had been delivered to him by a surety on condition that he obtained the signatures of others as co-sureties thereon. *Ibid.*

In many of the states, however, the contrary rule prevails.

Thus, sureties who sign a treasurer's bond and deliver it to third persons upon the understanding and condition that such third persons shall deliver it only on condition that the signatures of other persons shall be obtained, and that the persons signing the bond shall qualify as owners of a designated amount of property, cannot escape liability thereon when it is delivered to the principal by such persons, who obtain its approval without the performance of the condition, as delivery in violation of the 45 L. R. A.

conditions will be deemed to have been the fault of their own agents. *Taylor County v. King, 73 Iowa, 153.*

And the fact that the sureties upon a treasurer's bond do not qualify to the ownership of sufficient property appearing upon the face of the bond is not sufficient to put the board of supervisors upon inquiry upon the question as to whether or not the bond was signed upon condition that other signatures should be obtained, in the absence of anything else to lead to the inference that such a condition had been imposed. *Ibid.*

And a treasurer's bond signed by sureties upon condition that other signatures should be obtained will not be deemed an escrow, where it was deposited with third persons by the obligors alone, and not by any agreement between them and the obligee. *Ibid.*

In the above case *Daniels v. Gower, 54 Iowa, 319, infra, VI.*, was distinguished upon the ground that that was an action upon a non-negotiable promissory note which had been deposited by the surety with a third person, and which was afterwards obtained by the principal and delivered by him in contravention of the terms imposed by the surety.

So, the fact that the sureties on the bond of a state treasurer executed it under a belief that it was absolute when in fact two other sureties thereon had executed it as an escrow to be binding on condition that certain other designated persons should execute it, who did not do so, does not release them from liability thereon. *Graves v. Tucker, 10 Smedes & M. 9.*

To constitute an escrow a delivery must be to a stranger, and the fact that sureties on a bond of the state treasurer delivered it to the principal to be obligatory on condition that two others should execute it, which was never done, is no defense in an action on the bond. *Ibid.*

And the bond of a state treasurer, which, when presented, was upon its face a perfect instrument drawn according to the requirements of law, and apparently duly executed by all whose names appear therein, which was duly delivered without stipulation, reservation, or condition to the proper committee of the legislature and duly approved and filed, and upon the faith of it the treasurer elect became treasurer of the state, cannot be avoided by the sureties upon the ground that they signed it on condition that it should not be delivered unless it was executed by others, where it does not appear that the obligee had notice of such condition or knowledge of facts or circumstances sufficient to put him upon inquiry. *State v. Peck, 53 Me. 284.*

In the above case, *People v. Bostwick, 43 Barb. 9, supra, II. a.*, was questioned.

So, the sureties on the bond of a county treasurer which had been duly approved by the board of supervisors are liable thereon where the bond was complete in every respect and in usual and proper form, though the treasurer assured them that he would procure the names of others, naming them, and they signed with this understanding, intending to be liable only upon condition that the other names were procured, which condition was not performed. *Carroll County v. Ruggles, 69 Iowa, 269, 58 Am. Rep. 232.*

The obligee in the official bond of a county treasurer has a right to presume, in the absence of notice, that the sureties thereon had conferred full authority upon the principal to deliver the bond, and the surety cannot set up an agreement between him and the principal that it should not be delivered to the obligee until another person not named should sign it, but that it was delivered without such signature, as a defense in an action on the bond. *Smith v. Peoria County Supers. 50 Ill. 414.*

And the sureties on a bond of a county treasurer which was absolute on its face and did not appear to have been conditionally executed cannot, after breach of the bond by the principal, set up by way of defense and establish by parol that they signed the bond and left it in the hands of the officer authorized to receive it upon condition that they were not to be bound until other named sureties had also signed it. *Lewis v. Gordon County Road Comrs.* 70 Ga. 486.

It is the duty of the sureties on the bond of a county treasurer to see that the principal in the bond, who is their agent and undertakes to procure the additional sureties, performs that duty, and in the event of his failure to do so withdraw from the bond before its approval; and they are liable in case of their failure to do so. *Carroll County v. Euggles*, 69 Iowa, 269, 58 Am. Rep. 232.

In the above case *Pepper v. State*, Harvey, 22 Ind. 399, 85 Am. Dec. 480, *supra*, was distinguished upon the ground that in that case the names of certain persons were inserted in the body of the bond, and only a part of such names were afterwards signed to it.

And *Daniels v. Gower*, 54 Iowa, 319, *infra*, VI., was distinguished upon the ground that that was an action against sureties upon a non-negotiable promissory note, the court saying that the question as to the rights of sureties upon official bonds was not before the court, and what was said in the opinion in relation thereto was not essential to the determination of the case.

So, the fact that the principal obligor in a bond of a defaulting school treasurer failed to sign the bond is a mere technicality where the sureties executed the instrument and relied merely upon the promise of the treasurer that he would before delivery of the bond sign it; but if the bond had been signed by the sureties upon condition that it should not be delivered without being executed by the treasurer, and if the trustees to whom it was delivered had received notice of such condition, or notice of such facts pointing to such a condition, as might put a prudent person on inquiry before the bond was approved, then they could not be regarded as innocent holders of the instrument, and entitled to maintain action upon it. *Trustees of Schools v. Sheik*, 119 Ill. 579, 59 Am. Rep. 830.

12. Collectors' bonds.

In some states the rule is that sureties whose names were placed upon the bond of a collector of taxes upon condition that the bond should be executed by those whose names appear thereon, together with another designated person, and that the bond should not be delivered without the fulfillment of that condition, are not bound thereby where the condition was not performed, unless they subsequently waived the condition. *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592.

Under this rule one who signs a collector's bond as surety, saying that it was not strong enough, and that the collector must get other names on it, and that he would not be security with those who were on the bond before him, with which declarations he left the bond in the hands of the clerk, is not bound thereon without the other signers to the bond. *Quarles v. Governor*, 10 Humph. 122.

And the surety on a collector's bond who pleads in defense in an action thereon that it was signed upon condition that they should sign and deliver it as an escrow may prove the truth of his plea by oral evidence. *Ibid.*

And a collector of taxes, who is sued with his sureties upon his bond and confesses judgment upon which a body execution is issued and he is 45 L. R. A.

imprisoned and afterwards discharged from confinement under the insolvent law of the United States, may testify in a proceeding against the sureties on trial of the case before a jury that one of the co-obligors had executed the bond on condition that others would execute it, which condition had not been performed. *United States v. Leffer*, 11 Pet. 86, 9 L. ed. 642.

But parol evidence is not admissible to show that a bond for the collection of parish taxes was to be signed by other persons than those who appear on it as sureties, where the instrument itself affords no evidence of that fact, and the principal was intrusted with it to procure the signature of his sureties. *Police Jury v. Haw*, 2 La. 41, 20 Am. Dec. 295.

Upon the other hand, however, it is held by many of the courts that a surety on the bond of a collector of taxes is liable thereon in case of default, though he signed it on the assurance by the principal that certain other persons were to become sureties who did not do so, as the failure to procure other sureties could not affect the liability of those who did sign it. *Lewiston v. Gagne*, 89 Me. 395.

Within this doctrine the bond of a tax collector which is perfect on its face and apparently duly executed by all whose names appear therein, and which purports to be signed, sealed, and delivered, and which was actually delivered to and approved by the supervisors to whom it was given without notice of any condition, cannot be avoided by the sureties upon the ground that they signed it on condition that it should not be delivered unless it was also executed by another designated person,—especially where they allow the bond to stand unquestioned and permit the collector to proceed with the collection of the tax and to deposit the same in the hands of one of the sureties without objection. *Richardson v. Rogers*, 50 How. Pr. 403.

And the absence of the name of a fourth surety named in a school collector's bond signed by three sureties is not *per se* a defense against payment by the three on behalf of the principal. *Grim v. Jackson Twp. School Directors*, 51 Pa. 219.

So, the official bond of a license tax collector given pursuant to Cal. Pol. Code, § 958, renders the sureties thereon jointly and severally liable when it is accepted and approved, and is valid against the parties signing it, and not subject to objection as invalid because a person named in it as surety for a designated sum had not signed it. *People v. Stacy*, 74 Cal. 373.

And an official bond given by a deputy collector of internal revenue to secure the payment of moneys collected by him as such, though signed by two of the sureties with the expectation that a third person would also execute it before delivery, is a valid obligation upon those who executed it, though such third person did not sign and his name was subsequently erased from the bond without their knowledge or consent, where the collector to whom the bond was given knew nothing of such expectation and appointed the deputy collector in reliance upon the bond. *Russell v. Freer*, 56 N. Y. 67.

And the sureties on such a bond cannot defeat liability thereon upon default of their principal upon the ground that their signatures were obtained on the express understanding that it should be signed by certain other persons named, and that without such signatures it should not be delivered, and that such signatures were not obtained, where it does not appear that the express understanding was had with the person to whom the bond was delivered, or that such person had notice of such understanding. *Tidball v. Halley*, 48 Cal. 610.

The fact that a bond given by a deputy col-

lector of internal revenue shows upon its face that the name of a person had been inserted therein as an obligor and erased therefrom is not sufficient to put the revenue collector to whom the bond was given upon inquiry as to whether or not the signature of the surety thereto was given upon condition that the person thus named should also sign, where all the names in the body of the bond were written by the justice, who took the acknowledgments of those who executed it, and by whom the oath to the justification was administered. *Russell v. Freer*, 56 N. Y. 67.

In the above case *Chouteau v. Suydam*, 21 N. Y. 179, *infra*, IV., was distinguished as being entirely different in its facts and not within the same principle. And, it was said that whether or not *People v. Bostwick*, 32 N. Y. 445, *supra*, II. g. 2, was well decided, may well be questioned; but the court distinguished it upon the ground that in that case the judgment was based upon the fact that the agent of the principal was directed by the sureties executing the bond not to deliver it to the auditor unless it should first be executed by a designated person as cosurety, and that he delivered it without such execution.

So, knowledge upon the part of a surety on the bond of a collector of taxes, of the erasure of one of the names accepted as sureties by the town at the time he signs is immaterial to affect his liability thereon if he did not annex to his signature the condition that the bond was not to be delivered until all those accepted by the town should sign. *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592.

13. Guardians' bonds.

The rule has been stated generally to be that one who signs a guardian's bond conditionally, leaving it with the principal upon the understanding that he is not to become a surety thereon unless two other designated persons become cosureties with him, is not bound as surety thereon where such other persons had not signed it. *Evans v. Daughtry*, 84 Ala. 68; *Daughtry v. Stewart*, 84 Ala. 69.

But one who signs a guardian's bond, and permits the guardian to obtain the appointment thereon and to act under it, thereby estops himself to deny his liability as surety upon the condition that others should also sign if he had knowledge of the facts, though it must be shown that he had knowledge or notice of some suggestive fact, which if followed up would have led to such knowledge. *Ibid*.

A surety on a guardian's bond is not released from liability thereon by the fact that he signed and executed it upon the agreement of the guardian to procure certain other named persons to sign and execute it as cosureties, which agreement he failed and neglected to perform, where the bond was delivered to the obligee without notice of such condition. *Blackwell v. State*, *Simpson*, 26 Ind. 204.

And a curator's bond regular in form cannot be avoided at the instance of a surety upon the ground that he had signed it under a conditional agreement made at the time with the principal that the latter was not to deliver the bond until the signature of a certain person had also been obtained, and that notwithstanding such agreement and in violation thereof the bond was delivered, where there was nothing on the face of the bond or in the circumstances of the case to apprise the taker that such further signature was called for in order to complete the instrument. *State, Bothrick, v. Potter*, 63 Mo. 212, 21 Am. Rep. 440.

One who signs a guardian's bond upon the agreement with the principal that the principal

shall procure the signature of a designated person as cosurety, and that the bond shall not be used without such signature, makes the principal his agent to have it completed and delivered, and no secret instructions can affect his power to do this in anything which was not so apparent on the face of the bond as to make the charge suspicious; and therefore the fact that he did not obtain such signature, but took the bond to the judge of probate where it was approved, will not release the surety. *Brown v. Kent County Probate Judge*, 42 Mich. 501.

And a surety on the bond of a general guardian running to the infant as obligee, who executed it pursuant to an understanding and agreement with the guardian and infant that it should not be filed or used until it was executed by one of three designated persons or some other responsible person as cosurety, but which was filed, and approved and a certificate of guardianship granted thereon, is liable thereon where the bond was in all respects regular and complete on its face, and contained nothing to indicate that it was to be signed by anyone else, though the regular practice of the surrogate's court was to require two sureties. *Bangs v. Bangs*, 41 Hun, 41.

And that a surety signed a guardian's bond upon the express condition that the principal before delivering it to the clerk would have it signed by one or more other good and solvent men as cosureties thereon, which was not done, is not a sufficient defense in an action thereon against the surety signing, and an answer setting up such condition is not sufficient. *Hunt v. State*, *Martin*, 53 Ind. 321.

So, that a surety signed a guardian's bond upon a representation by the guardian that another person would also sign it as cosurety, and upon his promise to obtain the signature of such person, and that the surety signing did so in the presence of the court, and that the name of such other person thus mentioned appeared in the bond as one of the sureties, are no defense to an action against the surety upon a bond where no fraud is imputed. *State, Barnes, v. Lewis*, 73 N. C. 138, 21 Am. Rep. 461.

And a delivery by two sureties signing a guardian's bond conditioned for execution by three sureties by leaving it with the surrogate and instructing the guardian to have it signed by the other surety, which he promised to do, is not a delivery on condition, and not an escrow which would prevent liability on their part, though the other surety never signed, as the delivery to the surrogate is a delivery to the grantee. *Ordinary of State v. Thatcher*, 41 N. J. L. 403, 32 Am. Rep. 225.

In the above case *Fawling v. United States*, 4 Cranch, 219, 2 L. ed. 601, *supra*, II. a, *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749, *supra*, II. a, and other similar cases, were distinguished upon the ground that they relate to the effect of deeds left in the hands of a co-obligor or of a third party to be vitalized on the performance of a condition clearly expressed. And *Evans v. Bremridge*, 8 De G. M. & G. 100, 25 L. J. Ch. N. S. 334, 2 Jur. N. S. 311, *supra*, II. g. 2, was distinguished on the ground that it arose on a bill in chancery and relief was afforded on grounds that do not seem to be present in the case in hand. And it was said that *Sharp v. United States*, 4 Watts, 21, 28 Am. Dec. 676, *supra*, II. a, appears to have been decided upon little consideration, and the decision is put upon a principle that is inconsistent with almost all the authorities on the subject. And *Fletcher v. Leight*, 4 Bush, 303, *supra*, II. g. 9, was said to be nothing but the exposition of a local statute.

So, a surety on a guardian's bond is not re-

leased from liability by the fact that he signed it upon a representation by the guardian that the name of another person signed thereto was genuine, where in fact such name was forged. *State, Hewitt, v. Hewitt*, 72 Mo. 604.

And the fact that the obligation clause in the printed form of a guardian's bond was so filled out as to read "sureties," which the probate judge changed so as to read "surety" upon the discovery that but one surety had signed, is not enough to suggest to the approving officer that a condition had been attached to the signature by such surety that the signature of another surety should have been obtained. *Brown v. Kent County Probate Judge*, 42 Mich. 501.

A minor under general guardianship is incapable of receiving or being charged with notice with respect to an agreement with the surety on the bond of her general guardian that the bond should not be filed or used until another had signed it as cosurety. *Bangs v. Bangs*, 41 Hun, 41.

14. Bonds of executors and administrators.

A few of the states, including Louisiana and Michigan, seem to have adopted the rule that a bond of an executor or administrator is rendered invalid as to sureties signing by a failure to perform a condition that others shall sign, though this rule may be deemed to be confined to cases in which the fact that others were expected to sign appears on the face of the bond.

Thus, a bond given by the curator of the estate of a deceased person drawn in the name of the principal and sureties, which one of the parties to the contract refuses to sign, is incomplete, and those who sign are not bound thereby. *Wells v. Dill*, 1 Mart. N. S. 592.

It must be assumed that the sureties in an administration bond when they sign it contemplate that all the other sureties named in it will join in the execution, and the absence of one of the names thus appearing on the bond makes it incumbent on a person seeking judgment against the other sureties to give some explanation thereof. *Woodin v. Durfee*, 46 Mich. 424.

And the failure of any of the obligors in an administratrix's bond, who were named therein, to sign it, authorizes the others to retract, but they must do so seasonably before the contract takes effect. *McNamara v. Jarvis*, 2 La. Ann. 591; *Canal & Bkg. Co. v. Brown*, 4 La. Ann. 545.

But it is too late to oppose the objection that other signatures had been omitted after the obligation of those who signed it had been completed by a delivery of the bond, and the judge, the creditors of the succession, and the administrator have been permitted to act upon it. *Canal & Bkg. Co. v. Brown*, 4 La. Ann. 545.

And a probate judge by whom the bond of an administratrix was accepted and letters of administration granted cannot be permitted to testify as a witness to establish the fact that one of the parties by whom the bond was signed executed it on the express condition that other persons who never signed it should become cosureties with him. *Taylor v. Jones*, 3 La. Ann. 619.

Parol evidence in an action upon such a bond to establish the fact that one of the parties executing the bond signed it on the express condition that other persons who sign it should become cosureties with them is inadmissible. *Ibid.*

The rule that such a bond signed by sureties on condition that others shall sign is good unless taken by the obligee with notice of the violation of the condition, however, is the prevailing one.

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Thus, sureties on the bond of an executor are not released from liability thereon by the fact that they signed the bond upon the parol agreement made at the time by the executor with them that he would procure other additional sureties and furnish them an indemnity bond, which he did not do. *State, Wight, v. Modrel*, 60 Mo. 152.

An agreement between the principal and the sureties in a probate bond, that he should procure another designated person to sign the bond as surety, which was violated, cannot avail the sureties signing as a defense where the bond as returned to the probate court appeared to be a perfected bond with nothing on its face to indicate that it was not perfected, it being in just the condition that all the signers designed it to be when returned and delivered to the court. *Probate Court v. St. Clair*, 52 Vt. 24.

And one who signs a probate bond as surety, and delivers it to the agent of the principal with nothing on its face to indicate that other sureties are to be obtained, will not, after it has been delivered to the probate judge who has no notice of the omission to obtain the other sureties, be permitted to defend against liability thereon by contending that it was not to be delivered without the addition of the names of other persons as sureties. *Belden v. Hurlbut*, 94 Wis. 562, 37 L. R. A. 853.

In the above case the court refused to follow *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601, *supra*, II. a, *State Bank v. Evans*, 15 N. J. L. 155, 28 Am. Dec. 400, *supra*, II. g. 2, *Bibb v. Reid*, 3 Ala. 88, *supra*, II. a, and *People v. Bostwick*, 32 N. Y. 445, *supra*, II. g. 2, saying that the current of decision, and especially of modern decision, is decidedly to the contrary, and that *People v. Bostwick*, 32 N. Y. 445, had been practically overruled.

So, one who has signed an administrator's bond as surety cannot avoid liability by showing that he signed upon the understanding with the administrator that another person was also to sign, and that such understanding was made known to the probate court at the time of accepting him as surety, and that the other person never signed. *Wolff v. Schaeffer*, 74 Mo. 154.

And the delivery by an administrator to the probate judge of his bond, in the body of which he had written his name, is not a violation of an express condition between himself and the sureties on which they signed the bond, that it should not be filed with the probate court until the administrator had signed it. *Keuck v. Parthen* (Mont.) 57 Pac. 94.

Sureties on such a bond are not relieved from liability thereon because it was delivered in violation of such a condition between the sureties and the administrator. *Ibid.*

The possession of an executor's official bond by the probate judge to whom it is made payable, and his approval of it, raise a presumption that it was properly executed and delivered to him, and the burden of rebutting such presumption and showing that it was executed and delivered upon condition that others should sign it as cosureties rests with the party asserting its invalidity. *First Nat. Bank v. Dawson*, 78 Ala. 67.

And the fact that a person signing an executor's bond was informed by those interested in procuring his signature that it would also be signed by another responsible surety, which promise was not fulfilled, will not release him from liability thereon where it does not appear that he delivered the bond merely as an escrow, or that it was fraudulently delivered without his consent, or that there was any positive agree-

ment or condition that it should not be delivered as his deed unless so signed. *Wolff v. Schaeffer*, 4 Mo. App. 367.

As to execution of executor's bond on the mere expectation that others would sign, see *Berkey v. Judd*, 34 Minn. 394, *supra*, II. d.

15. Miscellaneous unclassified bonds.

It has been held that the law presumes that a party signing a bond of a paymaster of the United States does so upon the condition that the other obligors named in the instrument should also sign it, and where it was stipulated between the principal and surety that another designated person should sign it as a cosurety, which was never done, the contract is incomplete, and is not binding upon the surety signing. *Duncan v. United States*, 7 Pet. 435, 8 L. ed. 739.

And that the surety on a bond for costs has the right upon signing it to make it an absolute condition that the instrument shall not become his bond unless it is also executed by the principal. *Hall v. Parker*, 37 Mich. 500, 26 Am. Rep. 540.

And such a bond, purporting on its face to have been executed by and to be binding upon the principal as well as the surety, is not binding upon the surety, and is void where it was signed upon the express condition that the principal should sign as such, and that it should not be used without his signature, and he did not join in it, and the obligees must be taken to have been fully cognizant of its effect and to have had notice of its fair and reasonable import. *Ibid.*

So, a surety on an injunction bond who signs it as such and intrusts it to the principal obligor for delivery, but with authority to deliver it only on condition that other persons join as sureties in its execution, which bond is delivered without such other persons having joined, is not liable thereon, as one who accepts delivery of such bond from a co-obligor is bound at his peril to inquire if he had authority to make it. *Guild v. Thomas*, 54 Ala. 414, 25 Am. Rep. 703.

But where a clerk and master has accepted an injunction bond proof to overturn his action, by showing that the signatures of many of the parties were put thereto as an escrow upon condition that others should also sign who did not, should be as clear, satisfactory, and demonstrative as that required to set aside a decree or judgment of a court of record upon the ground of fraud. *Ward v. Cullom*, 2 Coldw. 364.

And one who signed his name to the official bond of a city comptroller in blank, leaving space for the names of the obligors unfilled upon the condition and understanding that the comptroller was to obtain the names of at least four other responsible men as cosureties thereon, and delivered it to the comptroller, thereby made him his agent to do what, according to their agreement, was necessary to give it legal efficacy; and where the comptroller delivers the bond without having obtained the other signatures agreed upon, and there is nothing on the face of the bond to put anyone on guard, the surety is bound by the action of the comptroller without regard to such secret instructions, and estopped from setting up such condition in defense in an action on the bond. *McCormick v. Bay City*, 23 Mich. 457.

And neither a supervisor nor the sureties on his official bond can be heard to object that the bond was not approved in the manner pointed out by law, because the town clerk refused to accept it without further security, which the supervisor promised to get but never did, where 45 L. R. A.

the sureties signed it unconditionally without any understanding that other sureties would be procured, intending that it should be accepted as their bond if the town clerk would accept it, and the town clerk took the bond and kept it, permitting the supervisor to act for the two years that he was town clerk. *Ashkum v. Lake*, 12 Ill. App. 25.

So, a bond of a special commissioner to make a sale in a chancery cause which is delivered by the commissioner to the clerk of the court, which on its face appears to be a complete and perfect bond, but which was executed by the sureties on condition that it should not be delivered until it was also executed by another person as surety, of which fact the clerk was not informed when he received it, is nevertheless a valid bond, and the sureties cannot set up a failure of such other person to sign it as a defense, as the handing of the bond to the clerk was a delivery thereof. *Lyttle v. Cozad*, 21 W. Va. 183.

And a surety upon a convict bond given for the amount of fine and costs adjudged against a convict, who signed the bond with the understanding that the convict was to get two other designated persons to sign it also, is not relieved from liability thereon because the agreement that others were to be procured to sign the bond had been violated, where the fact of the existence of such agreement had not been communicated to the county judge whose duty it was to approve the bond, and he approved it without any knowledge of such understanding. *Bannister v. Wallace*, 14 Tex. Civ. App. 452.

And the bond of a clerk and master, signed by a surety on condition that others named would join, the surety telling the chancellor that others would sign but not that his signature was conditioned thereon and would be void unless they did, which is approved by a chancellor though the other persons did not sign, is valid and binding upon the surety signing. *Bramley v. Wilds*, 9 Lea, 674.

III. Conveyances.

The rules with reference to conveyances signed on condition that others shall sign seem to be the same, and the same conflict of opinion seems to have arisen, as in case of bonds.

Thus, to defeat an absolute delivery of a deed and convert it into an escrow, the party delivering it must have made an express condition on which he delivered it, and that condition must not have been complied with; and an understanding that others are to sign who fail to do so is not sufficient unless it was handed over on the condition that if such others did not sign it should be no deed. *Carrick v. French*, 7 Humph. 460.

But where the two parts of an indenture are executed by the parties of the one part, and by some of the parties of the other part with an agreement that one of the latter, who had executed the instrument, should obtain the signatures of his co-obligors to one part to be then exchanged for the other part, which such party was in like manner to get signed, and one part of the instrument was executed accordingly but was never exchanged for the other, the execution of which was not completed, there is no sufficient legal delivery of the instrument to make it binding upon the parties named therein. *Chandler v. Temple*, 4 Cush. 285.

So, a deed perfect on its face, which is delivered to one of the grantees therein named, cannot be shown by parol evidence to have been delivered as an escrow, not to operate as a deed until it was completed by the signature of the wife of one of the grantors, as this would in-

fringe the rule forbidding the admission of oral declarations of the parties, made contemporaneously with, or antecedent to, the execution of a written instrument for the purpose of contradicting its terms. *Hargrave v. Melbourne*, 86 Ala. 270.

The rule that there cannot be a delivery in escrow to an obligee applies to a delivery to one of a firm where the partnership is the obligee, and a delivery of a deed to a member of a firm to which it runs upon condition that it should afterwards be signed, sealed, and delivered by some other person, which was not done, is an absolute delivery, and the violation of the condition does not render the delivery invalid. *Moss v. Riddle*, 5 Cranch, 351, 3 L. ed. 123.

Though a deed may be delivered to the grantee to await complete execution by other parties without the conclusive inference that such delivery gives effect to it. *Brackett v. Barney*, 28 N. Y. 333.

And it has been held that one who guarantees the performance of the conditions of a lease by the lessees upon the agreement and condition that he should not be liable as guarantor, and that the lease should not be delivered to the lessor until all those named as lessees in the lease should sign it, may successfully defend against an action on the guaranty where the lease was delivered in violation of the agreement. *Markland Mfg. & Mfg. Co. v. Kimmel*, 87 Ind. 572.

And an answer in an action upon a guaranty of the performance of the conditions of a lease by the lessee reciting that the lessees were partners, naming them, alleging that the guaranty was signed and delivered to one of the partners with instructions not to deliver it to the lessor until another had signed it, and that one of the persons named refused to sign, and that there was no firm composed of the persons signing, sets up a good defense. *Ibid.*

And the fact that a mining lease was not executed by all those named in it as lessee is sufficient to put the lessor upon inquiry and charge him with notice of the condition that a guaranty of the performance of the conditions thereof should not be binding until he had signed. *Ibid.*

And a lease made by an owner of property signed by certain officers of a corporation as lessee, which by the mutual consent of the parties was left with a designated person to procure the signatures thereto of other officers of the corporation with instructions to deliver the paper to the town clerk upon accomplishing this object, is incomplete and unexecuted until such condition is performed; and where it is not performed, and such signatures are not obtained, it does not take effect as a valid contract between the parties thereto. *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131.

But a surety who indorses a guaranty upon a lease that the lessees shall faithfully fulfil their part of the agreement, cannot escape liability upon the ground that the lease was executed by only one of the lessees where it appears that both lessees occupied the demised premises and had possession of all the property mentioned in the lease for the whole term. *McLaughlin v. McGovern*, 34 Barb. 208.

And one who signs a bond to secure the payment of rent by a lessee in which another is named as co-obligor on the representation that such other could not be present but would sign it at any time, but who afterwards refused to sign, is not relieved thereby from liability to the lessor on nonpayment by the lessee. *Sidney Road Co. v. Holmes*, 16 U. C. Q. B. 268.

And one who, as guarantor, signs a lease made to two lessees, only one of whom, with the 45 L. R. A.

lessor, had executed it, is bound by his guaranty where he knew of the formal defect in the instrument when he signed, though he stated at the time of signing that it was not to be binding without the signature of the other lessee. *Adams v. Bean*, 12 Mass. 137, 7 Am. Dec. 44.

So, where a bond to secure the payment of rent by a lessee is executed by a surety in which another is also named as obligor, and the person executing it does so upon the representation that the other cannot conveniently attend, but will sign at any time, and such other person afterwards refuses to sign, such refusal is no defense in an action thereon under a plea of *non est factum* as showing a variance between the bond declared on and that set out. *Sidney Road Co. v. Holmes*, 16 U. C. Q. B. 268.

But a defense in an action on a covenant by a surety for the payment of rent that the covenant was executed upon the representations by the lessee that other named persons should also execute it, and that he should be responsible with them only, and that he gave due notice of the facts to the lessor before any breach, is good where the evidence showed that the representations were made by the lessor's agent as showing in substance that he executed it conditionally and as an escrow. *Huron County v. Armstrong*, 27 U. C. Q. B. 533.

Though such a plea would not be good if there was nothing to connect the plaintiff with the representations on which the surety executed the covenant, as he might have executed it on the understanding that he only should be surety. *Ibid.*

IV. Ordinary contracts or agreements.

Ordinary contracts signed on condition that others shall sign do not seem to be governed by a different rule from that governing bonds and sealed instruments.

Thus, where one executes an assignment expressing a joint as well as a several contract and showing on its face that it was intended to be executed by three subscribers, and leaves the instrument with the attorney for the assignee under an agreement that it shall not be operative unless the signatures of the two other subscribers shall be obtained thereto, there is no such delivery and acceptance of the instrument as will bind either party by the stipulations therein contained until such signatures be obtained, and there is no rule of evidence which excludes parol testimony tending to prove such condition and such nondelivery and nonacceptance. *Gibbons v. Ellis*, 83 Wis. 434.

And a composition deed before the execution of which it was agreed in the presence of the surety that it should be void unless all the creditors executed it, though it was afterwards executed by him in the ordinary way without saying anything when it was delivered to one of the creditors for the purpose of getting it executed by the rest, is to be considered as having been delivered as an escrow, and the surety is not bound thereby where all the creditors did not execute it. *Johnson v. Baker*, 4 Barn. & Ald. 440.

And a surety in an undertaking to secure the performance of a contract of dissolution of a partnership is a competent witness for the principal where both surety and principal were sued upon such undertaking, to sustain the defense set up by the surety that he was to be bound only on condition that another would execute it, which had not been done, as the contingent interest of the surety is not such as to affect his competency, but goes only to his credibility. *Millett v. Parker*, 2 Met. (Ky.) 608.

So, an agreement between merchants of a

city to pay the owner of a wharf boat the designated amount for receiving and storing goods, in consideration of which he agreed to forego a tax previously charged by him upon all boats in the city for collecting their freight bills, is rendered void by the failure to procure the signature of all merchants in the city using the facilities thus furnished. *Butler v. Smith*, 35 Miss. 457.

And parol evidence of a promise by the owner of a wharf boat left in front of a city to procure the signatures of other merchants in the city, to a contract in which he agreed to forego a certain charge for collecting their freight bills which he failed to do, is admissible in an action of replevin brought by the merchants against him for refusing to deliver certain goods without giving notice that he would no longer be bound by the agreement. *Ibid.*

And parol evidence is admissible to show that previous to the signing of a deed by several of the stockholders of a company there was an agreement between the parties to the instrument that all the stockholders should sign it, and that it was signed by those who executed it with the understanding or agreement that it should not be delivered until the signatures of all were procured. *Black v. Lamb*, 12 N. J. Eq. 108.

So, whether an agreement executed by a part of the stockholders of a company was executed by them as their act and deed unconditionally, or upon the understanding or agreement that the same should be executed by the remaining stockholders before the same should be delivered, and whether the same ever was, in point of fact, legally delivered by the parties or by their authority, is a proper issue in an action upon the agreement in which it was alleged that it was executed upon the condition that it should be executed by all. *Ibid.*

And the burden of proof in an action upon a contract executed by one person in which another is named as joint contractor with him rests with the person executing it to show that he was not to be bound thereby by his execution of it unless and until it was also executed by the other party. *Dillon v. Anderson*, 43 N. Y. 231.

It has been held, however, that one who executes a contract alone in which another is named as joint contractor with him, if he does not mean to be bound by the contract thus executed, should accompany the delivery of it with an expression of such intention. *Ibid.*

And under this rule the fact that in the body of a contract for the construction of a pair of boilers for a steamboat a person who did not execute it was named as a joint contractor with another who did execute it does not prevent it from having effect as a contract against the person executing it. *Ibid.*

And one who executes a contract in which another is named as joint contractor with him, but who does not sign, cannot testify in an action thereon in his own behalf as to whether or not he intended to make an individual contract. *Ibid.*

So, an agreement between the executor of a deceased partner and a creditor of the partnership with relation to partnership debts is not rendered invalid by the fact that upon its face it appears that it was also to be executed by the assignee of the partnership but was not executed by him, where no extrinsic evidence was offered to show that the agreement was not intended to be obligatory until so signed, and the firm being utterly insolvent the execution of the agreement by its assignee could be of no importance. *Chouteau v. Suydam*, 21 N. Y. 179.

And where an assignment is made by an insolvent 45 L. R. A.

debtor in trust for his creditors by an indenture of three parts, signed and sealed and purporting to have been delivered by the debtor and some of the creditors to the trustees, and the debtor's property passes into the hands of one of the trustees, parol evidence is inadmissible to show that the delivery was conditional to take effect when the instrument should be signed by a major part in interest of the creditors. *Ward v. Lewis*, 4 Pick. 518.

V. Negotiable instruments.

a. Conflict of authority as to.

There is the same conflict of authority with reference to the conditional execution of negotiable instruments under parol agreements that others shall sign as that appearing with reference to such an execution of bonds and other agreements. Such instruments are held to be vitiated, even in the hands of an innocent holder, by failure to procure the performance of the condition in the one class of cases apparently upon the theory that the authority to deliver the instrument is special and limited, and therefore such that the person taking it is bound to inform himself as to its scope. But in the other class of cases the person executing a negotiable instrument on such a condition is held bound when it has come to the hands of an innocent holder on the theory that the authority to deliver was general, and that therefore if the person delivering it had apparent authority the signer would be bound without reference to the condition.

b. Rule: that failure to perform condition vitiates instrument.

Under this rule one who agreed to join another in making a promissory note upon the representation that another named person would also join, and who signed the note jointly with the other, after which the proposed cosurety refused to sign and the other, without his knowledge, delivered the note to the payee for value, is not liable thereon as it is a case of limited authority to deliver which was countermanded by the refusal of the cosurety to join. *Awde v. Dixon*, 6 Exch. 869, 20 L. J. Exch. N. S. 295, 5 Eng. L. & Eq. 512.

And signing a note and placing it in the hands of one of the signers with direction to deliver it only on condition that it should be signed by other designated persons is not a case of an escrow of an executed instrument left to be delivered on certain conditions, but is a case of an instrument not executed in full, and there can be no recovery against those executing it where it had not been executed by all. *Keener v. Crago*, 81* Pa. 166.

So, where a person signs a promissory note as surety upon the express condition that another shall sign it as cosurety, and places the note thus signed in the hands of the principal debtor to procure the signature of such other person before delivery, and such other person refuses to sign and the note is delivered to the attorney for the payee, this will constitute a delivery as an escrow, and the note will not be obligatory upon the surety signing it, unless the condition is performed or unless he agrees that it shall be so after being informed that the other had refused to sign; and the fact that the attorney received the note without knowledge that it had been conditionally executed makes no difference. *Perry v. Patterson*, 5 Humph. 133, 42 Am. Dec. 424.

And the cashier of a bank with whom certain notes were left, payable to a third person, to be signed by other persons at the bank simply

for the convenience of the parties concerned, merely for the purpose of getting the signatures of such other parties, is not the agent of the payee so that the payee will be bound by declarations made by him to the signers. *Warburt-on v. Ralph*, 9 Wash. 537.

So, promissory notes delivered by a person who executed them upon the express condition that they should not be deemed to be his notes or be regarded as delivered unless they were also executed by another person named as co-maker, cannot be enforced by the payee against the person so executing them, unless such condition is complied with. *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363.

And one who signs a promissory note as indorser on condition that another shall sign it above his signature is not liable thereon unless the condition is complied with. *Miller v. Gamble*, 4 Barb. 146.

And the payees in a note signed by a person on the representation that others are to join cannot recover against the person signing in an action thereon unless the jury is satisfied that, knowing the facts and being aware of his rights, he consented to waive his objection. *Leaf v. Gibbs*, 4 Car. & P. 466.

So, a note upon the back of which persons write their names, and leave it with the agent of the payees to procure the signatures of other designated persons, with the understanding that when these signatures shall be procured, and not before, the guaranty or indorsement shall become operative, never becomes their contract so that they are liable thereon, where such other signatures are never procured. *Merchants' Exch. Bank v. Luckow*, 37 Minn. 542.

And a note signed by one person as surety upon condition that another person also sign it as cosurety with him, and left with the payee for that purpose, cannot be enforced against the surety signing unless executed also by the person indicated as cosurety. *Jordan v. Loftin*, 13 Ala. 547.

And a note signed by the sureties and sent by them to the payee under the agreement that he was to procure it to be signed by the principal debtor and then accepted in liquidation of certain indebtedness is incomplete where the payee neglected to obtain the principal debtor's signature or present the note to him for that purpose, and the sureties are not bound. *Knight v. Hurlbut*, 74 Ill. 133.

And a surety who signs a joint and several bill of exchange for a firm on the faith that another will join as cosurety, who never does so, who is afterwards compelled to pay it by proceedings at law at the suit of an indorsee, is entitled to recover the amount and costs of the proceedings both at law and in equity; and where one member of the firm dies and the other becomes bankrupt the claim is not provable under the bankruptcy act, and therefore not barred by the certificate. *Rice v. Gordon*, 11 Beav. 265.

So, the rule that it is competent to show by parol that notwithstanding its delivery an instrument not under seal was intended by the parties to become operative as a contract only upon the happening of a future contingent event, such as that it should first be executed by some other person, is applicable to negotiable paper. *Merchant's Exch. Bank v. Luckow*, 37 Minn. 542.

And a condition that a draft should not be delivered until another person had signed it as guarantor, and noncompliance therewith, may be established by parol in an action against a guarantor thereof, not as tending to vary or alter the contract of guaranty, but for the purpose of showing there had been no valid deliv-

ery thereof. *Belleville Sav. Bank v. Bornman*, 124 Ill. 200.

And parol evidence is admissible in an action on a note to be paid in chattels, against a surety thereon, that when he signed the note as surety it was agreed between him and the plaintiff that the plaintiff should procure the signature of another designated person as surety thereon, and that unless such person signed it it should be void as to the defendant, and that it was delivered to the plaintiff for the purpose of getting such person's signature. *Westman v. Krumwelde*, 30 Minn. 314.

Parol evidence in an action on a note tending to prove that it was signed upon condition that it should not be deemed the note of the signer or regarded as delivered unless it was also executed by another person named as co-maker, and that it had not been so executed, is competent, and does not fall within the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument. *McCormick Harvesting Mach. Co. v. Faulkner*, 7 S. D. 363.

And a defendant sued upon a paper purporting to be his promissory note may show under the general issue that after he signed it it was delivered to the payee for the express purpose of having another sign it before it should take effect, and that the other signature was not procured, and it is error to exclude evidence of such facts. *Moasher v. Rogers* (Ill.) 20 Cent. L. J. 316.

And a statement by a person presenting a note signed by himself and another to a third person, that he wanted to renew a note, asking him to execute the renewal note with them which he did believing both to be principals, is admissible in evidence in an action against him as surety on the note as a part of the *res gestae*. *Bobbitt v. Shryer*, 70 Ind. 513.

c. Rule that failure to perform is no defense.

Under this rule, which seems to be supported by a majority of the cases where a note is made and delivered to another upon the express condition that it should not be delivered to the payee until other designated persons have signed it, but which is delivered in violation of such conditions, the payee taking it for value without notice of the condition will be deemed to have constituted the person to whom it was delivered his agent to negotiate it, and having clothed him with the means of perpetrating the fraud, must bear the loss, in the absence of anything to show notice to the payee. *Tabor v. Merchants' Nat. Bank*, 48 Ark. 458.

And one who indorses a note in blank and intrusts it to his clerk with authority to deliver it to another upon his signing it with the name of his firm, is bound by the act of the clerk in delivering the note in excess of his authority before it had been so signed. *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257.

The rule that it is a good defense to an action on a bond against a surety that he intrusted it to the principal obligor as an escrow with authority to deliver it only on the express condition that other named persons should join as sureties in its execution prior to its delivery, and that it was delivered in violation of such condition, does not apply to commercial paper which has come into the hands of a bona fide purchaser before maturity, who is without notice of the condition. *Marks v. First Nat. Bank*, 79 Ala. 550, 58 Am. Rep. 620.

And a surety on a promissory note cannot escape liability thereon upon the ground that he signed it upon the representation and promise that other designated persons would also sign who did not do so, where it does not appear

that the holder had any knowledge of the facts, or that the note had been delivered when the agreement was made. *Micklewait v. Noel*, 69 Iowa, 344; *North Atchison Bank v. Gay*, 114 Mo. 203; *Merriam v. Rockwood*, 47 N. H. 81; *Findley v. State Bank*, 6 Ala. 244; *Bank of Missouri v. Phillips*, 17 Mo. 29; *Farmers' Bank v. Hunt*, 124 N. C. 171.

And where there is nothing on the face of it indicating that any other cosurety was expected to sign, and no fact is brought to the knowledge of the payee before he accepts it calculated to put him upon guard or which should induce inquiry. *Merriam v. Rockwood*, 47 N. H. 81; *Ward v. Hackett*, 30 Minn. 150, 44 Am. Rep. 187.

In *Micklewait v. Noel*, 69 Iowa, 344, *supra*, *Daniels v. Gower*, 54 Iowa, 319, *infra*, VI., was distinguished upon the ground that the note in that case was not negotiable, and was given to a stranger to be delivered upon compliance with a condition.

So, a surety on a joint and several promissory note, who signed it under an agreement with the principal that he would not use it unless he could also procure the signature of a designated person as cosurety upon it, cannot defend against an action on the note on the ground that the signature of such person was not obtained, where neither the bank advancing the money thereon nor any of its directors had knowledge or notice of such agreement. *Passumpsic Bank v. Goss*, 31 Vt. 318; *Dixon v. Dixon*, 31 Vt. 450, 76 Am. Dec. 128; *First Nat. Bank v. Dawson*, 78 Ala. 67.

Though the payee had notice that the surety signed as such when he received it in payment of a pre-existing debt, and had no notice or knowledge of the agreement to obtain another signer. *Dixon v. Dixon*, 31 Vt. 450, 76 Am. Dec. 128.

In *Passumpsic Bank v. Goss*, 31 Vt. 318, *supra*, *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698, *supra*, II. g. 10, and *Pawling v. United States*, 4 Cranch, 219, 2 L. ed. 601, *supra*, II., a, were distinguished upon the ground that in those cases the bonds bore evidence on their face that they had not been completed according to the original intention. And *Leaf v. Gibbs*, 4 Car. & P. 466, *supra*, V. b, was distinguished upon the ground that the plaintiff in that case was fully cognizant of the arrangement, and knew that as against the defendant he was not entitled to hold and enforce the notes. And *Awde v. Dixon*, 5 Eng. L. & Eq. 512, *supra*, V. b, was distinguished on the ground that in that case the payee's name was left blank, that the defendant signed the note as surety and it was inserted at the time the note was delivered and the money advanced, and that the plaintiff became the payee by having his name inserted when the note was in that condition. And *Johnson v. Baker*, 4 Barn. & Ald. 440, *supra*, IV. was distinguished upon the ground that the deed in that case had never been delivered, but had been intrusted to one of the creditors for the purpose of having all the creditors sign it, and that all the creditors were named in it and it was incomplete upon its face as between the parties until all the creditors executed it.

And when a note is signed by the principal and four sureties, an agreement between the principal and such sureties that it is not to be delivered to the payee until a certain other person signs as surety, which condition is not complied with, constitutes no defense unless the payee had notice or knowledge of the agreement at the time of the delivery, or of facts which should have induced inquiry. *Brumback v. German Nat. Bank*, 46 Neb. 540.

And a negotiable note signed by sureties upon 45 L. R. A.

the agreement with their principal that he would not deliver it to the payee until another person had signed it as cosurety with them becomes a valid and enforceable obligation against them, though it was turned over to the payee without the signature of the cosurety, when it passes from the party holding it in escrow into the hands of a bona fide holder for value. *Lookout Bank v. Aull*, 93 Tenn. 645; *Jordan v. Jordan*, 10 Lea, 124, 43 Am. Rep. 294; *Smith v. Moberly*, 10 B. Mon. 266, 52 Am. Dec. 543.

Where he took it without notice, direct or constructive, of such condition. *Jordan v. Jordan*, 10 Lea, 124, 43 Am. Rep. 294.

In that case it was said that the correctness of the decision in *People v. Bostwick*, 32 N. Y. 445, had been expressly questioned in a subsequent case.

Where a note is perfect on its face and contains no indication that it is delivered in violation of an agreement that the principal should procure an additional surety, the taker will not be affected by such agreement if he took it in good faith and for a valuable consideration. *Whitcomb v. Miller*, 90 Ind. 384.

One who signs a note as surety upon condition that another shall also sign is not discharged by the delivery of the paper by the principal to the payee without such additional name, where the payee is not notified of such condition and money is advanced thereon. *Clark v. Bryce*, 64 Ga. 486.

And one who refused to sign a note as surety unless another person would first execute it, when the principal forged the name of such other person, will be held liable thereon where he afterwards signed it and money was procured upon it from a person who had no notice of the fraud. *Stoner v. Millikin*, 85 Ill. 218.

A note complete and perfect on its face in the hands of an indorsee in the ordinary course of business for full value before maturity without notice of limitation of authority on the part of the persons putting it in circulation cannot be defended against by a surety thereon upon the ground that he indorsed it with certain blanks to be filled up, and intrusted it to a third party to secure other indorsers, with instructions that it was not to be negotiated until such other indorsers were secured, but that he violated such instructions and negotiated the note without the performance of such conditions. *First Nat. Bank v. Compo-Board Mfg. Co.* 61 Minn. 274; *Ward v. Hackett*, 30 Minn. 150, 44 Am. Rep. 187.

And an agreement between a surety and the principal in a promissory note at the time the surety signed it that before it should be used the principal would procure it to be signed by another responsible person as cosurety, and that the note should be used at the bank to which it was made payable, which the principal violated by selling and delivering the note to a third person who advanced the full amount of it in cash acting in entire good faith and without notice of the agreement, does not affect the rights of the person to whom the note was sold, and such person is entitled to recover thereon in the name of the bank as plaintiff. *Farmers' & M. Bank v. Humphrey*, 36 Vt. 554.

And an understanding and condition between a person signing a note as joint maker for security and the maker thereof, that the maker would get two others to sign as surety or destroy the note, does not relieve the person so signing from liability thereon where the maker took the note and got one of the other persons to sign but not the other, and delivered it for value before maturity to the payee, who had no notice of the condition. *Terrell v. Hunter*, 21 Mo. 436.

But ordering a verdict on a promissory note in favor of a surety, who defended upon the ground that he signed the note on the express condition that it should not be delivered or take effect until two other designated persons had signed it, which condition and its violation were known to the holder, is not error as against another surety thereon who had closed the transaction without the additional security, and procured the holder to advance the consideration. *German-American Nat. Bank v. People's Gas & Electric Co.* 63 Minn. 12.

The defense in an action between the original parties on a promissory note, payment of which is resisted by a surety on the ground that he left it with his principal upon the understanding that another surety was to sign also, who did not do so, must comprehend the two elements of incompleteness of the instrument, and notice thereof, actual or virtual, to the payee. *Bonner v. Nelson*, 57 Ga. 433.

And the essential thing to relieve a surety on a note who signed it on condition that another surety should be obtained, which condition was violated, from liability thereon, is knowledge on the part of the taker of the note that it has been so delivered and the agreement violated, and an answer in an action on the note not alleging notice or knowledge is insufficient on demurrer. *Whitcomb v. Miller*, 90 Ind. 334.

And parol evidence is not admissible to prove that the payee of a note agreed when he received it that he would procure another person to sign it and that it was not to be binding on the maker until it was so signed. *Claulin v. Esterly Harvesting Mach. Co.* 118 Ind. 372, 3 L. R. A. 863.

Parol evidence in an action upon a promissory note that the defendant signed and delivered the note to the plaintiff under an arrangement and verbal understanding with him that it should be signed by another designated person, and that if not so signed it should be considered as inoperative and void, and that such other person never executed the note, is inadmissible as tending to vary the legal effect of the note. *Massmann v. Holscher*, 49 Mo. 87.

d. The condition; sufficiency and waiver.

To establish the delivery of a bill as an escrow it must be proved affirmatively, not that the principal promised something further should be done by way of inducement to the execution of the instrument by a surety, but that performance of such further act was the condition upon which he was to become bound or the instrument to be delivered as his act or deed. *Evans v. Gibbs*, 6 Humph. 407.

A surety upon notes is not discharged from his contract because when he signed them he expected a certain person would also sign them with him and that the principal debtor would deliver to him certain books and papers as an indemnity for the surety, unless it be also shown that he stipulated with the creditor or his agent that his signature should not have effect until one or both of such things were done, or unless the agent obtained the signature by fraudulently representing that such person would sign, and that the creditor would place in such person's hands his books and papers to be by him collected and applied in payment of the debt. *Martin v. Stribling*, 1 Speers, L. 23.

And proof that a person signing a note as surety heard the principal debtor ask the cashier of the bank if he would be good on the note, after which he signed it on the statement that other sureties would also sign, when

the principal said to the cashier: "I will take the note and get the other names on it and send or bring it up,"—to which the cashier assented, no other names having been mentioned in the cashier's presence, does not establish a conspiracy between the principal and the cashier to get the surety to sign under the belief that others were to sign. *North Atchison Bank v. Gay*, 114 Mo. 203.

So, the reasons upon which the doctrine that a delivery in escrow cannot be made to the payee or obligee apply with equal force to writings which are transferable, executed upon condition that others shall sign, as to writings which are not transferable. *Millett v. Parker*, 2 Met. (Ky.) 608.

And the common-law rule that a deed did not pass title by delivery to the grantee as an escrow is applicable to a sealed instrument for the payment of money, though it may be negotiated, which was executed by two or three parties and left with the plaintiff for the purpose of procuring its execution by a third person where it was to be used in lieu of a former instrument of the same kind. *Neely v. Lewis*, 10 Ill. 32.

And an oral condition that promissory notes were to be signed by another before taking effect as such is a nullity where they are not delivered to a third party but to the payee himself. *Massmann v. Holscher*, 49 Mo. 87.

And the fact that a note was delivered by a surety thereon to the payee upon the payee agreeing to obtain the signature of another person thereto presents no defense in an action on the note, as such an agreement by parol would be contradictory to the writing, and could not be permitted to destroy its obligation. *Hubble v. Murphy*, 1 Duv. 280.

So, a note cannot be signed by a surety and delivered upon condition that it shall be signed by others as cosureties to the payee, or to his agent for him, and an answer alleging such a delivery sets forth no defense, and parol evidence of such an agreement is inadmissible thereunder, and a judgment on the pleadings is proper where no fraud appears. *Hurt v. Ford*, 142 Mo. 283, 41 L. R. A. 823.

Though in Tennessee the rigid rule of the common law has been modified so as to give relief, both at law and in equity, to a surety upon a promissory note who has signed upon the condition that others shall sign, although the delivery may have been directly to the payee or obligee. *Alexander v. Wilkes*, 11 Lea, 221.

So, one of two sureties on a promissory note cannot escape liability thereon on the ground that he signed on the understanding that two other designated persons should also sign, which they refused to do, where he himself closed the transaction without their signatures, and upon his procurement the bank advanced the consideration therefor. *German-American Nat. Bank v. People's Gas & Electric Co.* 63 Minn. 12.

And the mere presentation of a note signed by the person presenting it and another to a third person for his signature is equivalent to a representation that the two signers were principals, and will estop the person by whom it was formerly signed to claim that he was a surety only and entitled to contribution from the subsequent signer. *Bobbitt v. Shryer*, 70 Ind. 513.

But that one who indorsed a note upon condition that another should indorse above his signature had an agency, or had been active in getting a payment indorsed upon the note, does not constitute a waiver of the condition. *Miller v. Gamble*, 4 Barb. 146.

a. Notice of condition.

The rule that a negotiable instrument executed upon condition that it should be signed by others, which condition was not performed, is invalid and not binding on those who did sign, where it is in the hands of one who received it with knowledge or notice of the violation of the condition, is practically universal, though there is perhaps a slight difference of opinion as to what is sufficient notice or sufficient to put the holder upon inquiry.

Thus, if a surety signs a note upon the condition that someone else is to sign, that condition being known to the payee and assented to by him, the surety is not bound or liable on such note unless it be signed by the other party. *Williams v. Luther*, 17 Ky. L. Rep. 811.

And that sureties upon a note signed it as such upon the agreement and condition that two other solvent persons would also sign it, which condition was not performed and of which and its breach the plaintiff had due notice before the note was delivered to them, is a valid defense in an action thereon against the surety. *Coffman v. Wilson*, 2 Met. (Ky.) 542; *Bivins v. Helsley*, 4 Met. (Ky.) 78.

And where the payee of a note knows that a surety thereon had signed upon the distinct and express agreement that it was not to be binding upon him unless signed by other parties, no recovery can be had by him against such surety on the note where the signatures of such other parties were not obtained. *Jackson v. Cooper*, 19 Ky. L. Rep. 9; *Hill v. Sweetser*, 5 N. H. 168.

So, one who writes his name upon a draft as guarantor has the right to impose as a condition to its acceptance by a bank that another person should become his coguarantor thereon, and where the bank had actual notice of such condition prior to its acceptance of the draft the surety is not liable thereon where the condition was not performed. *Belleville Sav. Bank v. Bornman*, 124 Ill. 200.

And a note presented by the payee to another to sign as security for its payment, and signed by him upon the false representation by the payee that another named person would also sign it as a cosurety with him, which was not done, is void for fraud, the fraud being the act of the payee of the note. *Dunn v. Smith*, 12 Smedes & M. 602.

And one who sues on a note indorsed by the defendant upon condition that another should indorse it above his signature, which condition was not complied with, is bound to show how it came to his hands without compliance with such condition. *Miller v. Gamble*, 4 Barb. 146.

So that the surety on a note left with the maker with the express understanding that he was to procure the signature of another surety, and that then the attorney for the payee was to get the note discounted and receive the money for the payee, but that such other signature was not secured and the note was not discounted, but after maturity it was indorsed to such attorney without recourse for the purpose of bringing suit, is a good defense in an action brought by him against a surety who signed it, the attorney being a mere depository of the note and in no sense an innocent holder. *Stricklin v. Cunningham*, 58 Ill. 293.

And a person who signed a note in the presence of the agent of the payee and holder as security, with the understanding that he would not be bound unless another named person should also sign it as security, and upon the express condition that such person would sign, is not liable where such condition is not performed if the understanding was mutual. *Cowan v. Baird*, 77 N. C. 202. 45 L. R. A.

So, one who signed a promissory note as surety for another upon the understanding and condition that it should not become binding upon him until it was signed by other named persons as cosureties thereon is not liable where the note itself bears upon its face evidence that some other party was to sign it above the name of the surety so sought to be bound thereby. *Read v. McLemore*, 34 Miss. 110.

And a joint note, which, when presented to the payee, had one of the names thereon obliterated or erased, which name was prior in position to those of the persons sought to be charged thereon, and which name was there when they signed it, is sufficient to put the payee upon inquiry as to the right to deliver the note with the name thus erased, and as to whether or not the other parties consented to be bound without the person whose name was erased. *McCrammer v. Thompson*, 21 Iowa, 244.

And where a bank takes a note with notice that a surety has signed it upon condition that it shall not be delivered until others have signed it as cosureties, and the names of the indorsers appear thereon one after another without anything to indicate a joint liability, a prima facie case of several consecutive liability is shown, which is notice to the bank that the condition has not been complied with. *First Nat. Bank v. Dawson*, 78 Ala. 67.

So, testimony in an action on a promissory note against a surety thereon by one of the sureties as to conversations had between him and his codefendants, wherein he told them he would sign the note as surety with them in case they signed it, is admissible as tending directly to sustain the defense that it was signed on condition that another would sign it, who failed to do so, where there was evidence tending to show that the plaintiff had knowledge of such conversation when he accepted the note. *Wels v. Morris Bros.* 102 Iowa, 327.

But where one of the sureties on a note signed a renewal note as surety upon the representation by the principal that the renewal would be accepted in payment of the old note and that the other surety upon the old note would sign it as cosurety with him, and such cosurety refused to sign, and the maker procured the signature of another person as surety in his place, and the creditor accepted the note so signed without notice of the agreement between the principal and the surety first signing, it is binding upon such surety as the creditor had a right to accept the note tendered in renewal of the original note without reference to whether it contained any or all of the names agreed to be procured or which appeared upon the old note. *Jones v. Shelbyville Fire, L. & M. Ins. Co.* 1 Met. (Ky.) 60.

The fact that officers of a bank discounting a note had said in the beginning that three designated persons would be sufficient security thereon, and that one of them refused to sign and the bank saw fit to take it without such signature, does not show constructive notice on the part of the bank of an agreement between the maker and the signing sureties that it was not to be used without procuring the signature of another surety. *Farmers' Bank v. Hunt*, 124 N. C. 171.

The fact that a part of the money derived from the discount of a note went toward the payment of a debt due from the maker to the person discounting it does not constitute the maker of the note the agent of the person advancing the money so as to fix the latter with knowledge or notice of an agreement between the maker and sureties that it should not be used until signed by another surety. *Ibid.*

And the burden of proof in an action on a

promissory note against a surety thereon, of notice on the part of the holder of a conditional delivery thereof to the payee by which it was not to take effect until others had signed as cosureties, rests with the defendant. *First Nat. Bank v. Dawson*, 78 Ala. 67.

VI. Non-negotiable notes.

So far as the rules differ non-negotiable notes are governed by the rules applicable to bonds rather than that applicable to negotiable instruments.

Thus, sureties on a non-negotiable note; who signed it with the agreement that it should not be delivered unless the signature of another should be obtained as cosurety, may properly claim that as to them the instrument was not delivered, and that therefore they were not liable thereon, where the signature of such person was never obtained. *Daniels v. Gower*, 54 Iowa, 321.

And a surety on a non-negotiable promissory note who signed it as such upon the express understanding that the principal debtor was to procure the signature of another designated person as a cosurety, and that if such name was not obtained he was not to be bound, and that it was not to be delivered unless such signature was obtained, is not bound thereby where such signature was not obtained, though the holder had no notice of the fact when he took the note. *Ayres v. Milroy*, 53 Mo. 516, 14 Am. Rep. 465.

And the makers of an accommodation note which was not negotiable, who consented to its delivery only on condition that it should be signed by ten solvent men, are not bound by its unauthorized delivery without being so signed. *Campbell Printing Press & Mfg. Co. v. Powell*, 78 Tex. 53.

So, one who signs a non-negotiable note as surety in just reliance upon the sureties whose signatures preceded his cannot be held liable thereon if for any reason they are not liable. *Daniels v. Gower*, 54 Iowa, 321.

And one who signed a clerk and master's notes upon the assurance that there was to be another solvent surety upon them also, and refused to sign them until the other security should be procured, but signed upon the assurance by the clerk and master that the notes would not be operative against him until it was procured, which was never done, is entitled to relief against judgment taken by motion against him on such notes. *Majors v. McNelly*, 7 Heisk. 204.

And while a party signing his name conditionally as surety to clerk and master's notes upon the understanding that another solvent security should be procured is not entitled to relief by petition without asking for process, as the ground for relief would be that he never became surety, but should proceed by an original bill; the proceeding may be considered as an original bill, and relief granted where all the parties appear and make defense without process. *Ibid.* F. H. B.

ARKANSAS SUPREME COURT.

STATE of Arkansas, *Appt.*, v. LANCASHIRE FIRE INSURANCE COMPANY.

(.....Ark.....)

1. A penal statute against trusts and combinations will not be given an extraterritorial effect because the legislature after the attorney general placed that construction upon the statute rejected a proposed amendment expressly limiting its effect to combinations formed to affect prices in the state.
2. An extraterritorial effect of a statute against trusts and combinations does not follow from the use of the words "any corporation, partnership, or individual," and "any pool, agreement, contract, combination," in describing the persons or acts to which the statute applies.
3. A foreign insurance company doing business in Arkansas, which enters into an agreement with other insurance companies formed outside the state, for the purpose of fixing the rates of insurance in foreign countries, not intended to affect, and which does not affect, persons, property, or prices of insurance in the state, does not thereby subject itself to the penalty imposed by act May 6, 1899, upon any corporation transacting any kind of business in the state, which becomes a party to any pool or combination to fix or limit rates of insurance.

(May 27, 1899.)

NOTE.—For cases similar to the above, see *State v. Philps* (Kan.) 18 L. R. A. 657; *Queen Ins. Co. v. State* (Tex.) 22 L. R. A. 483; *Etna Ins. Co. v. Com.* (Ky.) *post*, 355; and *State, Crow, v. Firemen's Fund Ins. Co.* (Mo.) *post*, 368. 45 L. R. A.

APPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County sustaining a demurrer to a complaint charging defendant with violating the anti-trust laws. *Affirmed.*

Statement by Riddick, J.:

The attorney general of the state filed a complaint against the defendant, Lancashire Fire Insurance Company, alleging that it was a foreign corporation, organized under the laws of England; that it was, on and after March 6, 1899, engaged in the business of insuring property in this state against loss or damage by fire; and that while so engaged it became and was a member of a pool or combination with other corporations engaged in a similar business, to regulate or fix the price or premium to be paid for insuring property against loss or damage by fire; wherefore he asks judgment against said company for the sum of \$5,000. The defendant company filed its answer, admitting that it was engaged in the business of insuring property against loss or damage by fire, as alleged in the complaint, but denied that while so engaged in business of insuring property in this state it became or was a member of any pool or combination, either in this state or elsewhere, for the purpose of fixing or regulating the price or premium to be paid for insuring property in this state against loss or damage by fire, etc. The state, by her attorney, filed a demurrer to this answer, on the ground that it did not state facts sufficient to constitute a valid defense. The circuit court overruled the demurrer, and, the state electing to stand on

its demurrer, final judgment was entered against it, from which judgment the state appealed.

Messrs. Jeff Davis, Attorney General, **Charles Jacobson**, **Jesse C. Hart**, and **Hal L. Norwood**, for appellant:

A declaration, though not drawn in accordance with the precedents, containing necessary commencement, statement, and breach is held sufficient.

Dougherty v. Edwards, 25 Ark. 84.

Under the Code no specific form need be followed when technical words are used.

Hughes v. Watt, 26 Ark. 228.

When some of the averments of a complaint are wanting in completeness and certainty, defendant's remedy is by motion to have the pleading rendered more definite.

Mellroy v. Adams, 32 Ark. 315; *McCreary v. Taylor*, 38 Ark. 393.

The common-law rules in regard to certainty in pleading are abrogated by the Code.

Bushey v. Reynolds, 31 Ark. 657; *Bush v. Cella*, 52 Ark. 378.

It is sufficient if the charges be in the language of the act creating the penalty, or in words of equivalent import.

Kirkpatrick v. Steuart, 19 Ark. 695.

The office of a demurrer, under the Code, is to state objections apparent upon the face of the pleadings.

Nordman v. Craighead, 27 Ark. 369.

In indictments for offenses created by statute, all that is required in ordinary cases is that the offense should be charged in the language of the statute creating it.

Medlock v. State, 18 Ark. 368; *Lemon v. State*, 19 Ark. 173.

If a defect at all exists it is a defect in the statute, and appellee's remedy was not by a general demurrer, but by a motion to make the complaint more definite and certain.

Ball v. Fulton County, 31 Ark. 379; *Struver v. Ocean Ins. Co.* 16 How. Pr. 422; 2 Estee, Pl. (Boone) § 3074, note 79; *Davy v. Betts*, 23 How. Pr. 396; *Dillaye v. Wilson*, 43 Barb. 261.

The state, in her sovereign capacity, may exclude foreign insurance companies entirely from her borders, or she may so regulate their mode and manner of doing business within her borders, or place such restrictions and inhibitions upon their entering therein, as she may see proper.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

An agreement between several fire insurance companies to delegate to an association of persons the power of prescribing the premium rates, and to abide by the rates so fixed, is a trust and a combine.

Beach, *Monopolies & Trusts*, 600.

In the construction of all penal statutes, and even constitutional provisions, the history of the enactment, as furnished by the rolls or journals, is the very best evidence as to what is the true intent or meaning of the act or law.

Hill v. Mitchell, 5 Ark. 613.

The word "any" is used thirteen times in 45 L. R. A.

§ 1 of this act, and it should be given its plain, natural, and ordinary meaning.

Re Board of Street Opening, 133 N. Y. 332, 16 L. R. A. 180; *Leonard v. Com.*, *Cassidy*, 112 Pa. 620; *Clark*, *Crim. L.* 360; *Cameron v. Vandergriff*, 53 Ark. 386; *State v. Chapin*, 17 Ark. 561, 65 Am. Dec. 452.

The state has power to impose any condition it may see proper on a foreign corporation.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *United States v. Trans-Missouri Freight Asso.* 53 Fed. Rep. 440, 19 U. S. App. 36, 58 Fed. Rep. 58, 7 C. A. 15, 24 L. R. A. 73, 4 Inters. Com. Rep. 443; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 140; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Lemmon v. People*, 20 N. Y. 627; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449.

The police power of the state in a comprehensive sense embraces its whole system of internal regulations by which the state seeks, not only to preserve the public order and prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules, good manners, and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as it is reasonably consistent with a like environment of rights by others.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625.

The police power of the state is as broad and plenary as the taxing power.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849.

Every possible presumption is in favor of the validity of a statute and its continuance until the contrary is shown beyond a reasonable doubt.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253.

Rules for the conduct of the most necessary and common occupations may be prescribed and enforced by a state whenever it is deemed they afford opportunities for imposition or fraud.

Cooley, *Const. Lim.* 5th ed. 743, note 1, p. 744; *Lothrop v. Stedman*, 42 Conn. 583; *Ward v. Farwell*, 97 Ill. 593.

Insurance companies, whether composed of individuals or consisting of a company, or existing as a corporation in one state, and authorized to carry on their business therein, have no natural right to carry on their business in any other state, and permission to do so can only be secured in accordance with the laws of the latter state.

Tiedeman, *Pol. Power*, 281; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. Life & F. Ins. Co. v. Massachusetts*, 10 Wall. 566, *Liverpool & L. Life & F. Ins. Co. v. Oliver*, 19 L. ed. 1029; *Leavenworth v. Booth*, 15 Kan. 628; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 637, 4 Inters. Com. Rep. 297; *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243.

The state may regulate the carrying on of any business within its limits.

Higgins v. Rinker, 47 Tex. 381; *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250; *Beach, Monopolies & Trusts*, § 13; *Munn v. Illinois*, 94 U. S. 124, 24 L. ed. 83; *License Cases*, 5 How. 583, 12 L. ed. 291; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 586; *State v. Moore*, 104 N. C. 714; *Com. v. Alger*, 7 Cush. 84; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Cooley, Const. Lim.* 6th ed. 707-720; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 16, 41 L. ed. 617; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147; *Crowley v. Christensen*, 137 U. S. 89, 34 L. ed. 621; *Hennington v. Georgia*, 163 U. S. 304, 41 L. ed. 169; *Calhoun v. Lanauz*, 127 U. S. 634, 32 L. ed. 297; *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657; *Holden v. Hardy*, 169 U. S. 391, 42 L. ed. 791.

The object in construing penal, as well as other, statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive.

United States v. Hartwell, 6 Wall. 395, 18 L. ed. 832; *United States v. Reese*, 92 U. S. 244, 23 L. ed. 574; *Re Coy*, 31 Fed. Rep. 800; *United States v. Morris*, 14 Pet. 474, 10 L. ed. 548; *State, Barton County, v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. Rep. 726; *Walster v. United States*, 42 Fed. Rep. 891; *Sickles v. Sharp*, 13 Johns. 497.

A penal statute should not be construed strictly for the mere purpose of defeating it, when its intent is plain.

State v. Stone, 118 Mo. 388, 25 L. R. A. 243; *Meadowcroft v. People*, 163 Ill. 56, 35 L. R. A. 176; *State, School Dist. No. 6, v. Moore*, 45 Neb. 12; *Doles v. Hilton*, 48 Ark. 305; *Hill v. Mitchell*, 5 Ark. 613; *Blake v. National Banks*, 23 Wall. 307, 23 L. ed. 119; *Edger v. Randolph County Comrs.* 70 Ind. 332; 23 Am. & Eng. Enc. Law, p. 335.

Courts, in construing a statute, may with propriety regard the history of the time when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning, of particular provisions in it.

United States v. Union P. R. Co. 91 U. S. 79, 23 L. ed. 228; *United States v. Oregon & O. R. Co.* 57 Fed. Rep. 429; *United States v. Wilson*, 58 Fed. Rep. 768; *Stout v. Grant County Comrs.* 107 Ind. 348; *Hunt v. Lake Shore & M. S. R. Co.* 112 Ind. 75; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373; *Garland v. Montgomery County Bd. of Revenue*, 87 Ala. 223; *Dunlap v. United States*, 33 Ct. Cl. 135; *Pacific Coast S. S. Co. v. United States*, 33 Ct. Cl. 36; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264.

The fact that a section or portion of a section of an act is unconstitutional does not necessarily render the whole act void.

English v. State, 31 Fla. 340; *State v. Scott*, 98 Tenn. 254, 36 L. R. A. 461; *State, Wheeler, v. Stult*, 52 Neb. 209; *Noble v. Mitchell*, 100 Ga. 519, 25 L. R. A. 238; *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250; *Fort v. State*, 92 Ga. 8, 23 L. R. A. 87, 45 L. R. A.

Messrs. Rose, Hemingway, & Rose, Cockrill & Cockrill, J. M. Moore, Dodge, Johnson, Carroll, & Pemberton, and Morris M. Cohn, for appellees:

In aid of the construction of the act, its title may be considered.

Black, Interpretation of Statutes, 174; *Oosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226.

The title says: "An Act Providing for the Punishment of Pools, Trusts, and Conspiracies to Control Prices, and as to Evidence and Prosecution in Such Cases."

An attempt to legislate for offenses that do not concern our property or people cannot be inferred, for such an inference would lead to absurd results.

In the construction of criminal and penal statutes the legislature is presumed to have intended to keep within the territorial limits of its jurisdiction.

Cooley, Const. Lim. 128; *Endlich, Interpretation of Statutes*, §§ 167-171, 178; *Bishop, Written Laws*, § 141; *Story, Conf. L.* §§ 18-20; *Iowa v. Chicago, B. & Q. R. Co.* 37 Fed. Rep. 497, 3 L. R. A. 554; *Grenada County Supers. v. Brogden*, 112 U. S. 269, *Grenada County Supers. v. Brown*, 28 L. ed. 707; *United States v. Coombs*, 12 Pet. 76, 9 L. ed. 1006; *Black, Interpretation of Statutes*, 91; *Bond v. Joy*, 7 Cranch, 350, 3 L. ed. 367.

The terms of the act are clearly those of a criminal act.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746; *Lees v. United States*, 150 U. S. 476, 37 L. ed. 1150; *Iowa v. Chicago, B. & Q. R. Co.* 37 Fed. Rep. 497.

Penal statutes must be strictly construed.

Hughes v. State, 6 Ark. 134; *Stout v. State*, 43 Ark. 415; *Casey v. State*, 53 Ark. 336; *Little Rock & Ft. S. R. Co. v. Oppenheimer*, 64 Ark. 271, 44 L. R. A. 353; *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830; *Whitehead v. Wilmington & W. R. Co.* 87 N. C. 255; *Dwyer v. Gulf, O. & S. F. R. Co. (Tex.)* 23 Am. & Eng. R. Cas. 654; *Hawkins v. Taylor*, 56 Ark. 45; *Basham v. Toors*, 51 Ark. 309; *Little Rock, H. S. & T. R. Co. v. Spencer*, 65 Ark. 183, 42 L. R. A. 334; *Watkins v. Griffith*, 59 Ark. 344; *Fanning v. State*, 47 Ark. 442; *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 517; *Re Mitchell*, 120 Cal. 384; *Tiffany v. National Bank*, 18 Wall. 409, 21 L. ed. 862.

The law should have no construction which gives it an extraterritorial operation.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 243, 40 L. ed. 956; *Story, Conf. L.* §§ 18-20; *Black, Interpretation of Laws*, 91 et seq.; *Endlich, Interpretation of Statutes*, §§ 169, 170, 335; *Bishop, Statutory Crimes*, § 141; *Jefferys v. Boosey*, L. R. 4 H. L. 946; *Cope v. Doherty*, 4 Kay & J. 367; *Routledge v. Law*, L. R. 3 H. L. 100; *Ex parte Blain*, L. R. 12 Ch. Div. 522; *Henderson v. Bise*, 3 Starkie, 158; *Wells v. Porter*, 2 Bing. N. C. 722; *Hewitt v. Price*, 4 Mann. & G. 355; *Selkirk v. Davies*, 2 Rose, Bankr. Cas. 311; *Cockerell v. Dickens*, 3

Moore, P. C. C. 133; *United States v. Palmer*, 3 Wheat. 610, 611, 4 L. ed. 471, 472; *Iowa v. Chicago, B. & Q. R. Co.* 37 Fed. Rep. 497; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746; *Bond v. Jay*, 7 Cranch, 350, 3 L. ed. 367; *The Ohio v. Stunt*, 10 Ohio St. 587; *Collier v. Davis*, 94 Ala. 456; *People v. Caesar*, 1 Park. Crim. Rep. 645; 1 Bishop, Mar. & Div. §§ 353, 657; 2 Nelson, Mar. & Div. 568; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *People v. Mosher*, 2 Park. Crim. Rep. 195; *Tenny v. Porter*, 61 Ark. 329; *Bank of Harrison v. Gibson*, 60 Ark. 269.

Messrs. Blackwood & Williams also for appellee.

Riddick, J., delivered the opinion of the court:

This is an action against a foreign insurance company in which the state, through her attorney general, claims a penalty of \$5,000. The question presented is whether a foreign corporation, doing a fire insurance business in this state, subjects itself to a penalty, under the recent statute against trusts and combinations, by entering into an agreement with other insurance companies for the purpose of fixing rates of insurance in foreign countries, when such agreement is neither made in this state, nor intended in any way to affect the prices or premiums to be paid for insuring property in this state. As the legislature has the power to entirely exclude foreign insurance companies from doing business in this state, it can, of course, dictate the terms upon which such companies may do business here. The whole matter rests in the discretion of the legislature. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357. There is no controversy on this point, but the attorney general contends that no insurance company, while a member of a trust or combination to fix rates in any portion of the world, can do business here, without becoming liable to a penalty under our statute. The defendant, on the other hand, denies that the language of the statute in question carries the meaning contended for by the attorney general, and the question before us has reference, not to the power of the legislature,—for that is conceded,—but to the proper construction and meaning of the statute.

The statute in question, so far as it affects this case, provides that "any corporation organized under the laws of this state or any other state or country, and transacting or conducting any kind of business in this state, or any partnership or individual . . . who shall create or enter into or become a party to any pool, agreement, contract, combination, association, or confederation to fix or limit the price or premium to be paid for insuring property against loss or damage by fire, shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties as provided by this act." Act March 6, 1899. Another section provides that "any person or corporation violating any provisions of the act shall forfeit 45 L. R. A.

not less than \$200 nor more than \$5,000 for every such offense, and each day such corporation or person shall continue to do so shall be a separate offense."

Before proceeding to discuss the language of this statute, we will notice an argument on the part of the attorney general to the effect that the intention of the legislature that this statute should have the broad meaning contended for by him is conclusively shown by the fact that, after he had placed such construction upon the statute, the legislature rejected a proposed amendment expressly limiting its effect to combinations formed to affect prices in this state. This argument assumes that the only reason moving members of the legislature to oppose such amendment was that they agreed with the attorney general in his construction of the act, and desired the act to stand as he construed it. But how can we know that this assumption is true? While some members may have acted from that motive, is it not just as reasonable to suppose that others differed with him in his construction of the law, and voted against the amendment on the ground that it was unnecessary and a needless waste of time to pass an amendment in order to make the law mean what they supposed it already meant? The settled rule, established by the highest authority, is that but little weight should be attached to expressions of individual members of the legislature, or to the fact that certain amendments were rejected. *Aldridge v. Williams*, 3 How. 24, 11 L. ed. 476, opinion by Chief Justice Taney; *Black, Interpretation of Laws*, 226. These matters are liable to be misunderstood. It is not always true that those members who speak are the most influential, or that those who speak express the views of those who do not speak, and we therefore have no means of knowing the reasons that influenced the legislature in voting down the amendment. To determine the meaning of a statute, the courts must look mainly to the language of the act itself; for that is the final expression of the legislative will, and therein must such will and intention be sought. Whatever the legislature may have intended, such intention can have no effect unless expressed in the statute, for this, being a penal statute, cannot be extended by implication. It would be in the highest degree unjust to punish conduct not clearly forbidden by the law itself. *Casey v. State*, 53 Ark. 336. And so, to quote the words of a recent opinion of the Supreme Court of the United States, "we are left to determine the meaning of this act as we determine the meaning of other acts, from the language used therein." *United States v. Trans-Missouri Freight Asso.* 166 U. S. 318, 41 L. ed. 1020.

The words of the statute to which counsel for state attach such a wide meaning are, "any corporation," "any partnership or individual," "any pool, agreement, contract, combination." It will be noticed that these are general words. The statute nowhere expressly says that it was intended to have the wide extraterritorial effect which

the construction of counsel for the state necessarily imputes to it.

Now, in determining the meaning of this statute, we must keep in mind certain well-known rules of construction, based on reason, and so well settled that members of the legislature must be supposed to have been familiar with them, and to have had them in view, in framing the law. One of these rules is that the legislature is presumed to intend that its statutes shall not apply to acts or contracts done or effected beyond the limits of the state, and having no reference to, or effect upon, persons or property in this state. As the legislature of each state assembles to legislate especially for the benefit of the people of that state, it is reasonable to suppose, when the statute does not expressly show to the contrary, that it was not designed to punish acts done, or contracts made, in foreign countries, and affecting only the people of such countries. For this reason, although the legislature may use general words, such as "any" or "all," in describing the persons or acts to which the statute applies, still it does not follow that the law has an extraterritorial effect; for it is presumed that the legislature did not intend to have such effect unless the language of the statute admits of no other reasonable interpretation. *Bond v. Jay*, 7 Cranch, 350, 3 L. ed. 367. The reports furnish numerous instances of the application of this rule, by which general words used in statutes are taken as limited to cases within the jurisdiction of the legislature passing the statute, and confining its operation to matters affecting persons and property in such jurisdiction. It will be necessary to notice only a few of such cases.

In the case of *United States v. Palmer*, 3 Wheat. 610, 4 L. ed. 471, there was a prosecution under a statute which provided for the prosecution and punishment of "any person or persons" committing murder or robbery upon the high seas. Chief Justice Marshall, discussing in that case the question whether the act applied to all persons committing such crimes, or only to those owing allegiance to the United States or committing the offense against her citizens, said that no doubt Congress had power to enact laws punishing pirates, although they may be foreigners and may have committed no particular offense against the United States. He admitted that the words, "any person or persons," used in the statute, were broad enough to comprehend every human being; but he said that such general words must be limited in some degree, and he held that it was offenses against the United States, not offenses against the human race, that Congress by the law intended to punish. "Every nation," he said, "provides for such offense the punishment its own policy may dictate, and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government."

So, a learned English court, construing an act of Parliament which abolished certain weights and measures, and enacted "that

any contract, bargain, or sale made by any such weights or measures shall be wholly null and void," held that the general words used in the law should be limited to contracts in which the goods bought or sold were to be weighed in that country, and that the statute, though the words used were as broad as those under consideration here, had no application to contracts, though made in England, when the goods were to be weighed in a foreign country. *Rosseter v. Cahlmann*, 8 Exch. 361.

If it were necessary, hundreds of cases and statutes could be referred to in which general words are thus limited. It is common for penal statutes to contain general words such as "any" or "all," in order to cover all persons of the kind referred to in the state where the legislature assembles; but these general words must necessarily be treated as limited in some respects, otherwise innumerable conflicts between the laws of different states and countries would result, and unutterable confusion be brought into the law. Among the vast number of cases construing such statutes, it is doubtful if one can be found in which such general words have not been treated as limited to some extent, for it is unusual for a legislature to intend that its statutes shall apply over the whole world. For these reasons, we think the words, "any pool or coinnation," used in the statute here, must also be treated as limited, and we cannot adopt the broad construction contended for by the state's counsel.

The cases cited by the attorney general on this point do not, we think, support his construction of this statute. Take, for instance, the case of *Leonard v. Com., Cassidy*, 112 Pa. 620, cited by him, in which the court construed a section of the Constitution of Pennsylvania which provided that "any person who shall while a candidate for office be guilty of bribery, fraud, or wilful violation of any election law shall be forever disqualified from holding any office of trust or profit in this commonwealth." The court held that this meant "any election law then in existence or thereafter to be passed by the legislature, which that body had a right to pass." It will be noticed that the court limited the general words "any election law" to laws passed by the legislature of Pennsylvania. But, if the court had applied the rules of construction contended for here by counsel for the state, the words, "any election law," would have included the election laws of every state or country, so as to prohibit persons violating such laws in another state from afterwards holding office in Pennsylvania. But no such broad construction was suggested by either court or counsel in that case.

Again, take the illustration that the attorney general makes of a man in Missouri who shoots and kills a person in this state. He says that such a man could be indicted and punished here. Suppose that this is so, still the argument is not in point, for the defendant here denies that, either in Missouri or elsewhere, it has entered into or

made any combination to affect rates in this state. In other words, to continue the illustration, it denies that it has shot or killed any man in this state, yet the state, by its demurrer, says that this is not a good answer.

But let us follow the argument of counsel for the state, and see whither it would lead. The defendant company is an English corporation, engaged in the business of fire insurance. It may, and probably does, carry on such business, not only in America, but also in Europe and Asia. Now, under the construction which counsel for the state seeks to have placed on this statute, if this English company, while doing business here, should, at its office in England, enter into an agreement with other foreign companies, for the purpose of fixing rates of fire insurance in Hong Kong or in the city of Canton, China, it would at once become liable to a penalty, under our statute; for counsel for the state contend that the words, "any pool or combination," used in the statute, embrace such combinations in any portion of the world. This, we admit, is the logical result of their construction of the law. There is no middle ground. Either the act applies only to combinations affecting persons, property, or prices in this state, or its scope is unlimited. If this be the meaning of the statute, then, if the attorney general was informed that a company doing business here had entered into a combination in Japan or South Africa fixing rates of fire insurance in those countries, he would be required to institute an inquiry, and perhaps to take proof. It is easy to see that, under such a law, litigation might take a wide range, for the field of evidence would be as wide as the habitable globe. Investigations of that kind would be expensive. The time of the attorney general and the courts of the state would often be consumed by controversies concerning trusts and combinations in different parts of the world, having no reference to, or effect upon, the people of this state. If the legislature intended the statute to have such a broad scope, it should have expressly said so in plain words.

It is so unusual for a legislature to intend that its acts shall have such world-wide effect that courts are never justified in putting such construction upon them, if their language admits of any other reasonable interpretation. *Bond v. Jay*, 7 Cranch, 350, 3 L. ed. 367. Such a construction might result in defeating the main purpose in passing the act, for it is evident that one object in passing the act was to encourage competition. By preventing the combinations and agreements named in the act, the legislature wisely intended to stimulate competition, and thus reduce prices. But it might happen that a company willing to lower prices here might, by force of circumstances, be compelled to enter such combinations in certain foreign countries whose laws permit them. If such a company can for that reason only be shut out from doing business here, although its contract as to prices in such foreign country had no reference to, or

effect upon, prices here, competition, instead of being increased, might be lessened, and prices thereby increased.

Again, this statute not only forbids corporations from entering into pools and combinations, but it also forbids individuals, persons, and partnerships, and they are subjected to like penalties. Now, while the legislature can dictate the terms under which corporations of other states may do business here, it does not have such control of the citizens. If a merchant of Missouri, doing business also in this state, should enter into a pool or combination in Missouri to regulate prices there, but not intended to have effect in this state, our legislature could not, on that account, prevent him from doing business here or subject him to a penalty. So, if we adopt the construction contended for by the attorney general, we must assume, as to a portion of the statute, that the legislature was attempting to do something it plainly had no right to do, and such portion must be treated as unconstitutional and void. But the courts always endeavor to avoid declaring an act, or any part thereof, unconstitutional. If it can reasonably be done, they avoid such a result by giving the statute such a construction as will enable it to take effect in all its parts; for the presumption is that the legislature intended the whole act to take effect. This furnishes another reason why the construction contended for by counsel for the state should not be adopted.

Our conclusion is that this statute does not apply to pools or combinations formed outside of this state, and not intended to affect, and which do not affect, persons, property, or prices of insurance in this state. In other words, we are of the opinion that the legislature, by this act, did not intend to prohibit or punish acts done, or agreements made, in foreign countries, by corporations doing business here, when such acts or agreements have reference only to persons, property, or prices in such foreign countries. We therefore hold that the answer sets up a valid defense, and that the demurrer thereto was properly overruled.

Entertaining no doubt of the correctness of the judgment of the Circuit Court, the same is affirmed.

Wood, J., concurring:

The proposition, when analyzed, is exceedingly simple. The legislature has no extraterritorial power to punish crime. The crime specified in this act is the entering into, becoming "a member of, or a party to, any pool," etc., "to fix or limit the prices or premiums to be paid for insuring property against loss or damage by fire," etc. If a foreign corporation doing business in this state enter into, or become a member of, this pool or trust beyond the limits of the state, then the crime is clearly committed beyond the limits of the state, unless the pool or trust is to fix the premiums for insuring property in Arkansas, in which event the crime put in motion in the foreign state

takes effect and becomes complete in Arkansas. Just as in the cases cited by the attorney general, where a man in one state throws a stone or shoots a gun across the line and kills a man in another state, or forms a conspiracy in one state to burn or destroy property in another state, the crime, in such cases, becomes complete where the person is killed or where the property is destroyed. But where the foreign corporation enters into, and becomes a member of, a pool or trust in a foreign state, which does not purport to, and does not, in any manner, affect the property of the people of this state, of course no crime is committed in this state.

The legislature certainly did not intend to make a crime and punish the mere act of doing business in this state by a foreign insurance company, although a member of a pool or trust, whether in or out of the state; for the very gravamen of the crime is entering a pool or trust to fix the price or premiums to be paid for insuring property, etc. Now, suppose the member of the pool or trust in the foreign state proposed to do business, and did business, in Arkansas on a strictly competitive basis, which tended to cheapen and lower the rates of insurance to the people of this state; could any dispassionate lawyer say that the legislature intended by this act to punish such a beneficial and commendable deed as that? Certainly not. The legislature manifestly was intending to correct an evil existing which affects, or might affect, injuriously the people of this state.

Now, the prohibiting of foreign corporations from doing business in this state on any terms and conditions that the legislature may prescribe is one thing, and the punishing of them for any crime they may commit is another, and entirely different thing. As to the former,—the privilege to do business,—the legislature had the power to say: "Foreign corporations, you cannot do business in this state if you are a member of a pool or trust to fix or limit prices anywhere in the wide world." As to the latter,—the entering the pool or trust,—they could only say: "You will be punished with the severe penalties demanded by the act, if you are a member of a pool or trust to fix the price or premium upon property in Arkansas." As the legislature had no power to punish foreign corporations for becoming members of a pool or trust outside of the state, which do not propose to affect prices in the state, and as it did have full power to punish them for entering pools or trusts to affect prices or premiums in Arkansas, and also to forfeit their right to do business in this state, is it not conclusive that they intended by the words, "any pool or trust," to mean any pool or trust to fix the price or premium on prop-

erty in this state? We must not convict the legislature of doing, or attempting to do, a vain and idle thing. Had the legislature intended to exclude foreign corporations that were members of a pool or trust anywhere in the world to fix prices anywhere, how easy would it have been to have made it unlawful for such corporations to do business in this state, and to have provided sufficient penalties for the violation of such law to secure its enforcement! But no such thing as that was provided in the act under consideration. The purpose of the legislature is doubtless correctly reflected in the title, "An Act Providing for the Punishment of Pools, Trusts, and Conspiracies to Control Prices," etc. The fact that the legislature embraced the other persons named in the act along with foreign corporations shows that it intended that these corporations might be considered as violating the law in the same way as any "partnership or individual or any other association or persons whatever" might do. It is an egregious mistake to suppose that a foreign corporation is guilty of an offense for merely doing business in this state, or to consider the act of doing business as an element of the offense under this law. It would be no more an offense for them to do business than for domestic corporations or individuals to do business. Foreign corporations are expressly authorized to do business. The doing of business by them is not an ingredient of the offense at all. The words, "and transacting or conducting any kind of business in this state," applied to them, are used in the sense merely of *descriptio personarum*. They merely indicate that these corporations are within the legislative jurisdiction because of the fact of their doing business in this state. There are no separate acts conjoined as the attorney general supposes and argues, but one act. The proof which would establish the crime would also establish the forfeitures of the right to do business in the state. The legislature could both forfeit the right of the insurance company to do business and punish for the crime of entering a pool or trust to fix the price or premium, if the act was done in, or became complete and effectual in, Arkansas, but it could not punish for the crime unless it did. Therefore the fact that the legislature has included individuals and domestic and foreign corporations, and has prescribed, as a result of the violation of this act, both a penalty for the crime committed and a forfeiture of the right to do business, shows conclusively that, as to foreign corporations, it could only have intended to reach such of these corporations as were in a pool or trust in this state or in a foreign state to regulate prices in this state.

KENTUCKY COURT OF APPEALS.

ÆTNA INSURANCE COMPANY *et al.*,
Appts.,
v.

COMMONWEALTH of Kentucky.

(.....Ky.....)

1. Contracts regulating insurance rates are not within Stat. § 3915, prohibiting combinations to regulate, control, or fix the price of "any merchandise, manufactured articles, or property of any kind."
2. A combination for the purpose of maintaining rates of insurance, although it may be a void contract, is not an indictable offense at common law.
3. Valid service of summons on a misdemeanor indictment against a foreign insurance company may be made under Stat. § 631, requiring consent to service of process on the commissioner "in any action," and Crim. Code, § 147, providing that process upon indictments shall be served as in civil actions.

(Guffy, J., dissents from propositions 1 and 2.)

(June 15, 1899.)

APPEAL by defendants from a judgment of the Circuit Court for Franklin County convicting defendants of conspiring to stifle free competition among fire insurance companies as to rates. *Reversed.*

The facts are stated in the opinion.

Messrs. S. E. Sloss and W. W. Thum, for appellants:

The indictment is bad upon two grounds:

1. Because it is defective in form and wholly insufficient in stating the facts of the alleged offense so as to apprise defendants of the offense charged in order that the judgment therein would be a bar to any other prosecution for the same offense. This is true whether the offense attempted to be described be a criminal conspiracy by statute or at common law, or whether it be such by reason of the object being unlawful or whether by reason of the use of unlawful means in accomplishing the object.

Crim. Code, §§ 122-124; *Com. v. Ward*, 92 Ky. 159; *United States v. Walsh*, 5 Dill. 58; *March v. People*, 7 Barb. 391; *Lambert v. People*, 9 Cow. 578; *State v. Parker*, 43 N. H. 83; *State v. Keach*, 40 Vt. 118; *State v. Roberts*, 34 Me. 320; *State v. Mayberry*, 48 Me. 218; *State v. Ripley*, 31 Me. 386; *Com. v. Wallace*, 16 Gray, 221; *Com. v. Prius*, 9 Gray, 127; *Wright, Criminal Conspiracies*, 205, 211, 257.

2. The combination of insurance companies for inspection in common and to fix rates of insurance is no criminal offense in Kentucky by common law or by statute, and the indictment does not describe any offense known to the law. Kentucky courts announce that only such rules of the common law of England and acts of Parliament as

are of a general, and not local, nature to that Kingdom, and were in force prior to 1607, are adopted by this state, and "that no rule of the common law not then recognized and in force in England should be recognized and enforced here."

Lathrop v. Commercial Bank, 8 Dana, 121, 33 Am. Dec. 481; *Ray v. Sweeney*, 14 Bush, 2, 29 Am. Rep. 388.

No case for conspiracy other than under statute can be found in England prior to 1607, though it is remarked that a conspiracy to falsely indict a man for murder would be a conspiracy at common law. The then existing statutes against combinations to raise wages and to raise prices of food stuffs, etc., on the way to market have never been extended beyond their terms, and do not embrace the subject-matter here. There are no conspiracies punishable at common-law except those involving fraud, malice, political conspiracies, conspiracies to commit crimes, to maintain false suits and prosecutions, etc. Combinations in the business world in restraint of trade, etc., while in many cases void as against public policy so that contracts made in pursuance thereof are not enforceable, are not unlawful in the sense of being criminal.

Wright, *Criminal Conspiracies*, chap. 1, and notes (accompanied by Carson's American Cases): Sir J. S. Stephen, *History of the Criminal Law of England*, chap. 30; *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 616 [1892] A. C. 25; *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483; *Anheuser-Busch Brewing Asso. v. Houck* (Tex. Civ. App.) 27 S. W. 602; *Continental Ins. Co. v. Board of Fire Underwriters*, 67 Fed. Rep. 313; *State v. Rickey*, 9 N. J. L. 364; *Huston v. Reutlinger*, 91 Ky. 333; *Schulten v. Bavarian Brewing Co.* 96 Ky. 224; *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613; *Brewster v. C. Miller's Sons*, 19 Ky. L. Rep. 593, 38 L. R. A. 505; *Kentucky Wagon Mfg. Co. v. Ohio & M. R. Co.* 98 Ky. 152, 36 L. R. A. 850; *Hetterman v. Powers*, 19 Ky. L. Rep. 1087, 39 L. R. A. 211; *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L. R. A. 464; *Union P. D. & G. R. Co. v. Cook*, cited in 50 Am. & Eng. R. Cas. 89, note; *Fire Ins. Cos. v. State*, 75 Miss. 24; *United States v. Addyston Pipe & S. Co.* 54 U. S. App. 723, 85 Fed. Rep. 271, 29 C. C. A. 141.

The Kentucky statute being broader than the common-law statutes, and embracing the subject-matter of those statutes, and many other matters besides, and being general in its character, supersedes and substitutes all previous laws existing on the subject of pools, trusts, and combinations.

Ky. Stat. § 3915; Ky. Const. § 198; *Endlich, Interpretation of Statutes*, § 203; *Com. v. Cooley*, 10 Pick. 37; *Com. v. Marshall*, 11 Pick. 350, 22 Am. Dec. 377; *State v. Boogher*, 71 Mo. 631; *Toule v. Marrett*, 3 Me. 22, 14 Am. Dec. 206; *Broadus v. Broadus*, 22

NOTE.—See the preceding case of *State v. Lancashire F. Ins. Co.* (Ark.) ante, 848, and footnote thereto; also *State, Crow, v. Firemen's Fund Ins. Co.* (Mo.) post, 863.
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10 Bush, 299; *Patterson v. Com.* 86 Ky. 313; *Smith v. Mattingly*, 96 Ky. 228; *Buchannon v. Com.* 95 Ky. 334; *Long v. Stone*, 19 Ky. L. Rep. 246.

Criminal statutes may be confined to the matters embraced in them, and no one can be deprived of his life, liberty, or property by virtue of criminal laws, unless the same be definite, and expressly and clearly embrace the supposed offense charged.

Louisville & N. R. Co. v. Com. 18 Ky. L. Rep. 483; *Endlich*, Interpretation of Statutes, 329-339; *State v. Powers*, 36 Conn. 77; *Com. v. Cooke*, 50 Pa. 201; *Western U. Teleg. Co. v. Aetell*, 69 Ind. 199; *Lair v. Killmer*, 25 N. J. L. 522; *City v. Wright*, 4 Phila. 138; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *Proctor v. Manwaring*, 3 Barn. & Ald. 145.

Messrs. W. S. Pryor, Firtle & Trabue, and Paddock, Wright, & Billing also for appellants.

Mr. W. S. Taylor, Attorney General, with *Mr. Robert B. Franklin*, for appellee:

It is an indictable offense at common law to conspire to do any act the manifest tendency of which is to affect injuriously the public or any class or body of men. And where a purpose to be accomplished is a manifest injury to the public, the means for its accomplishment need not be specifically stated in the indictment.

Fire Ins. Cos. v. State, 75 Miss. 24; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390; *Huston v. Reutlinger*, 91 Ky. 333; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Hilton v. Eokersley*, 6 El. & Bl. 47; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221; *Judd v. Harrington*, 139 N. Y. 105; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 395; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186; *People, Peabody, v. Chicago Gas Trust Co.* 130 Ill. 288, 8 L. R. A. 497; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361; *King v. De Berenger*, 3 Maule & S. 67, 3 Chitty, Crim. L. 1139; 4 Am. & Eng. Enc. Law, *Criminal Conspiracy*, by Robert Desty, pp. 582-640; *King v. Journeymen-Tailors*, 8 Mod. 10; *Queen v. Kenrick*, 5 Q. B. 49; *King v. Eodes*, 3 Dougl. 337; *Reg. v. Parnell*, 14 Cox C. C. 508; *Levi v. Levi*, 6 Car. & P. 239; *Note to Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193; *State v. Buchanan*, 5 Harr. & J. 317, 9 Am. Dec. 534, note; *State v. Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649, note; *Crump v. Com.* 84 Va. 927; *People v. Richards*, 1 Mich. 216, 51 Am. Dec. 75, 92, note; *Miffin v. Com.* 5 Watts & S. 461, 40 Am. Dec. 527; *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79; *Com. v. Ward*, 92 Ky. 158; *Com. v. Ward*, 1 Mass. 473; *Com. v. Judd*, 2 Mass. 329, 3 Am. Dec. 54; *State v. Burnham*, 15 N. H. 396; *People v. North River Sugar Ref. Co.* 54 Hun, 354, 5 45 L. R. A.

L. R. A. 386; *State v. Norton*, 23 N. J. L. 40; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657; *Beechley v. Mulville*, 102 Iowa, 602; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259; *Roberson*, Ky. Crim. Law & Procedure, § 94.

The indictment complained of in this case alleges specifically a combination to stifle and kill the effect of free competition in insurance rates, and thereby to enable the defendants to extort from the insuring public large sums of money which they would not obtain if such competition were not stifled. This indictment was sufficiently specific.

Mr. M. H. Thatcher also for appellee.

Du Relle, J., delivered the opinion of the court:

This appeal is from a judgment of conviction under an indictment charging appellants with "the offense of unlawfully conspiring, by persuasion, intimidation, and force, to counteract, avoid, stifle, and kill the effect of free competition among fire insurance companies and agents engaged in and offering to do a fire insurance business in the city of Frankfort, county of Franklin, and state of Kentucky, committed as follows, viz.: The said *Ætna Insurance Company*, a corporation organized under the laws of the state of Connecticut [and eighty-six others], in the said city of Frankfort, county of Franklin, and state aforesaid, on the 22d day of September, 1898, and within one year before the finding of this indictment, did then and there, each with the other, and with other persons, associations, firms, and corporations to this grand jury unknown, unlawfully conspire, confederate, combine, enter into, maintain, consummate, and continue an unlawful pool, trust, conspiracy, confederation, combination, compact, and agreement intending and contriving thereby to persuade, intimidate, compel, and force all agents and companies then and there engaged in and offering to do a fire insurance business to enter into, maintain, consummate, and continue said unlawful pool, trust, conspiracy, combination, confederation, compact, and agreement, the objects, aims, and ends of which were then and there to counteract, avoid, stifle, and kill the effect of free competition among all insurance companies and agents then and there engaged in and offering to do a fire insurance business, to fix and maintain the cost of fire insurance to the insuring public at a greater premium rate than would otherwise have to be paid, and thus unlawfully to exact, extort, and procure great sums of money from citizens of this commonwealth owning and insuring property in the city of Frankfort, county of Franklin, and state aforesaid, which said great sums of money said citizens would not have to pay but for the existence of said unlawful pool, trust, conspiracy, combination, confederation, compact, and agreement and which said unlawful pool, trust, conspiracy,

combination, confederation, compact, and agreement so as aforesaid entered into, consummated, maintained, and continued by the parties aforesaid is of grievous prejudice and hurt to the common and public good and welfare, of evil example, and against the peace and dignity of the commonwealth of Kentucky." To sustain this charge of conspiracy, the commonwealth introduced the constitution and by-laws of the Kentucky and Tennessee board of fire underwriters and the Frankfort board of underwriters, to show the objects of the associations named, together with the evidence that appellants were engaged in fire insurance business at Frankfort through agents who were members of the Frankfort or local board. Not all of the appellants were members of the Kentucky and Tennessee board, but all appear to have done business in Frankfort through members of the local board. The Kentucky and Tennessee board was an association of fire insurance companies doing business in the two states named; the object stated in its constitution being, "to organize and maintain local boards, to establish and enforce uniform commissions, adequate rates, correct forms of policies, and to inculcate sound principles of underwriting." Each company desiring membership was required to subscribe to the constitution and by-laws through its representatives, "thereby pledging itself to the objects and regulations of the association, and every member of this association shall require its agents to unite with local boards, and co-operate actively therewith; but all rules and rates of the association must be enforced by members, whether adopted by the local boards or not." The by-laws require the secretary, "under the direction of the executive committee, to promulgate rates and rules of the association." The Frankfort board, entitled "The Local Board of Fire Insurance Agents of Frankfort, Kentucky," had for one of its objects, as declared by its constitution, the establishment "and maintenance of adequate and equitable rates." Membership was confined to agents of companies and officers of local companies, and no person was eligible to be a member who was in any way interested in insurance business with a person or company not a member, "unless they also are governed by all the rules and rates adopted by the board." Every member was required "strictly and rigidly to adhere to the rules and rates adopted by the board, without deviation in letter or spirit." By the by-laws, provision was made for an executive and rating committee to survey and report risks. The surveys and rate books issued to members were the property of the board, and returnable upon its order. Misrepresentation or improper means of interference by agents subjected the party offending to charges. No agent was allowed to employ a solicitor or broker. Members were forbidden to attempt to create or foster prejudice against the state association, the local board, or its members. There were provisions against dividing commissions,

and writing risks outside the jurisdiction of the board at less than the established rate at the locality of the risk. Obedience to these regulations was to be enforced according to a schedule of penalties fixed in the by-laws, and members were to be punished for violation of rules or rates by suspension from membership, after hearing, upon a two-thirds vote, followed by a request to the companies of such agent that his commission be canceled. Testimony was introduced tending to show that a considerable increase had taken place in the rate of insurance in Frankfort and vicinity after the establishment of these boards. It is not necessary here to go further into the testimony.

A number of questions are presented upon this appeal, and have been most elaborately argued by counsel. Among other grounds for reversal presented, it is urged that under the ruling in *Com. v. Ward*, 92 Ky. 158, the indictment did not sufficiently set forth the facts stating the offense attempted to be charged; that the evidence was insufficient to sustain the charge; that this was especially true as to the so-called nonboard companies, which were not members of either board, and against whom the only testimony connecting them with the alleged conspiracy is the fact that they employed agents in Frankfort who were members of the local board, thereby adopting the rates promulgated by that board; that the service and summons upon the insurance commissioner were not sufficient to bring the defendants before the court to answer an indictment; and that the instructions did not present the law to the jury. But the underlying question, which, if answered in the negative, renders the consideration of these questions unnecessary for the disposition of this case, is whether, either by the common law or under the statute, there is in this commonwealth such an offense as that attempted to be described in the indictment. This question we shall consider first.

It was conceded by counsel representing the commonwealth, both in oral argument and brief, that this proceeding was not instituted under the statute, but under the common law; and a careful examination of the statute has convinced us that it does not apply to a case like the one at bar. It provides (Ky. Stat. § 3915) "that if any corporation under the laws of Kentucky, or under the laws of any other state or country for transacting or conducting any kind of business in this state, or any partnership, company, firm, or individual, or other association of persons, shall create, establish, organize, or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation, or understanding with any other corporation, partnership, individual, or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured articles or property of any kind, or shall enter into, become a member of, or party to, or in any way interested in, any pool, agreement, contract, understanding, combination,

or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property, commodity, or merchandise to be produced or manufactured, mined, bought, or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act." The language used would indicate that the statute was intended to prevent pools and trusts forming for the purpose of fixing the price of merchandise and manufactured articles. Without giving undue weight to the argument that the punctuation shows the word "property" to be qualified by the adjective "manufactured," it seems certain that the *ejusdem generis* rule of construction does apply, and that property referred to in the section was property of the same general class or nature as that described previously by the words "merchandise and manufactured articles." And while it may be admitted that a contract, either for labor, or for indemnity against contingent loss, like an insurance contract, when executed, becomes property, because it is then a chose in action, the right to enter into such contracts, which belongs to all persons capable of contracting,—as well natural persons as artificial ones authorized by their organic law to make such contracts,—would hardly be considered to be included by the word "property," unless that word were used in a much broader sense than it is customarily used by lawyers or in statutes. We conclude, therefore, that the word "property," as used in the statute, does not include the right to enter into a contract of insurance, nor to fix the terms upon which such a contract will be made.

This brings us to consider whether, by the common law, as adopted into the jurisprudence of Kentucky, the acts whereof appellants have been charged, constitute an indictable offense. And we should inquire further whether the English common law, at the time of its importation into our system, contained a principle which, by natural growth and expansion to meet the needs of social progress in a civilized state, has so enlarged its original scope as to include those acts in the catalogue of public offenses. On behalf of the commonwealth it is contended with great ability and fervor that criminal conspiracies—that is, conspiracies that were indictable at common law—included three classes: First, conspiracies to do an unlawful or indictable thing; second, conspiracies to accomplish a lawful purpose by means which were themselves unlawful or indictable; and, third, conspiracies to do a wrong affecting the general public, or an individual thereof, though neither the acts done to accomplish the end nor the end itself, would be in themselves indictable, but for the conspiracy. Perhaps as clear and compact a statement of the commonwealth's contention as can be given is to be found in an extract from the article by Mr. Robert Desty on Criminal Conspiracies, in the American and English Encyclopædia of Law, vol. 4, p. 583: "A criminal conspiracy is (1) a corrupt com-

bination (2) of two or more persons, (3) by concerted action, to commit (4) a criminal or an unlawful act, (a) or an act not in itself criminal or unlawful, by criminal or unlawful means; (b) or an act which would tend to prejudice the public in general, to subvert justice, disturb the peace, injure public trade, affect public health, or violate public policy; (5) or any act, however innocent, by means neither criminal nor unlawful, where the tendency of the object sought would be to wrongfully coerce or oppress either the public or an individual. It is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end, that constitutes a criminal conspiracy. The unlawful thing must either be such as would be indictable if performed by one alone, or of a nature particularly adapted to injure the public or some individual by reason of the combination. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal; it is enough that they are wrongful—that is, amount to a civil wrong. . . . Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is an indictable offense, regardless of the means whereby it is to be accomplished." 2 Bishop, Crim. L. § 172, is to substantially the same effect: "Conspiracy is the corrupt agreeing together of two or more persons to do by concerted action, something unlawful, either as a means or as an end. The unlawful thing must be such as would be indictable performed by one alone, or, not being such, be of a nature particularly adapted to injure the public, or some individual, by reason of the combination." Relying upon these text-writers, and upon the expressions of courts in a number of adjudged cases, the commonwealth urges that fire insurance, in the progress of civilization, has grown to be an everyday necessity; that a combination to prevent free competition among those engaged in the business is against public policy; that, at common law, all combinations to raise the cost of necessities were indictable, and therefore this combination is indictable here. Considerable argument on the other side is devoted to the attempt to show that the combination here complained of is not only not obnoxious as against public policy, but a positive benefit to the public, since by the maintenance of adequate rates it secures the companies bound by it against doing business in a manner which might render them insolvent, and thereby cause loss to the policy holders. This argument, which is plausible, if not convincing, need not be here considered.

In this state the law seems to be well-settled that agreements in restraint of trade or commerce are so far against public policy as to be illegal, in the sense of being void and not enforceable. *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390. In *Huston v. Reut-*

linger, 91 Ky. 333, it was held that an association of underwriters almost exactly similar to the ones now in question, organized "for the purpose of securing uniformity in the rates of premiums, harmony in the conditions of insurance," etc., was void, in so far as it undertook to regulate the employment of solicitors, the time of employment, and the compensation to be paid. And while there are decisions on the subject holding that the business of insurance, as carried on in one state by a company incorporated in another, was not commerce between the states (*Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 297), and in which it has been held that a dealer in foreign exchange was not engaged in commerce, but merely in supplying an instrument of commerce (*Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993), this court seems to have had no difficulty in holding that a combination in restraint of the exercise of the right to contract for labor was against public policy, and an agreement to be bound by the rules of such combination was void. We shall assume, therefore, that under the cases of *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, and *Huston v. Reutlinger*, 91 Ky. 333, and *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613, the agreement whereby appellants and their agents became members of the associations mentioned was against public policy and void, in so far as it restrained or prevented free competition in the fire insurance business, and shall proceed to consider whether such a combination was an indictable offense by the common law as we obtained it, or included within the spirit of the common-law doctrine as to criminal conspiracies. In *Lathrop v. Commercial Bank*, 8 Dana. 121, 33 Am. Dec. 481, in an opinion by Chief Justice Robertson, this court, construing the question of how far the common law of England was adopted by Kentucky, said that only such principles of the common law as had been adjudicated before the fourth year of James I. had been adopted in Kentucky. The history of the adoption is given as follows: "By an ordinance of 1776, Virginia adopted 'the common law of England, and all statutes or acts of Parliament made in aid of the common law, prior to the fourth year of King James I., and which (were) of a general nature, and not local to that Kingdom.' And the 8th section of the 6th article of the Constitution of Kentucky adopted, with certain qualifications, 'all laws which, on the 1st of June, 1792, were in force in the state of Virginia.' Unless the British mortmain acts were in force in Virginia on the 1st of June, 1792, they have never been in operation in Kentucky. Virginia had never, prior to June, 1792, specially enacted any mortmain statute; and, therefore, if the mortmain acts of England, prior to the fourth James I., were all 'local to that Kingdom,' no part of them was ever in force in either Virginia or Kentucky." In *Ray v. Sweeney*, 14 Bush, 2. 29 Am. Rep. 388, in an opinion by Judge Cofer, 45 L. R. A.

the court said: "By an act of the Virginia convention of 1776 it was declared 'that the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James I., and which are of a general nature, and not local to that Kingdom . . . shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony.' Morehead & B. Ky. Stat. 612. The present Constitution provides, and previous Constitutions in substance provided, that 'all laws which on the first day of June, 1792, were in force in the state of Virginia, and which are of a general nature, and not local to that state, and not repugnant to this Constitution, nor to the laws which have been enacted by the general assembly of the commonwealth, shall be in force in this state until they shall be altered or repealed by the general assembly.' . . . But only such principles and rules as constituted a part of the common law prior to the fourth year of the reign of James I. are, or ever were, in force in this state. This is clearly implied in the act of 1776. To declare that the common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here. James I. ascended the throne of England in 1603, March 24, and the fourth year of his reign commenced March 24, 1607, and when it is sought to enforce in this state any rule of English common law, as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date." What, therefore, was the common law as to criminal conspiracies in the year 1607? In Mr. Wright's admirable little book upon the Law of Criminal Conspiracies (§ 1), it is said: "There appears to be no evidence that during the first of these periods [A. D. 1200 to 1600] any other crime of conspiracy or combination was known to the common law than that which was authoritatively and 'finally' defined in A. D. 1305 by the ordinance of conspirators (33 Edw. I.), as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds. During the reigns from that of Edward III. to the end of that of Elizabeth various statutes were directed against combinations for treasonable purposes or for breaches of the peace, against combinations by merchants to disturb the markets or prices, and against combinations by masons and carpenters, by victualers to raise prices, and by laborers to raise wages or alter hours; but no mention has been found in any of the writers' reports, or abridgments of the period before the seventeenth century of any kind of conspiracy, confederation, or combination, as being criminal at common law, except the crime of conspiracy as defined by the ordinance of 1305. The process by which this specific

offense has been expanded into the comprehensive title of conspiracy or combination in the modern criminal law is now to be traced." The author then proceeds to trace the expansion of the criminal law of England in this behalf until it "grew into a rule that a combination to commit or procure the commission of any crime was criminal, and might be prosecuted as a conspiracy, although the crime might have nothing to do with the crime of conspiracy, properly so-called." He ascribes the principal share in the earlier stages of this development to the court of star chamber. Speaking of this book, Sir James Fitzjames Stephen, eminent alike as judge and law writer, says in the thirtieth chapter of his magnificent *History of the Criminal Law of England*: "Mr. R. S. Wright, in a work of remarkable learning and ability, collected and commented, with a special view to this particular subject, upon every case ever decided upon the subject of conspiracy. The matter has also been fully discussed in many other works. The result is that the following statement as to the result of the authorities upon the subject may be depended upon: (1) No case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at common law before the year 1825. There is, indeed, one case (that of the journeymen tailors of Cambridge) which may perhaps be an authority the other way, but this appears doubtful. (2) There are some *dicta* to the effect that such combinations would be unlawful. The most important of these is the *dictum* of Grose, J., in *King v. Mawbey* [6 T. R. 636]: 'In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal as, in the case of journeymen conspiring to raise their wages; each may insist on raising his wages, if he can, but if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.' This *dictum* is an illustration not necessary to the decision of *King v. Mawbey*, and founded, as it seems to me, upon the case of the Cambridge tailors. (3) 'Some traces may be found in the ancient books of a doctrine that it may be criminal, independently of combination, for one man to oblige another, by bond or otherwise, to abstain from the exercise of his proper craft or employment.' These traces, however, are very faint, though it is clear enough that the attempt to create monopolies by royal grants, or by the by-laws made by bodies corporate or the like, or to restrain people by contract from exercising their trade, were always held to be illegal, except under certain limitations which do not affect this matter, in such sense as to be void." The result of the examination of the English cases is thus summarized in Stephen's remarkable book: "Such, for the present, is the final result of the long history which I 45 L. R. A.

have been relating. It is one of the most characteristic and interesting passages in the whole history of the criminal law. First there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labor, and end in general provisions, presenting and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the statute law is put upon an entirely new basis, and all the old statutes are repealed, but in such a way as to countenance the doctrine about conspiracies in restraint of trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law, and carry it so far as to say that any agreement between two people to compel anyone to do anything he does not like is an indictable conspiracy, independently of statute."

In the volumes of Wright and Stephen, all the English cases cited on behalf of the commonwealth are considered and discussed, and it is very conclusively shown that prior to 1807 there was no such thing at the common law as criminal conspiracy, except the confederacy for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds, and that whatever may have been the *dicta* of the judges who decided subsequent cases, or the deductions drawn therefrom by some of the text writers, the cases themselves, for more than 200 years thereafter, do not support the contention made on behalf of the commonwealth. There were a large number of statutes against forestalling, engrossing, regrating, and badgering, and a very large number against combinations of laborers and artisans to raise their wages. Some of the latter class were not formally repealed until the year 1875. Of this system of statutes Stephen says: "I should not myself describe it as a system specially adapted and designed to protect freedom of trade. The only freedom for which it seems to me to have been specially solicitous is the freedom of the employers from coercion by their men." The English cases cited on behalf of the commonwealth are all discussed in the works referred to and shown not to sustain appellee's contention. In the case of *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 549, there was a confederation of steamship companies, united to drive their rivals out of the carrying trade between England and China. The question for decision was whether the federation constituted a conspiracy at common law, as being in general restraint of trade, and of particular injury to certain individuals and to the general public. The opinion in the Queen's bench division was delivered by Lord Coleridge. Subsequently, in the appeal division of the Queen's bench, reported in L. R. 23 Q. B. Div. 616, the opinion was delivered by Bowen, L. J. It was subsequently decided in the House of Lords. The opinions of the

judges on the two first hearings, and those of the various law lords upon the final appeal, present a very complete review of all the English cases. Not to occupy too much time in their consideration, it may be remarked that the language of Crompton, J., in *Hilton v. Eckersley*, 6 El. & Bl. 47, relied on for appellee, was disapproved, Lord Halsbury saying in his opinion, [1892] A. C. 39: "I am unable to assent to that dictum. It is opposed to the whole current of authority, it was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the exchequer chamber, and it seems to me contrary to principle." In the opinion of Lord Bramwell in the House of Lords the doctrine was thus stated: "I think, upon the authority of *Hilton v. Eckersley* and other cases, we should hold that the agreement was illegal,—that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground, they must make out that it was an offense, a crime, a misdemeanor. I am clearly of opinion it was not. Save the opinion of Crompton, J. (entitled to the greatest respect but not assented to by Lord Campbell or the exchequer chamber), there is no authority for it in the English law." We think it unnecessary to go further in an examination of the English cases upon this subject. The opinions in the *Mogul Steamship Case* in themselves form a treatise upon the subject, and a very complete discussion of practically all of the English cases upon it. It is evident from this examination that at the time the English common law, and the English statutes of a general nature, became a part of our system, the acts charged as an offense in this case were not indictable. Nor do we think that any such principle has been adopted generally by the states of this Union as would justify us in holding, in the absence of all precedent to that effect in this state, that the acts charged are criminal.

We do not consider it necessary to go into an extended review of the American cases upon this subject, but we shall refer to a few of them. In *Hutchins v. Hutchins*, 7 Hill, 107, Chief Justice Nelson [Chief Justice Shaw in *Com. v. Hunt*, 4 Met. 134, 38 Am. Dec. 346], in an elaborate opinion, in which the English cases are reviewed at length, said: "We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy." To the same effect see *Carew v. Rutherford*, 100 Mass. 14. In a carefully considered 45 L. R. A.

opinion in the case of *United States v. Ad-dyston Pipe & Steel Co.* 54 U. S. App. 723, 85 Fed. Rep. 278, 29 C. C. A. 141,—a case arising under the Federal statute,—Judge Taft, in discussing the statute, said: "Contracts that were in unreasonable restraint of trade at common law were not unlawful, in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Mogul S. S. Co. v. McGregor* [1892] A. C. 25; *Hornby v. Close*, L. R. 2 Q. B. 153; Lord Campbell, Ch. J., in *Hilton v. Eckersley*, 6 El. & Bl. 47, 66; Hannen, J., in *Far-rar v. Close*, L. R. 4 Q. B. 602, 612. The effect of the act of 1890 is to render such contracts unlawful, in an affirmative or positive sense, and punishable as misdemeanors, and to create a right of civil action for damages in favor of those injured thereby and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints." And see *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455; *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L. R. A. 464. In the view we have reached as to this case, it is immaterial to discuss the cases which have arisen under more or less stringent statutes in a number of the states, of which *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 433, upon the one side, and *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657, 4 Inters. Com. Rep. 297, upon the other, are fair examples. There are some cases, it is true, where it seems to have been held that a combination to injure another in his business or reputation constituted an offense or afforded a cause of action. In these the element of malice seems to have been relied on. *Toledo, A. I. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 738, 19 L. R. A. 387, 5 Inters. Com. Rep. 522; *Casey v. Cincinnati Typographical Union*, No. 3, 45 Fed. Rep. 135, 12 L. R. A. 193.

We must not be mistaken as intimating that contracts in restraint of trade, or which prevent a contracting party from accepting employment from or giving it to whomsoever he may desire, are not illegal, in the sense of being void as against public policy. That such contracts are unenforceable is settled law in this state, and in most of the states of the Union. Indeed, the bulk of quotations from adjudged cases given in the very ingenious brief of counsel who represented the commonwealth upon the trial are from cases where this was the question for decision. This is notably the case in his quotations from *Anderson v. Jett* and *Huston v. Reutlinger*, decided by this court. It is true that in *Com. v. Ward*, 92 Ky. 158, this court—misled, doubtless, by similar loose expressions in the text writers—used this language: "A criminal conspiracy is a corrupt combination of two or more persons by concerted action to do an unlawful act, or an act not unlawful by unlawful means, or an act which would tend to prejudice the

general public." But the latter clause of the sentence quoted was not at all necessary to the decision of the case then before the court, and must be considered as *dictum*.

We are not able, from a consideration of the cases decided in this state, to reach the conclusion that the doctrine as to criminal conspiracies to be deduced from the common law and statutes recognized in England prior to 4 Jac. I. has exhibited any such growth in this state as to include any offenses not then cognizable. On the contrary, the tendency in this state in one respect, at least, has been in the other direction. The statutes of Edw. VI., adopted in 1552, were, at the time we got our common law, in full force against forestallers and regrators. But, notwithstanding the English law had been adopted, by which it was unlawful to buy goods on their way to market; to contract to buy them before they came to market; to make any motion, by word, letter, message, or otherwise, to any person for the enhancing of the price or dearer selling of any goods; to buy up dead victuals of any kind in one market in order to sell them at a higher price later at the same place, or within 4 miles,—it was found necessary in Virginia to adopt statutes against forestalling and ingrossing food, in order to obtain provisions for the Revolutionary army. Even more marked has been the progress, or, rather, retrogression, in relation to labor unions. At the time we adopted the English law, the statutes passed in the time of the sixth Edward were in full force, which forbade all conspiracies and covenants of artificers, workmen, or laborers not to make or do their work but at a certain price or rate, under the penalty, on a third conviction, of the pillory and the loss of an ear, and to be taken as a man infamous. There were also in force at that time, unless superseded by the elaborate act of fifth Elizabeth, the statute of 3 Hen. VI., providing that, "whereas by the yearly congregations and confederacies made by the masons in their general chapters and assemblies the good course and effect of the statutes of labourers be openly violated and broken," the chapters should not be holden, those that caused them to be assembled and holden should be "judged for felons, and punished by imprisonment, fine, and ransom." The statute of Elizabeth referred to fixed the hours of work; required all persons able to work, and not possessed of independent means or other employment, to labor on demand; gave power to the justices to fix the rate of wages; and forbade anyone to set up or exercise any craft, mystery, or occupation unless he had served an apprenticeship of seven years. But, so far as we are informed, the right of workingmen to combine for an increase or maintenance of their wages by lawful means has never been held unlawful in this commonwealth. The statutes of Henry, Edward, and Elizabeth upon that subject, so far as the Kentucky authorities show, have always been as dead as they were in England after the act of 1875. Says Mr. Bishop (2 New Crim. Law, § 233): 45 L. R. A.

"Whatever the language of some of the old cases, no lawyer of the present day would hold it indictable for men simply to associate to promote their own interests, or specifically to raise their wages. If the means adopted were mutual improvement of their mental or physical powers, mutual instruction in their methods of doing their work, mutual inquiring and imparting information as to the wages paid in other localities, or anything else of a like helpful nature, severally enabling the members to obtain higher wages, nothing could be more commendable, and nothing further from the inhibition of the law. Or, if employers should combine simply to reduce wages, not proposing any unlawful means, perhaps we might not so much commend them, yet still they would stand under no disfavor from the law. The result of which is that a conspiracy to enhance or reduce wages is not indictable *per se*, while yet it may be so by reason of proposed unlawful means." And this has been the doctrine recognized in this state. In *Schulten v. Bavarian Brew. Co.* 96 Ky. 224, this court said that it was "not unlawful for several persons in trade to confederate together to protect themselves by lawful acts from dishonest debtors." In *Sayre v. Louisville Union Benev. Assn.* 1 Duv. 145, 85 Am. Dec. 613, referring to a New York case, the court said: "It seems to have been held [in New York] that all combinations of workmen, to raise their wages are necessarily injurious to trade or commerce, and indictable as misdemeanors. . . . It seems to be doubtful whether either of those positions is correct. It is entirely consistent with the interest of the public that labor shall be fairly rewarded. If the employer of a number of workmen should refuse to pay them fair wages, why may they not, if bound by no contract, combine for the purpose of obtaining reasonable prices for their labor? We do not perceive that the public would be injured by it, nor any principle, upon which it can be condemned as illegal." See also *Breuster v. C. Miller's Sons*, 19 Ky. L. Rep. 593, 38 L. R. A. 505, citing *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 21 L. R. A. 337. And in *Hetterman v. Powers*, 19 Ky. L. Rep. 1087, 39 L. R. A. 211, in an opinion by Judge Hazelrigg, this court distinctly recognized the doctrine that a laborers' union, formed for the purpose of maintaining wages, might be protected in the use of a label indicating that manufactured goods had been made by members of the union. We conclude that by the common law of Kentucky it is not an indictable offense to combine for the purpose of maintaining rates of insurance.

One other question should perhaps be decided, as necessary to determine what order shall be entered in the circuit court as to the foreign insurance companies when the case goes back. That is the sufficiency of the service of summons upon the insurance commissioner. By the statute (Ky. Stat. § 631), foreign insurance companies are required to file with the commissioner a resolution "consenting that service of process

upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state shall be a valid service upon said company." Section 11 of the Criminal Code provides: "A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the commonwealth of Kentucky. . . . The proceedings in penal actions are regulated by the Code of Practice in civil actions." Section 9 provides: "All public offenses may be prosecuted by indictment, except offenses of public officers," etc. Chapter 3 of the Criminal Code, on the subject of "Process upon Indictments," provides in § 147: "The summons shall be issued and served in the same manner as a summons in civil actions." It is urged that as the consent goes no further than to make the service upon

the commissioner sufficient in an action, civil or penal, it cannot be extended to an indictment, because the action is within the consent given by the company, and the indictment is not. But we think these statutes, though they might have been better expressed for the purpose, were intended to apply to exactly this class of cases, and to make valid service upon the commissioner of summons on a misdemeanor indictment, and give jurisdiction of such prosecutions to the Franklin circuit court.

For the reasons given, *the judgment is reversed*, with directions to sustain the demurrer to the indictment.

Guffy, J., dissents, except from that part of the opinion as to service upon the commissioner.

MISSOURI SUPREME COURT (In Banc)

STATE of Missouri, on Information of Edward C. CROW, Attorney General,
v.
FIREMEN'S FUND INSURANCE COMPANY *et al.*

(.....Mo.....)

1. An unlawful combination insurers in violation of Mo. act 1897, prohibiting any pool or combination to regulate prices or the premium to be paid for insurance, is made by insurance companies each of which buys and furnishes to its agent the rate book and correction slips prepared by a certain person, while the agents form what is called an "Underwriters' Social Club," to the secretary of which, who is an inexperienced young man and not an insurance expert, each local agent submits his daily reports in an unsealed envelope, addressed to his company, that the secretary may see that the agent does not write policies at less than the rates agreed.
2. A general denial by insurance companies of knowledge of the acts of their agents in forming a combination to maintain rates in violation of a statute is not sufficient to raise an issue on that question when the special defenses in the answer amount to a practical admission of such violation and challenge the constitutionality of the statute.
3. A provision against a combination to maintain prices or premiums for insurance is within the title of "An Act for the Punishment of Pools, Trusts, and Conspiracies to Control Prices."
4. The constitutional guaranty of the right to life, liberty, and property does not include the right of insurers to contract among themselves for the maintenance of rates.
5. A foreign insurance company does not acquire any vested rights by complying with existing police regulations or

comity laws, which cannot be affected by subsequent changes in such regulations or laws.

6. The invalidity of a section of a statute which is separable from the remainder of the act, leaving provisions which are sufficient to be operative and accomplish their purpose, does not make the statute altogether void.
7. Insurance companies may be ousted of all rights, privileges, and franchises under the laws of the state, because of the violation of such laws by their agents, through whom they do business.
8. Insurance companies charged with violating the statutes against illegal combinations which make common cause with other companies similarly charged which are found guilty will be treated in the same way with the other defendants, and ousted of all rights, privileges, and franchises under the law, although the evidence does not show that they were guilty.

(*Gantt, Ch. J., and Robinson and Valliant, JJ., dissent.*)

(June 30, 1899.)

APPPLICATION for a writ of quo warranto to oust defendants from exercising the rights, privileges, and franchises conferred upon them by law permitting them to do insurance business in the state. *Judgment of ouster entered.*

Statement by **Marshall, J.**:

This is an original proceeding by quo warranto to oust seventy-three fire insurance companies of their corporate rights, privileges, and franchises under the laws of Missouri on account of a violation by them of the laws of this state relating to "pools, trusts, and conspiracies, unlawful combinations." The defendant companies are organized under the laws of other states or foreign countries, and are doing an insurance business in Missouri by reason of and compliance with the comity laws of this state. The petition, after stating the necessary facts

NOTE.—See the preceding cases of *State v. Lancashire F. Ins. Co.* (Ark.) *ante*, 348, and footnote thereto; and *Ætina Ins. Co. v. Com.* (Ky.) *ante*, 355.
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as to the character and organization of the defendants and their compliance with the laws of Missouri in respect to foreign insurance companies doing business in this state, is as follows: "That afterwards, on the — day of November, 1896, each and all of said defendant corporations unlawfully, illegally, and wilfully misused and abused their said franchises, rights, and privileges as fire insurance companies authorized to do business under the laws of the state of Missouri, in this, to wit: That each and all of said defendant corporations having an authorized agent and representative in the city of St. Joseph, a city of less than one hundred thousand inhabitants, did then and there, through and by means of a certain organization known as the 'Underwriters' Social Club' of said city (which said Underwriters' Social Club of said city was organized, and has been maintained, and is now maintained, with the knowledge and consent, and according to the desire and wish, of said defendant corporations, and for the sole purpose of the advancement of the business interests of said defendant corporations in said city of St. Joseph), create, enter into, become a member of and a party to a certain pool, trust, agreement, combination, confederation, and understanding with each other and other fire insurance corporations and associations of persons to regulate, fix, and control the price or premium to be paid for insuring property in St. Joseph, Buchanan county, Missouri, against loss or damage by fire, lightning, and storm; and to maintain and control said price, when so regulated and fixed, and to prevent competition in said business in said city. That each and every one of said corporations, being so represented in said city of St. Joseph by a local resident fire insurance agent, legally and fully authorized by each of said several defendant corporations to act for their respective corporations in all matters relating to the insurance of property against loss or damage by fire, lightning, and storm in said city, that said agents, and each of them, did then and there, with the knowledge and consent and according to the wish and desire of the said respective defendant corporations which the said agents represented, and for the sole and only purpose of advancing the business interests of said defendant corporations, then and there wilfully, unlawfully, and knowingly did agree, confederate, and combine with each other to form and organize on the — day of November, A. D. 1896, a certain organization whose membership was composed exclusively of local resident fire insurance agents, representatives alone of defendant corporations; and that said organization was then and there perfected by the said local resident agents of defendant corporations by the election of a president, secretary, treasurer, and other officials, whose names, except those of the secretary and president, are to the relator unknown, but who were at said time, and are now, local resident fire insurance agents representing different ones of the

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defendant corporations. That the said organization so formed was the Underwriters' Social Club of St. Joseph, Missouri, and it was formed by said local resident agents of said defendant corporations solely for the purpose of advancing the interests of said respective defendant corporations, and for the purpose of maintaining what is known in insurance circles as 'correct practices;' or, in other words, for the purpose of keeping up the agreed rate on all the different classes of risks of insurance. That the said rates so agreed upon to be maintained in said city of St. Joseph were fixed by one W. J. Fetter, of Kansas City, Missouri, as relator is informed and believes. That — Wise is president of said Underwriters' Social Club, and that Mr. E. F. Scott is secretary of said organization, and was brought from the office of Mr. Fetter in Kansas City, Missouri, as relator is informed, for the purpose of assuming the duties of secretary of said Underwriters' Social Club of St. Joseph, Missouri. That, among other things, the duties of Mr. E. F. Scott were to check the daily reports of the different agents belonging to said Underwriters' Social Club, and to see that the policies written by said agents were all written at the agreed rate as fixed by said W. J. Fetter, and promulgated in the rate book sent to the resident local agents of defendant corporations. That the said secretary, E. F. Scott, was and is paid a salary, and that the method of paying the same is as follows: That the local resident agents of defendant corporations each proportionately contribute according to the amounts assessed against them, respectively, sums sufficient in the aggregate to pay the monthly salary of said E. F. Scott as secretary of said Underwriters' Social Club of St. Joseph, Missouri. That each of said resident local agents of defendant corporations deduct the amount so contributed by said respective local agents of defendant corporations to the monthly salary of E. F. Scott from the monthly remittances of said respective local resident agents to the said respective defendant corporations represented by said local resident agents, and that said respective defendant corporations acquiesced in said deduction from the remittances due from their said respective local resident agents, and credit said local resident agents with the amount paid by each of said agents toward the salary of said E. F. Scott. That said W. J. Fetter, of Kansas City, Missouri, styles himself an insurance expert, and that as such insurance expert he supplies the rates to be charged on all classes of risks by fire, lightning, and storm in the state of Missouri, outside of the cities of Kansas City and St. Louis; and that the defendant corporations, each and all of them, do not write any insurance on any class of risk for fire, lightning, and storm insurance except at the rate fixed and agreed upon in the city of St. Joseph by the Underwriters' Social Club of St. Joseph, which rate is obtained from a rate book coming to members of said organization in a blank envelope

from Kansas City, Missouri. That the rate so established, and at which all insurance against loss by fire, lightning, and storm is written in the city of St. Joseph by the local resident agents of defendant corporations is supplied said resident local agents in a rate book which comes from Kansas City, Missouri, in a blank envelope, and said Underwriters' Social Club of St. Joseph, Missouri, is organized and maintained by defendant corporations and their agents for the purpose of maintaining said rates so furnished as aforesaid. That if the resident local agent of any of said defendant corporations writes insurance against loss by fire, lightning, and storm in St. Joseph, Missouri, at a rate not in accordance with that fixed in said rate book, and agreed upon by the said Underwriters' Social Club of St. Joseph, Missouri, that said defendant corporation in which said insurance is written instructs its local resident agent to cancel said policy or policies. That the general nature and object of the said combination and confederation so made as aforesaid by defendant corporations, by the means and in the manner aforesaid, in the city of St. Joseph, is: First, to fix and regulate and control the certain price and premium to be paid for insuring property against loss or damage by fire, lightning, and storm in said city of St. Joseph, Missouri; and, second, to maintain the said certain price or premium when so regulated or fixed for insuring property against loss or damage by fire, lightning, and storm in said city; and that the said defendant corporations, through their said local resident agents in St. Joseph, Missouri, have entire control of, and have monopolized to the exclusion of all others, and to the great detriment of the public, the business of writing insurance against loss or damage by fire, lightning, and storm in the city of St. Joseph, Missouri; and that the purpose and intention of said defendant corporations has been, and is now, to unlawfully and wilfully thus combine and confederate with each other to monopolize and control absolutely, and prevent competition in, the business of writing insurance against losses by fire, lightning, and storm in the said city of St. Joseph, Missouri; and the said defendant corporations, through said Underwriters' Social Club of St. Joseph, Missouri, and in pursuance of the object, purpose, and intention of said defendant corporations, have wilfully and unlawfully agreed, combined, and confederated with each other, and with other fire insurance companies (doing business under the insurance laws of the state of Missouri), to form an insurance trust and pool in St. Joseph, Missouri, to regulate, fix, and maintain the price and premium to be charged by each of said defendant corporations for insuring the different designated classes of risks on property against loss or damage by fire, lightning, and storm in St. Joseph, Missouri; and the said defendant corporations, and other insurance companies acting with them, in pursuance of the said

agreement, combination, confederation, and trust, and through the said Underwriters' Social Club, of St. Joseph, Missouri, are each of them, through their respective resident local agents, wilfully and unlawfully maintaining said agreed price and premium upon the respective classes of risks on property against loss by fire, lightning, and storm in St. Joseph, Missouri, and which said rate so fixed in said rate book aforesaid, and so agreed to by members of said Underwriters' Social Club of St. Joseph, Missouri, aforesaid, is the minimum rate charged in St. Joseph, Missouri, by all said defendant corporations for insuring the different designated classes of property against loss or damage by fire, lightning, and storm; and that said rate aforesaid, so fixed as aforesaid, is the minimum rate the said agents of said defendant insurance companies are allowed to charge by said defendant corporations, in the city of St. Joseph, Missouri. And by reason of the premises aforesaid relator now charges and avers that since the ——— day of November, A. D. 1896, and up to the present time, said defendant corporations in the city of St. Joseph, Missouri, have grossly offended against the laws of this state, and have wilfully, flagrantly, and grossly abused and misused their corporate authority, franchises, and privileges, and have wilfully and unlawfully assumed and wilfully usurped franchises and privileges not granted to said defendant corporations by the laws of the state of Missouri, by then and there entering into and becoming a member of and a party to said trust, combination, and confederation and pool, as aforesaid, in said city of St. Joseph, Missouri, to monopolize the business of writing insurance against loss or damage by fire, lightning, and storm, and to, by means of said combination and confederation, prevent competition in said business, and to regulate, fix, and maintain the price and premiums to be paid for insuring property against loss or damage by fire, lightning, and storm in St. Joseph, Missouri. And relator further here now charges and avers that the action of the defendant corporations as hereinbefore set out is a wilful, malicious, and gross perversion of the franchises granted to said defendant corporations by the state of Missouri, and an illegal, wilful usurpation of privileges not granted to them, and which said gross and wilful usurpation of privileges and franchises not granted them is of great and permanent injury to the public. Wherefore your relator herein, the attorney general, prosecuting in this behalf for the state of Missouri, prays that said defendant corporations, each and all of them, severally be excluded from all corporate rights, privileges, and franchises under the laws of the state of Missouri, and that their rights and certificates to do business under the insurance laws of this state be declared forfeited, and that proceedings at law may be issued against defendant corporations that they may each and every one of

them be ousted of their said several franchises and corporate privileges."

The defendants answered jointly, as follows: "Defendants in the above-entitled cause, by leave of court, file this, their amended answer, and protesting that the information filed in said cause against these defendants is not sufficient in law, for their joint and several amended answers thereto, say that they admit that they are severally and respectively corporations legally organized under the laws of their respective states and countries for the purpose of carrying on the business respectively stated in said information; that they have respectively complied with the laws of the state of Missouri relative to foreign insurance companies desiring to write fire and other insurance in this state; that they have been respectively duly licensed by the superintendent of insurance of this state to write said insurance in the state of Missouri; and that they have been, from the date of their respective licenses, and are now, writing fire insurance and insurance against loss by lightning and storm in the state of Missouri, in so far as they are respectively, by said license, authorized to write such insurance. And, further answering, these defendants say that the said act of the general assembly of the state of Missouri entitled 'An Act Providing for the Punishment of Pools, Trusts, and Conspiracies to Control Prices, and as to Evidence and Prosecution in Such Cases,' approved April 2, 1891, and the amendments thereto, approved April 11, 1895, and March 24, 1897, is violative of the provisions of the Constitution of the state of Missouri and of the United States, as follows: (1) That the title to said act infringes that part of § 28 of art. 4 of the Constitution of the state of Missouri which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title, in this: that the subject of insurance against loss or damage by fire, lightning, or storm is a different subject, and not germane to the matters contained in the title of said act; and defendants plead that said law, in so far as it attempts to cover the subject of such insurance, is unconstitutional and void. (2) That the Constitution of the state of Missouri (§ 30, art. 2) provides 'that no person shall be deprived of life, liberty, or property without due process of law,' and defendants say that said act and the amendments thereto, especially as set forth in § 1 of said amended act of 1897, does deprive defendants of their liberty without due process of law, inasmuch as it renders it unlawful for defendants to contract or agree among themselves or with the agents of other insurance companies, or for their agents to contract and agree among themselves, for the reasonable adjustment and maintenance of rates of premium to be charged for insurance against fire, lightning, or storm in this state. (3) That § 1 of said amended act contravenes and infringes § 10 of article 1 of the Constitution of the United States, which provides

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that no state shall pass any law impairing the obligation of contracts, inasmuch as each of defendants, prior to the enactment of said law, made the deposits and paid the fees and moneys required by the insurance laws of this state to secure to themselves respectively the right to carry on their said business in said state, had complied with all the requirements of the insurance laws of said state, and were respectively duly authorized to conduct and carry on their said business in said state; that thereby, in virtue of said payments and said law of the state of Missouri, there was vested in each of said defendants, at the time of their admission into said state, the right to contract and be contracted with, and to continue and carry on their said business in a reasonable, usual, and lawful manner. And defendants say that until the enactment of said law they and their agents had, in the safe, reasonable, and usual course of their business, been making and entering into contracts or agreements with each other for the conservation of their business and the protection of their policy holders by adjusting, agreeing upon, and maintaining reasonable rates of insurance against fire, lightning, and storm in said state. Defendants say that said act does deprive said defendants, and each of them, of their said vested rights, in forbidding them or their agents to make or enter into such contracts or agreements, and impairs the obligation of the contracts entered into by and between each of them and said state of Missouri at the time of their respective admission into this state; that, therefore, said act is unconstitutional and void. (4) That § 1 of the amended act is in violation of § 1 of the 14th Amendment of the Constitution of the United States, which provides 'that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,' in this: that said act and section provide for a difference and discriminates between foreign insurance companies and domestic insurance companies, and discriminates and makes a difference and distinction between foreign insurance companies insuring property in this state against loss or damage by fire, lightning, or storm and all other foreign and domestic insurance companies doing other kinds of insurance business in this state, by providing by § 1 of said amended act that it should be unlawful for any corporation organized under the laws of this or any other country, insuring property against loss or damage by fire, lightning, or storm, to make any agreement and to have any understanding with any other insurance company, or with the agents thereof, to fix or regulate the premiums to be paid for insuring property in this state against fire, lightning, or storm, or to maintain said premiums when so regulated or fixed, or to fix or limit the price or premium to be paid for insuring property against such loss or damage in this state. And these defendants say that each

and every one of them did comply with the laws of this state before being admitted to do business in this state, and that in said compliance they have paid the fees, and made all necessary deposits, and secured the necessary licenses required by the insurance laws of this state; and that, having done and performed all that was required by law, they were each of them duly authorized to do the business of insurance in this state, and that thereby the right to do said business was secured and vested in each of them by the laws of the state of Missouri; and that they have been respectively conducting said business under the said laws of this state, and have paid and are paying sums of money for the right to conduct their said business in this state. And defendants say that said act deprives them of the right to carry on their business in a manner fair and just among themselves, and not in any manner injurious to any other person in the state, and that said act deprives them of the right of making the necessary and proper contracts relating to the business of insurance, and discriminates against them and in favor of other domestic and foreign insurance companies who are not embraced in said law, and that said act is unconstitutional and void. (5) That § 6 of said amended act is violative of § 1 of art. 14 of the Amendments of the Constitution of the United States, in that it provides 'that in all proceedings to have such forfeiture declared, proof that any such person who has been acting as the agent of any such foreign corporation in transacting its business in this state, has been, while acting as such agent, in the name, behalf, or interest of such foreign corporation, violating any provision of the preceding sections of this act, shall be received as prima facie proof of the act of the corporation itself;' and defendants say that said act discriminates and makes a difference and distinction between foreign insurance companies doing the business of insuring against fire, lightning, and storm and domestic insurance companies doing like business in like situation by providing rules of evidence and pleading in judicial proceedings under said act against foreign insurance companies different and more onerous than those provided for domestic insurance companies who may be engaged in the same business, and do the same thing, and defendants therefore say that said act is unconstitutional and void. (6) And defendants plead that §§ 9 and 10 of said act are violative of § 1 of the 14th Amendment to the Constitution of the United States, in that it imposes upon defendants and other corporations mentioned in said act, in case judgment is rendered against defendants in proceedings under said act, attorney's fees of not less than twenty-five (25) dollars or more than five hundred (500) dollars, and the expenses of attorneys for the state incurred in the prosecution of such suits when such fees are not imposed upon other corporations or judgment defendants under the laws of this state; and defend-

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ants say that said law discriminates and makes a distinction and difference between defendants as aforesaid and the state of Missouri by imposing such fees on defendant corporations against whom judgments are rendered, when in like situation, where judgments should be rendered against the state in such proceedings, no attorney's fees or expenses are imposed upon or provided to be collected from the state; and defendants say that therefore said law is violative of the Constitution of the United States, and is null and void. (7) And, further answering, these defendants deny each and every allegation in said information contained, not heretofore admitted to be true. And defendants having fully answered, pray to go hence respectively dismissed, with their costs in this behalf expended."

The reply is a general denial of the new matter set up in the answer.

Upon these issues a vast volume of oral testimony has been taken. Briefly stated, the ultimate facts established by the evidence are these: All of the defendants are corporations organized under the laws of sister states or of foreign countries, and are doing a fire insurance business in Missouri under licenses issued to them by the superintendent of insurance of this state. With the exception of the Newark Fire Insurance Company, Norwalk Fire Insurance Company, London Assurance Corporation, Citizens' Insurance Company of New York, Union Insurance Company of Philadelphia, and Equitable Fire & Marine Insurance Company of Providence, Rhode Island, all of the defendant companies are represented by agents at St. Joseph, Missouri, and all of those agents had been prior to and were at the date of the institution of this proceeding members of the Underwriters' Social Club of St. Joseph, Missouri. Prior to the taking effect of the amendment of 1895 (Acts 1895, p. 237) to the laws relating to "pools and trusts," which for the first time brought fire insurance companies explicitly and specifically within the ban of the law prohibiting trusts, there existed in Missouri an association called the "Association of Fire Underwriters of Missouri," which was organized for the purpose of controlling rates of insurance in this state. W. J. Fetter was employed to fix such rates, and all insurance was required to be controlled by the rates fixed by him. When the act of 1895 went into effect, Fetter addressed the following letter to all the companies doing a fire insurance business in Missouri:

Missouri Fire Inspection and Advisory Bureau, Inspection of Fire Risks and Estimates of Rates Furnished to Order. Also Maps of Rated Towns not Mapped by Sanborn-Perris Map Co.

Office: American Bank Building.

Kansas City, Mo., June 11, 1895.

Dear Sir:

You are probably aware that an amendment has been made to the anti-trust law of

Missouri to include fire insurance companies thus prohibiting all combinations of persons or corporations from making or maintaining fire-insurance rates. My arrangement with the Association of Fire Underwriters of Missouri for state rating will therefore cease on 20th inst., and the state board will then no longer exercise jurisdiction over rates. In view of these facts I have concluded to make estimates of fire-insurance rates and publish maps on my own volition, without any connection with any board whatever, and without combination with any companies or individuals. These rates so made will be published and sold to any person or company desiring to buy them. The price of these rate books, and corrections from time to time, will depend in some measure on the amount of work made necessary by the greater or less volume of business transacted in the state by the company. It is estimated, however, at about 8-10 to 9-10 of 1 per cent of the premium. For this work, bills will be sent quarterly. The local boards of St. Louis and Kansas City, being exempted from the operation of the law, have separate arrangements for rating, and will have no control of nor responsibility for the above-proposed system of rating. Soliciting your subscription to my rate books and supplements in cities or towns where you are represented, I remain, yours truly,

W. J. Fetter.

The prior and subsequent proceedings are best told by the testimony of Fetter himself. W. J. Fetter testified on behalf of informant as follows: "I have been in the insurance business in Missouri forty-nine years, excepting two years that I was in Saline county; and have been in Kansas City sixteen years." Witness was here handed a list of the companies that were defendants in the suit, and he said that he had heard that they were all doing business at St. Joseph. "I furnish estimates for Kansas City, Missouri. Have been doing so since '91. I furnish them anywhere in the state they are asked for, if I can. I furnish them in towns where they are asked for, except St. Louis. Am satisfied that the rates furnished by me in the book known as the 'Fetter Rate Book' for different towns of the state are the basis of rates upon which a considerable amount of the business of the state is written. I do not know whether there is an agreement among the agents at St. Joseph or not. Have no real knowledge about the situation at St. Joseph. I have heard loose talk, and have heard it as a fact, that my rates are used. I do not furnish the rates to the agents at St. Joseph, but I furnish the rates direct to the companies. I sell the book directly to the insurance companies. That is, I furnish the book either to the companies or the general agents of the companies; not to the local agents. I furnish my rate book to the general agents of all the companies that do business in St. Joseph. There are corrections that go with the book from time to time, and I supply those, and they are sent direct 45 L. R. A.

to the companies. I had a young man named E. F. Scott in my office at Kansas City. He was a dry-goods clerk when he came to my office, and got acquainted with some of my boys, and they asked me if I could not get him a job. He kept on coming there, and I gave him work at \$10 a week, and he did good service, and I increased his salary; and after awhile somebody asked me if I knew a good clerk,—some man that was good in figures,—and I said, 'Yes, I know a man,' and they said they would like to see him. Well, I did not say anything to him. I thought maybe they would not employ him. I telephoned him to come to the depot; that I had something I wanted to know about; and he came down, and I introduced him to two insurance agents from St. Joseph. One of them was Mr. Buckingham, and I do not remember the other gentleman's name. I introduced Mr. Scott to them, and he was employed, and I supposed that he was hired to work in the insurance business, but I never asked what his duties were. The general agent for Missouri of the Firemen's Fund Insurance Company is Mr. Chard, of Chicago, and in the period from November, '96, to July, '97, I think I furnished the special agent of the Firemen's Fund a rate book for Missouri. The record in my office would simply show that I furnished it to the company. I did at one time send my rate books direct to the company, but I concluded that was wrong, or, rather, inexpedient. My rate books cover all of Missouri except Kansas City and St. Louis, except some few towns not surveyed and examined. I mean, by this, small towns. If the companies want towns rated, we go and make an estimate. These rate books are not furnished annually, but just as they are made. The last book I made for St. Joseph, Missouri, was in 1897. I cannot say what the companies do with the rate book. I furnish them for St. Joseph. I sell the rate books to any company that wants to buy them. I do not know of anyone else in Missouri, outside of St. Louis and Kansas City, from whom the old-line fire insurance companies buy rate books and rate sheets. Before the anti-trust law was passed, I was employed by the state board for Missouri on a salary, and I covered the same territory that I do now. The state board was composed of seventy or eighty persons. Now I am not so tied down by rules and regulations, and I feel at liberty to increase or decrease the rates, as I think feasible. For instance, at Jefferson City Mr. Orear thought my rates were a little too high, and he wanted me to look into it. I found that the buildings had improved,—they had put in more fireproof buildings,—and I made a reduction in the rates. I do not account to anybody for that. I just make it of my own volition, and two or three other places the same way. I have more discretion now than I had before, or, rather, I exercise more. It is the tariff the companies accept at Jefferson City as fixed by myself. I get my rates in the following way: Take, for instance, St. Joe. I take a brick building.

An ordinary brick building at St. Joe, with gravel roof, makes the basis rate, sixty cents, and then, if the side walls do not extend 2 feet higher than the roof,—that is, where they are exposed,—we add five cents. If there is a skylight that goes onto the building, we add for that; if wooden cornice,—not iron,—add to the rates; if elevator in a three or four story building, we add for that; and all similar charges add something for each. Then if an exposure,—other buildings might turn it,—we add to it in proportion to the hazard for exposure; and then the question of the area comes in,—the size of the building. If a very large building, we have a very small charge to it; and, when the rate of the building is made up, then we add for the stock being more perishable; or when a building is easier damaged by smoke, water, etc., from ten to twenty-five cents, more or less. There are two classes of stock, the preferred and the nonpreferred. This is the method by which I get at the rate, and I get the personal knowledge of the buildings by going to St. Joseph and examining them. I had the rate book for St. Joseph printed in St. Joe, and it took me nine months to get it printed. I paid for having the book made. When the anti-trust law of '91 went into effect, we paid no attention to it, as we thought it did not include us, and I furnished rates for St. Joseph then just the same as I had been doing before. I furnished the rates for St. Joseph before 1895. I made a book for St. Joseph before that time. Before the anti-trust law, I was employed on a salary to make the rates, and furnish them for the different towns,—St. Joseph as well as the others. After the anti-trust law of 1895 became operative, I read the law. It seemed to me that the law provided against combinations to make rates. The state board was therefore abolished. I sent out a circular to the companies and stated, in substance, that the state board was out of existence, and that I proposed to make estimates of rates, and sell them to the companies, without any connection or association with anything at all, and sell these rates at a given price,—this book at a given price; and that included the keeping up of the books, too. These books I offered to make were of the same kind and character I had been making. I asked the companies to purchase my books, and some purchased them, and some did not. The agents that got my rate books at St. Joseph, and the correction slips I furnish, got them from the companies." Witness was here handed a copy of the petition containing list of the companies against which suit is brought, and was asked if he had examined this list of companies, and he said he had and that he furnished a portion of these companies with his rate book between November, 1896, and July, 1897, and he designated as those that he had furnished the rate book to as follows: Aetna of Hartford, Orient of Hartford, Phoenix of London, British America, Westchester In-

surance Company, Atlas, Commercial Union, London & Lancashire, Lion's, Lancashire, London Assurance, Union & Crown, London & Globe, Imperial, Manchester, Northern, North British, Palatine, Royal Insurance Company, Sun Insurance Office, Aachen & Munich, Hamburg-Bremen, Prussian National, German of Freeport, Traders' Insurance Company, Springfield Fire & Marine, Michigan, Detroit, St. Paul, Merchants' of Newark, the Agricultural, Caledonian, American Fire Insurance Company of New York, Citizens' of Missouri, Commercial Union, German Ambrecian, Hanover, Home, Niagara, Queen, Westchester, Glens Falls Insurance Company of North America, Union Insurance Company of Philadelphia, Pennsylvania Fire, Merchants' Insurance Company of New Jersey, Providence-Washington, Scottish Union & National, Concordia, Milwaukee Mechanics', Brooklyn. "I know Mr. Buckingham at St. Joseph, and from November, '96, to July, '97. He was in the insurance business, and a local resident agent of various companies at St. Joseph; and he came and inquired about someone to do a certain class of work. I recommended Mr. Scott. The companies responded to my circular that they would buy the rates. I suppose the agents at St. Joseph get the rates from the companies, as I mail no rates from my office in Kansas City to the agents at St. Joseph, Missouri. I did at one time send the slips direct to St. Joseph. I do send the slips direct to the agents sometimes in this way: The companies buy my rates, and they will say to me, 'I want you to send a copy to Mr. John Smith at Sedalia; he has not a copy;' and they want me to send to this one and to that one; and the agent at St. Joe wants me to send slips, and, if the companies order me to, I will send the slips, but not otherwise. I did that a short time, and I concluded I would not do it any more, but, if the companies order me to send the slips or books to any town in Missouri except Kansas City, I will do so.

Q. Can you name any of these companies that were doing business, as is charged in this petition, in the city of St. Joseph, between November, 1896, and July, 1897, at whose instance you sent any of those slips?

A. As I understand the fact, several, I think, have them; but to say that they do, I could not. I was told recently that an agent there at St. Joseph who has the agency of the northern end of the Home and two or three companies that way, did; but I do not know, and there are no records in my office that would indicate whether or not I sent the slips or rates direct to the agents at St. Joseph, Missouri, but I probably did, occasionally, between November, 1896, and July, 1897. I think probably in the interim of time from November, 1896, to July, 1897, I did forward the slips, as well as the books, to some resident agents at St. Joseph, Missouri. I might have a record in my office; my books might show; probably I have. We have a list of the companies who take the

slips and the rate books. Some of them do not want anything but this town and that town, but otherwise they get everything. We just send them to the company indiscriminately, and only send direct to the resident agents, either the slips or books, by direction of the company. I would send the slips regularly to resident agents at St. Joseph on condition that every agent have an order from some company of his, so that all the agents get the books; but, in the absence of directions, I send the slips to the companies. To the best of my knowledge, the insurance business at St. Joseph is generally done at the rate fixed in my rate book and my slips. The rate I fix is based on the proposition that the companies will, by securing the rate I name, be enabled, according to insurance statistics, to met losses, pay expenses, and a fair dividend on the capital, and that is what we term an 'adequate rate.' I aim to make an adequate rate. I suppose that is the reason the companies want my rates. I charge the companies about eight or nine tenths of 1 per cent of the volume of business. That is the only way I can fix it. I can only do this work for the companies on a per cent of the business, and I get the volume of business of the companies from Mr. Orear, superintendent of insurance. This nine tenths of 1 per cent is nine tenths of 1 per cent of all the premiums, and for that I furnish the companies with my rate book and corrections, and such mass of information as they may desire, and that I may have in my possession; and that is my compensation complete from the companies. I pay my own clerical force in my office. This book is a St. Joseph rate book. [Here book was shown witness.] This is the only rate book published by myself for the city of St. Joseph. The policy that is written and the reports that are made of the daily business in St. Joseph does not come to my office.

Cross-examination: I make the Fetter rate book. I sell it to any insurance company that desires it. I make it as an insurance expert. The use of a rate book of this kind is to give the agents an idea of the risks and the adequacy of the rate.

Redirect examination: My compensation is governed by the volume of business done by an insurance company. I sell this book to any company that wants to buy. I have been doing that since the anti-trust law went into effect. The rates were made about on the same basis by myself after the anti-trust law became operative as before.

After the act of 1895 became operative, the agents of the defendant companies (except those above pointed out) got together, and formed the Underwriters' Social Club of St. Joseph. The president of the club, Mr. Wise, said: "We cannot, in this club, recognize anything in writing that would lay ourselves liable to a prosecution under the late law passed regarding trusts in Missouri. Consequently anything that is done regard-

ing the maintenance of rates shall be understood among the members of the club." Accordingly no constitution or by-laws were ever adopted or put into writing. The secretary of the club was E. F. Scott, who had formerly been a dry-goods clerk, and for a short time before he went to St. Joseph was a clerk in Fetter's office in Kansas City. He had no other experience in the insurance business. The club had two rooms. In one the secretary had a copy of Fetter's rate book, a map, a desk, and a few chairs. In the other there were some chairs. It had no regular time for holding meetings. Sometimes it met once a week, and sometimes not once in three or four weeks. One of the members defined its purpose to be that "one of the objects of the club was social and advisory to our business. The social nature of the club was talking to each other about Lloyd's insurance companies and the mutuals, and inquiring about how business was, and generally anything appertaining to our business. . . . There were no billiard nor card tables in the room. No periodicals kept there. I guess there was a desk. I never took an inventory of it. I couldn't tell whether there was a carpet on the floor." Another described the purposes of the club as follows: "To the extent of smoking cigars, one of the objects was to cultivate good-fellowship. Another object was to become better acquainted with each other, and with the methods of doing business; also to become better acquainted with all risks in St. Joseph, and get wider and more general information about insurance business, and about conducting insurance business. Another object was to secure a uniformity of policies, as in adjustment of partial losses the losses become extremely complicated, and it requires the highest order of ability to adjust such a loss. Concurrence is therefore insisted upon by the manager, Mr. Scott. That is one of the things accomplished by the club; that is, it is deemed beneficial to the insurer, and makes it easier to adjust any losses. In speaking of the objects of the club, I use the words 'correct practices,' which covers all this, and means the application of concurrence and the application of a general form to a big scattered risk. I also stated that the object was to maintain rates." The salary of the secretary was made up by the members contributing one dollar a month for each company represented by the members. Some of the members charged this to their companies direct, and it was allowed. Others put it in as "postage," or other expenses, and their companies allowed it in that form. After the formation of this club, the fire insurance done by the agents of the defendant companies was carried on in this way: The secretary had a list of the numbers of all policies in the agent's office, so as to enable him to keep check on every daily report that went to the company. The daily report contained the name of the company by which the policies were written, the name of the assured, the date of issuance and of

expiration, the amount of insurance, premium, rate, general form of policy, the property insured with its location. These daily reports were made out by the agents, placed in stamped, but unsealed envelopes, addressed to the company issuing the policy, and the envelopes were turned over to the secretary of the club for inspection, and to be sealed and mailed by him. He kept no record of anything that was done in his office, but at first, if there was a variance between the rate specified in the policy and that fixed by the Fetter rate, the secretary would put a small slip on the report to notify the general agent of the company of the variance. Afterwards it was thought "inexpedient" to have any such matters in writing, so the secretary simply notified the agents verbally of any variance, and demanded to know the reason therefor. In this way every daily report from an agent to his company passed under the inspection of the secretary, and he alone mailed all reports to the companies. To prevent an agent from writing a rate in the policy in conformity to the Fetter rate, and afterwards giving the insured a rebate, all the agents also submitted all their monthly statements to the secretary, and he inspected them, and likewise mailed them. Several times an agent was detected not living up to the Fetter rate, and then the club met, and the offending agent was called on for an explanation, which was accepted as satisfactory, and "everybody arose to their feet, and expressed a determination to live up to the rates" (Fetter's rates). There was an unwritten by-law of the club prescribing that "where a member was caught cutting a rate there was to be a penalty of not to exceed \$50 for the first two offenses, and, after that, loss of his agency." Some of the general managers of the defendant companies testified that they had never heard of the club or its practices until this proceeding was begun; others testified that they had expressly refused to allow their agents these club expenses, and had charged them back to the agent; while the manager of the Queen Insurance Company wrote the local agent as follows: "While we are not fully advised as to the situation in St. Joseph, yet at the same time we understand that all agents, with the exception of your good self, are now members of the social club. In the interest of harmony and correct practice, we trust you will find it convenient to associate with the organization referred to, as it will undoubtedly redound to our mutual welfare."

Messrs. Edward C. Crow, Attorney General, and **Samuel B. Jeffries**, for relator.

Messrs. Given Campbell and Waddill, Ellerboe, & Hereford, for respondents:

This suit is in the nature of a public accusation, and if the state makes out its case the judgment is penal, and in such case the burden of proof is upon the state to prove the charges as alleged.

5 Thomp. Corp. § 6804; *State, Crow, v. Bland*, 144 Mo. 534, 41 L. R. A. 297; High, 45 L. R. A.

Extr. Legal Rem. § 710; *State, Walker, v. Talbot*, 123 Mo. 69; 2 Spelling, Extraordinary Relief, §§ 1850, 1851, 1860.

The overwhelming weight of evidence establishes the fact that the Underwriters' Social Club of St. Joseph, Missouri, was not created, formed, or organized, conducted or carried on for the purpose of fixing or maintaining rates of insurance in that city, or for the purpose of controlling rates of insurance in any respect, and that it did not either fix, control, or maintain rates of insurance according to Fetter estimates.

Anderson v. United States, 171 U. S. 604, 43 L. ed. 300.

The information filed by relator does not state facts sufficient to constitute a cause of action.

State, Crow, v. Bland, 144 Mo. 534, 41 L. R. A. 297.

The act approved April 2, 1891, as amended by the acts of April 11, 1895, and March 24, 1897, is repugnant to the Constitution of the state of Missouri, for the following reasons:

1. It infringes the provisions of § 28 of art. 4, which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title.

State, Hixon, v. Schofield, 41 Mo. 39; *St. Louis v. Tiefel*, 42 Mo. 578; *State v. Persinger*, 76 Mo. 346; *State v. Blackstone*, 115 Mo. 427; *State, Dickason, v. Marion County Ct.* 128 Mo. 427; *Witzmann v. Southern R. Co.* 131 Mo. 612; *State, Keshlear, v. Slover*, 134 Mo. 10; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Philadelphia Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 154 Mass. 92, 12 L. R. A. 563; *Hooper v. California*, 155 U. S. 655, 39 L. ed. 300, 5 Inters. Com. Rep. 610.

2. It violates § 30 of art. 2, which provides that no person shall be deprived of life, liberty, or property without due process of law.

State v. Loomis, 115 Mo. 316, 21 L. R. A. 789; *State v. Julow*, 129 Mo. 177, 29 L. R. A. 257; *Cooley, Const. Lim.* 6th ed. 481, 483.

That said act, as amended, is unconstitutional in that § 1 of said act is violative of § 1 of the 14th Amendment to the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law.

Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485; *Marchant v. Pennsylvania R. Co.* 153 U. S. 390, 38 L. ed. 756; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989.

That said act, as amended, is unconstitutional in that § 6 of said act is violative of § 1 of article 14 of the Amendments to the Constitution of the United States in that said § 6 provides, among other things, viz.: "And in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent for any such foreign corporation in transacting its business in this state has been, while acting as such agent, in

the name, behalf, or interest of such foreign corporation, violating any provision of the preceding sections of this act, shall be received as prima facie proof of the act of the corporation itself," which makes a distinction, difference, and discrimination between foreign insurance companies, insuring against fire, lightning, and storm, and domestic insurance companies engaged in the like business and doing like acts.

Cooley, Const. Lim. pp. 207, 481, 483; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819; *State v. Kingsley*, 108 Mo. 139; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075; *State v. Loomis*, 115 Mo. 316, 21 L. R. A. 789; *State v. Julow*, 129 Mo. 177, 29 L. R. A. 257; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666; *New Orleans Gas-light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910; *Emert v. Missouri*, 156 U. S. 312, 39 L. ed. 434, 5 Inters. Com. Rep. 68; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578; *Railroad Tax Cases*, 13 Fed. Rep. 733; *Re Ah Fong*, 3 Sawy. 144; *State, Harris, v. Hermann*, 75 Mo. 353; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365.

That said act, as amended, is unconstitutional in this, that §§ 9 and 10 of said act are contrary to § 1 of art. 14 of the Amendments to the Constitution of the United States, in that said §§ 9 and 10 impose upon the defendants, in case judgment is rendered against them, an attorney's fee of from \$25 to \$500 and the expenses of the attorney general, when no provision is made in said act in favor of defendants for their counsel fees and expenses, if they should have judgment rendered in their favor, thereby discriminating against the defendants and denying to them the equal protection of the laws.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Railroad Tax Cases*, 13 Fed. Rep. 722, 8 Sawy. 238.

Courts are extremely reluctant to adjudge a forfeiture of franchise, especially in a case of this character.

Topeka v. Topeka Water Co. 58 Kan. 349; *State, Atty. Gen., v. Société Republique*, 9 Mo. App. 114; *Chicago & A. R. Co. v. People*, Koerner, 67 Ill. 11, 16 Am. Rep. 599; *State, Croix, v. Lincoln Trust Co.* 144 Mo. 562; *High, Extr. Legal Rem. § 229*; *Spelling, Extraordinary Relief*, §§ 1777, 1828, 1829.

Marshall, J., delivered the opinion of the court:

1. The special provision of the statutes of Missouri under which this proceeding is prosecuted and which it is claimed the defendants have violated, is § 1 of the act of 1897 (Acts 1897, p. 208), and is as follows:

"Sec. 1. Any corporation organized under 45 L. R. A.

the laws of this or any other state or country for transacting or conducting any kind of business in this state, or which does transact or conduct any kind of business in this state, or any partnership or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price of premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, contract, combination, or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this act: provided, however, that the provisions of this section shall not apply to agreements of fire insurance companies, or their agents, or boards of fire underwriters, to regulate the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm in cities in this state, which now have or which may hereafter acquire a population of one hundred thousand inhabitants or more; and provided further, that if such insurance companies, or their agents, or the board of fire underwriters doing business in any such city, shall combine in such city, either directly or indirectly, or agree or attempt to agree, directly or indirectly, to fix or regulate the price or premium to be paid for insuring property located wholly outside of such city against loss or damage by fire, lightning, or storm, such company so violating the provisions of this act, either by itself, its agents, or by any such board of underwriters, shall be taken and deemed to have forfeited its right to do business in this state, and shall become liable to all the penalties and forfeitures provided for by the provisions of this act." The first question, therefore, is whether the defendant companies have entered into or become members of or parties to a pool, trust, agreement, combination, confederation, or understanding to fix the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated or fixed. There is no room for doubt that prior to the amendment of 1895, which specifically brought insurance companies within the purview of the anti-trust laws the Association of Fire Underwriters

of Missouri was organized and maintained for the purpose of establishing and maintaining the rates at which property in Missouri would be insured against loss or damage by fire, and that Fetter was employed by the association to fix such rates, and see that they were maintained. Neither can it be doubted that when the act of 1895 became effective that association realized that its practices were violative of that act, and hence the association ceased to exist. This is clearly shown by the testimony of Fetter, and by his letter of June 11, 1895, above referred to. After the passage of that act, Fetter, on his own account, published a book of rates, which were the same as the rates that had been fixed and maintained by the association before the law went into effect. This book, with correction slips, keeping it up to date, he sold and delivered to the defendant insurance companies direct, except that, when specially instructed by a company, he sent them to the local agent instead of to the company, and having it (and the correction slips) reach the agent through the company. All of the local agents of the defendant companies at St. Joseph had the book and slips. Except in very extraordinary cases, all policies were written according to the Fetter rates; and when there was a variance the general agent was, at first, notified by a slip attached to the daily report, and later, when it was considered "inexpedient" to commit such matters to writing, the local agent was notified, and, if it was not corrected, the local agent was called to account therefor. Fetter had no fixed price for his book and slips, but charged each company eight or nine tenths of 1 per cent of the volume of business done by each. After the act of 1895 became a law, the local agents of all the defendant companies, except those above noted, formed the Underwriters' Social Club of St. Joseph. The president distinctly stated that it would not put anything in writing that would lay the members liable to prosecution under the act of 1895 relating to trusts, and that everything that was done regarding the maintenance of rates would have to be understood by the members. No written constitution or by-laws were ever adopted. The club had no regular meetings, no club furnishings, paraphernalia, or usual accompaniments. When it met, each man smoked his own cigars, and talked about Lloyd's insurance companies and the mutuals, about "concurrency" and "correct practices,"—which was but another name for maintaining the Fetter rates,—or else called a member to account for a variance from the Fetter rates, and, although "whitewashing" him, "everybody arose to their feet, and expressed a determination to live up to the rates." When the club was formed, a committee was appointed to select a secretary (doubtless one who was peculiarly social), and the committee went to Kansas City, and consulted Fetter, who kindly let them have one of his clerks, whom he had taken out of a dry-goods store a short time

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before, and who was therefore presumably "social," even if he was not an insurance expert, and knew nothing about St. Joseph or its insurable risks. This young man was taken to St. Joseph, and made secretary of this social club. He was installed in a room, with a copy of Fetter's book, a map of St. Joseph, a desk, and a few chairs. In order that he might not become lonesome in the club rooms (where the members assembled only on rare occasions to smoke their respective cigars, talk about Lloyd's, the mutuals, concurrency, correct practices, call an offending member to account for writing a policy at a rate that varied from Fetter's and stand up and promise to live up to the rates), and, just to be social, each of the local agents of the defendant companies sent him their daily reports already enclosed in unsealed envelopes, addressed to their respective companies, and, just to be social, he examined each report, and, so as not to forget his former benefactor, he compared the rates specified in each policy with the Fetter rates, and, if there was a variance, put a slip on the report, calling the attention of the general agent of the company to the variance, until it was discovered that this practice was "inexpedient," and in conflict with the expressed policy of this social club not to put anything in writing that would lay the members liable to a prosecution under the anti-trust laws, and then he adopted the more social process of notifying the local agents personally of the variance. Of course, each agent only wanted to keep up this daily social communication with the secretary of the club; and of course the secretary only wanted to be social when he insisted upon concurrency, correct practices, and the exclusive right to seal and mail all the reports from the local agents to the companies; and of course the monthly reports were likewise submitted to the secretary for social reasons, and not for the purpose of advising him that the agent had not circumvented Fetter's rates by giving the insured a rebate from the rate written on the face of the policy; and of course the higher officers of the defendant companies did not know (after it was deemed inexpedient for the secretary to put slips on the daily reports, showing variances from the Fetter rates) that their naughty local agents belonged to the social club, whose practices might, if put in writing, make them liable to prosecution under the anti-trust laws, and hence had forbidden them to be social, notwithstanding they did know that the policies were all written according to the Fetter rates, and were the same as they were before the anti-trust laws were enacted; and of course the general managers wondered why they had taken the trouble and gone to the expense of maintaining the association of Fire Underwriters of Missouri, and had paid Fetter a salary to fix and maintain a rate in Missouri before the passage of the anti-trust law in 1895, when, after that law went into effect, their local agents could maintain the same old rates, either unas-

sisted, and at no expense to their companies, or else by means of a social club, which cost the companies nothing! But we decline to believe anything of the kind. The formation of the club immediately after the passage of the act of 1895 is admitted. The maintenance of the old Fetter rates as established and practised by the Association of Fire Underwriters of Missouri, which was abolished immediately after the passage of the act of 1895, because it would violate that law, is not denied. The character of the club arrangements, and that it had no constitution or by-laws, and only occasional meetings, is conceded. The fact that all daily and monthly reports were submitted to this inexperienced young man, who was not an insurance expert, by all the local agents of the defendant companies, and that he alone had a right to seal and mail the reports to the companies, is confessed. The fact that each company paid Fetter for his book and correction slips a percentage on the volume of its business, and that the book and slips were sent by Fetter to the company, and by the company to the local agent, or else by Fetter to the local agent direct when ordered so to do by his company, is proved and not controverted. And the conclusion is inevitable and irresistible that the Underwriters' Social Club of St. Joseph is a plain, palpable, but bungling pool, trust, agreement, combination, confederation, and understanding organized to evade the anti-trust laws of Missouri, but wholly inefficient for such a purpose. The local agents did it, and all knew it, and their knowledge is the knowledge of their companies, and their acts are the acts of their companies (*Nickell v. Phoenix Ins. Co.* 144 Mo. 420); for it could not be tolerated for a moment that an insurance company could hide under the skirts of its agents, and violate the anti-trust laws of our state with impunity. These corporations can only act through agents, and if their agents' acts or practices are in violation of their orders, they must suffer the consequences, for the law must be enforced whether the act violating it is done by one or another of the agents of the corporation. The company can and must control its agents, and must see, at its peril, that its agents do not violate the law while attending to the business of the company. This is the rule as to libels, assaults, malicious torts by agents of incorporated companies; and there is greater reason for it being the true rule in cases involving the anti-trust laws. In fact, unless it was so, no company could ever be convicted of a violation of those laws, for they would do as the president of the social club said the club must do,—put nothing in writing that would make them liable to prosecution, keep no records, leave no tangible evidences or tracks of their doings.

A few illustrations of the liability of a corporation for the wilful or malicious torts of its agents committed while in the prosecution of the company's business committed to their care, although the act is unknown to 45 L. R. A.

the president, board of directors, or manager of the corporation, will be sufficient to point the rule. For libel, *Buckley v. Knapp*, 48 Mo. 152; *Johnson v. St. Louis Dispatch Co.* 65 Mo. 539, 27 Am. Rep. 293; and this extends to liability for criminal libel, *State v. Boogher*, 3 Mo. App. 442; *Brennan v. Tracy*, 2 Mo. App. 540. For malicious prosecution, *Boogher v. Life Asso. of America*, 75 Mo. 319, 42 Am. Rep. 413. For assault and battery, *Perkins v. Missouri, K. & T. R. Co.* 55 Mo. loc. cit. 214. For conversion, *Sherman v. Commercial Printing Co.* 29 Mo. App. loc. cit. 38. For trespass, *Favorite v. Cottrill*, 62 Mo. App. 119. In this case, however, the companies cannot be heard to say that they did not know of or sanction the acts of their agents, for they have answered jointly, and boldly confess that they are writing insurance in this state, because they have been licensed to do so; and then they challenge the constitutionality of the act, and assert that it violates five different provisions of the Constitutions of Missouri or of the United States, and contend that, having been admitted to do business in this state before the passage of the act of 1895, they acquired a vested right to do so in a manner fair and just among themselves, which vested right cannot be taken away from them by the act of 1895 without violating the 14th Amendment to the Constitution of the United States. In short, their answer is a clear admission that they have violated, and do violate, the act of 1895, but they declare that they have committed no offense in so doing, because, they say, that act is unconstitutional. It is true that the answer closes with a general denial of all the allegations of the petition not admitted by the answer to be true, but this avails nothing in view of the character of specific defenses pleaded, which are all predicated upon the facts charged being true. If this be not the meaning of the answer, then so much of it as raises so many constitutional questions amounts only to a moot court proceeding, for, if it be true that the defendants have never done the acts charged, but have observed the requirements of the act of 1895, and avoided its inhibitions, then it is wholly immaterial in this case whether the act is constitutional or not. It is only upon the theory that they have violated it that they can be heard to question its constitutionality. And this is clearly the idea of the pleader in this case, and is the only way in which the general denial can be made to consist with the specific defenses. *Mississippi Valley Trust Co. v. McDonald*, 146 Mo. loc. cit. 480.

This brings us to the question whether the acts done constitute a pool, trust, conspiracy, or unlawful combination. The evident purpose of the social club was to maintain the Fetter rates. To accomplish this, their practice was for each agent to submit to their common agent—the secretary of the club—a daily report of all the policies written by each. This was done to enable him to see that they were not writing policies at a less

rate than the Fetter rates. It could have been for no other purpose, for he was not an insurance expert, and they were experts; so they did not need his judgment or advice as to whether the risk was a proper or safe one. He could only watch them, and see that they followed "correct practices;" that is, charged the Fetter rates. They could all have done this without him, but he was employed to watch them all for the benefit of each; to catch anyone who attempted to cheat his confederates in the trust. This could have been the only purpose of submitting all the daily and monthly reports to him, and having him mail them to the companies. The companies all knew what rates their agents were to charge, for the Fetter books and slips were bought by the companies and furnished to their agents as a part of their supplies. They knew that the Fetter rates were charged and lived up to, because they could see that fact from every policy they issued. So that the purpose, plan, pool, and trust are plain. The practice under the trust is also plain. The fact that the parties to the trust were treacherous to each other, and in the desire for business violated the trust agreement, and occasionally wrote policies for less than the Fetter rate, does not even tend to disprove the existence of the trust, for it is the experience of all lawful as well as unlawful associations that some of the members will violate the common agreement for a selfish purpose, and hence penalties are usually provided (as they were in this case) for such violations. Of course, there was no written agreement forming the trust, for that was "inexpedient," and might make the members liable to prosecution under the trust laws, as the president of the club well and wisely remarked when the club was formed. When people set out to do acts that are either *mala in se* or *mala prohibita*, they do not put up a sign over the door, or a stamp on the act, declaring their purpose and intent. Concealment is generally their prime object. But as such matters exist without agreements, and rest upon common understanding and practice, so the proof of their existence may be of the same character; and, while such laws are penal in their nature, and should be strictly construed (*State, Walker, v. Talbot*, 123 Mo. 69; *State, Crow, v. Bland*, 144 Mo. 534, 41 L. R. A. 297), nevertheless a pool or trust may be as conclusively proved by facts and circumstances as by direct, written evidence, for in this regard they are like all other frauds. As was well said by Campbell, J., *Webber v. Jackson*, 79 Mich. loc. cit. 180: "While fraud is not to be assumed without proof, it is nevertheless oftener shown by circumstances than in any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be, but are not, given, it is no violent inference to conclude that there is something wrong. And where this occurs repeatedly, and is the general

characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences." And as was equally as well said by Sherwood, Ch. J., in *Baldwin v. Whitcomb*, 71 Mo. loc. cit. 659: "Whenever fraud is the matter in issue, any unusual clause in an instrument, any unusual method of transacting the business, apparently done with the view for effect, and to give to the transaction [of the business] an air of honesty, is of itself a badge of fraud." Pools and trusts are not of modern origin. The courts, at common law, ferreted them out, and placed the stamp of disapproval on them. Then they usually took the form of contracts in restraint of trade or creating monopolies. As early as the case of *Mitchell v. Reynolds*, 1 P. Wms. 181, Chief Justice Parker laid down the rule that such contracts were void if they were general, and Best, Ch. J., in *Homer v. Ashford*, 3 Bing. 328, said: "The law will not permit anyone to restrain a person from doing what the public welfare and his own interest require that he should do." The same rule was laid down by Parke, B., in *Mallan v. May*, 11 Mees. & W. 653. In those early days there was no legislation against such practices, but from the beginning the courts have recognized the danger attending such combinations, and in the absence of criminal, penal, or prohibitive statutes, have refused to enforce such contracts. It is not necessary here to review the cases where courts have held contracts valid which only partially restrained trade. It is only necessary to call attention to the fact that in such exceptional cases the main purpose of the contract was lawful, and the restraint was only a necessary incident or ancillary to the contracts, "to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *United States v. Addyston Pipe & S. Co.* 54 U. S. App. loc. cit. 747, 85 Fed. Rep. 282, 29 C. C. A. 151. In the case just quoted, Taft, circuit judge, delivered the opinion of the court, which was concurred in by Mr. Justice Harlan and Lurton, circuit judge, and we might well leave the law of the case at bar to depend upon that decision, for it is a most lucid, learned, and luminous exposition of all the law, ancient and modern, upon the questions here under consideration; so much so, in fact, that any attempt to enlarge upon the authorities cited and reviewed and the reasoning employed by the learned judge would prove futile, feeble, and foolish. After reviewing the instances where pools and trusts have undergone judicial scrutiny and condemnation, Judge Taft says: "Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common

law, because in restraint of trade, and tending to a monopoly." And so it is here. But the common-law remedy of refusing to enforce such contracts proved insufficient to prevent the blighting injuries to the public interests which modern trusts produced, and hence it has been found necessary by the national and state legislatures to enact drastic laws against trusts, pools, unlawful combinations and conspiracies, which will prevent and punish them, and not leave them to exist, and enforce their contracts among themselves, denying them only the aid of the courts as at common law. The general assembly of Missouri has done its duty in this respect. Our statutory law has been progressive. The act of May 18, 1889 (Acts 1889, p. 96), entitled "An Act Entitled 'An Act for the Punishment of Pools, Trusts, and Conspiracies, and as to Evidence in Such Cases,'" as was to be expected, was not efficient to meet all cases, and it was therefore found necessary to amend it in 1891 (Acts 1891, p. 186). Even this proved insufficient, and it was amended again in 1895 (Acts 1895, p. 237). Again the law was found not comprehensive enough to meet all cases (like this case, for instance), and the general assembly proved itself equal to the exigencies of the occasion, and passed the act of 1897, under which this proceeding was instituted (Acts 1897, p. 208). This act in express terms covers the case at bar, and the courts would be recreant to their duty, their past meritorious rulings, and to the principles they profess to practice and to teach, if they let the game out of the legislative trap in which it has been caught by any forced construction of law, or any distortion of the facts, or any maudlin sentimentality superinduced by the magnitude of the interests involved.

The Underwriters' Social Club of St. Joseph is a pool, trust, and conspiracy organized and maintained by the defendant companies, and is therefore an unlawful combination, and subject to the penalties prescribed by the act of 1897. "A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means, or a lawful end by unlawful means." *United States v. Addyston Pipe & S. Co.* 54 U. S. App. loc. cit. 764, 85 Fed. Rep. 293, 29 C. C. A. 151. A trust is a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly. As was said by Chief Justice Fuller in *United States v. E. C. Knight Co.* 156 U. S. loc. cit. 16, 39 L. ed. 330. "Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." In *United States v. Trans-Missouri Freight Assn.* 166 U. S. loc. cit. 342, 41 45 L. R. A.

L. ed. 1028, it was said: "For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it." Just so here, the practice of the members of the social club had the effect of maintaining the Fetter rates, and hence constituted it a trust, no matter whether the members intended it to have that effect or not (and we have no doubt they did so intend it), and no matter whether they also intended to be "social" in the manner hereinbefore indicated or not. In the olden times such practices were called "contracts in restraint of trade." Nowadays they are called "trusts." There is no difference in the principle. There is a difference in the extent and methods. Those the courts condemned long ago were as mere saplings compared to the mammoth oaks when considered alongside of those of to-day. When the evils to the public interest that flow from these trust combinations are attempted to be described, words become mere weaklings in their power of expression, and one stands appalled at the helplessness of the people outside of judicial aid. This case strikingly illustrates the condition, and calls aloud for the enforcement of the statute. The facts establish the case laid against the defendants, and the statutory results must follow, if the statute is valid.

2. The defendants challenge the constitutionality of the anti-trust law of Missouri, and cite two specific provisions of the Constitution of Missouri and the 14th Amendment of the Constitution of the United States, which the act, or some part of it, violates, and we will consider the points in the order they are pleaded.

First. The title of the act of 1891, and the amendments thereof in 1895 and 1897, are said to infringe "that part of § 28 of art. 4 of the Constitution of Missouri which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title, in this; that the subject of insurance against loss or damage by fire, lightning, or storm is a different subject, and not germane to the matters contained in the title of said act." The title of the act of 1891 is, "An Act Providing for the Punishment of Pools, Trusts, and Conspiracies to Control Prices, and as to Evidence and Prosecution in Such Cases." In *Ewing v. Hoblitzelle*, 85 Mo. 64, it was held that, "where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single; and, if it is sufficiently expressed in the title, the statute is valid." In *State, Atty. Gen., v. Miller*, 100 Mo. loc. cit. 445, Black, J., said: "In adopting a title the legislature may select its own language, and may use few or many words. It is sufficient that the title fairly

embraces the subject-matter covered by the act; mere matters of detail need not be stated in the title." These cases have been many times cited approvingly, and have never been overruled, and state the law today. If a combination, arrangement, or understood course of dealing to fix and maintain prices or premiums to be charged for insuring property against loss by fire constitutes a pool, or trust, or conspiracy, then the title of the act of 1891 and its amendatory acts covers and embraces it. That it is a pool, or trust, or conspiracy is fully shown by what is hereinbefore said. It follows that this contention is untenable. The supreme court of Kansas reached the same conclusion in the case of *Re Pinkney*, 47 Kan. 89.

Second. It is claimed that § 30 of art. 2 of the Constitution of Missouri provides that "no person shall be deprived of life, liberty, or property without due process of law," and that this act violates that provision, because "it renders it unlawful for defendants to contract or agree among themselves, or with the agents of other insurance companies, or for their agents to contract and agree among themselves, for the reasonable adjustment and maintenance of rates of premium to be charged for insurance against fire, lightning, or storm in this state." This is a total misapprehension of the act. It does not prohibit any company, or the agent of any company, from contracting with any person who desires to insure his property upon any terms they two may agree upon. This is the extent and true meaning of the right to contract. It does prohibit any company, by itself or through its agents, contracting with any other company or its agent not to contract with the insured except upon terms which such insurance companies or their agents have previously established. In other words, it protects the company against the temptations of a trust or monopoly by refusing to permit it to strip itself of the power to freely contract, for under the arrangement shown in this case the applicant for insurance is free to contract, but the company and its agent has already limited and qualified its power by its previous contract with another company or its agent. The law has made this provision more out of regard for the otherwise helpless insurer than from tender consideration for the insurance company, but it incidentally preserves what it is here claimed it denies,—the free, unrestrained power to contract by both parties to it. Such laws have not only been adjudged constitutional by the Supreme Court of the United States (*United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007; *United States v. Joint Traffic Assn.* 171 U. S. loc. cit. 558, 43 L. ed. 283), and by the United States court of appeals (*United States v. Addyston Pipe & S. Co.* 54 U. S. App. 723-777, 85 Fed. Rep. 271, 29 C. C. A. 141), but the principles they announce have been expressly sanctioned by the supreme courts of New York (*People v. Sheldon*, 139 45 L. R. A.

N. Y. 251, 23 L. R. A. 221); of Pennsylvania (*Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159), of Ohio (*Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666), of Kentucky (*Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390), of Iowa (*Chapin v. Brown*, 83 Iowa, 156, 12 L. R. A. 428), of Illinois (*Craft v. McCounoughy*, 79 Ill. 346, 22 Am. Rep. 171; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361), of Wisconsin (*Milwaukee Masons & B. Assn. v. Niezerowski*, 95 Wis. 129, 37 L. R. A. 127), of California (*Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510), of Texas (*Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598) and of Louisiana (*India Bagging Assn. v. Kock*, 14 La. Ann. 164.) There is no more merit in this contention than there would be that a law was unconstitutional which prohibited two or more persons from conspiring to commit murder, or burglary, or any other felony. There is no such thing in civilized society as the unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power of the government is complete to legislate so that, while according to every man the fullest possible liberty to do what he pleases with his own, he must not interfere with the similar right of others. This principle underlies and runs through all governments and societies, and is the corner stone of the police power of the state.

Third. It is contended that § 1 of the act is in violation of § 1 of the 14th Amendment to the Constitution of the United States, which provides "that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," because it discriminates between foreign and domestic insurance companies, and because these defendants had, prior to the enactment of this law, complied with the laws of the state of Missouri; and "that said act deprives them of the right to carry on their business in a manner fair and just among themselves, and not in any manner injurious to any other person in the state; and that said act deprives them of the right of making the necessary and proper contracts relating to the business of insurance." Section 1 of the act of 1897 makes no distinction between foreign and domestic insurance companies, but, on the contrary, expressly covers "any corporation organized under the laws of this or any other state or country." So the postulate of this proposition is not true, and hence the conclusion fails. It is a misconception of the 14th Amendment to the Constitution of the United States to suppose that any person acquires any vested rights by complying with existing police regulations or comity laws which cannot be affected by subsequent changes in such regulations or laws. Such compliance is equally the duty of the citizen and the stranger, and both are treated alike by this section of the act of 1897. Hence the protection which the Constitution of the United States af-

fords has not been denied or abridged by the passage of this law. This is too plain to need the citation of authority to support it, and is fully illustrated in the cases hereinbefore referred to.

Fourth. It is insisted that § 6 of the act of 1891, as amended by the act of 1895, violates the 14th Amendment to the Constitution of the United States in that it discriminates between foreign and domestic companies by making the act of the agent prima facie proof of the act of the company as to foreign companies, while such is not the case as to domestic companies. It might be conceded, for the purposes of this case, that this section is void for this reason, but that would avail these defendants nothing, for this section is not involved in this case; and no prima facie presumptions are invoked by the attorney general or indulged in by the court. The case has been tried and submitted and will be decided just as any other case involving a question of fact is tried, and the defendants have been accorded every privilege and presumption in their favor that any litigant can have or is accorded in any other kind of a case; even more so, for, the proceeding being penal in its nature, it is strictly construed, and its abuse or violation must be clearly proved. *State, Walker, v. Talbot*, 123 Mo. 69. Aside from this, however, this section is clearly separable from the remainder of the act, and, if eliminated from it, the remainder of the act, and particularly §§ 1 and 6, would constitute a sufficient law to reach and cover the offenses here charged, and, this being the case, it is wholly immaterial—in fact, a mere academic question—whether § 6 is or is not constitutional. *St. Louis County Ct. v. Griswold*, 58 Mo. loc. cit. 199.

Fifth. It is further argued that §§ 9 and 10 of the act violate the 14th Amendment of the Constitution of the United States, because they allow an attorney's fee of not less than \$25 nor more than \$500 to be taxed against defendants in such cases, while no such fees are taxable against defendants in ordinary cases. What is said above as to § 6 applies to this contention with equal force. Besides, no such question, claim, or demand is set up in this case, and it will be time enough to consider it when a proper case involving such a claim is presented. A decision, in this case, of that proposition, might well be regarded as *obiter dictum*.

We have thus at great length set out the facts and circumstances disclosed by the record and the evidence, examined and reviewed the law bearing upon the case, and, with a lively appreciation of the effects and consequences to the seventy-three defendants, have reached the only conclusion which is possible on the facts under the law,—that the defendants are guilty of the offense charged against them of deliberately forming a trust to fix and maintain the price or premium to be charged and paid for insurance against loss or damage by fire, lightning, and storm, contrary to the provisions of the laws of this state; and, having reached this conclusion, it only remains to pronounce and enforce

the penalty which the law has fixed and prescribed in such cases.

The judgment of the court is that the defendants be ousted of all rights, privileges, and franchises, conferred by the laws of this state, and of their certificates to do business under the insurance laws of this state, and that they pay the costs of this proceeding, and that execution issue therefor.

As before indicated, the evidence does not show that the Newark Fire Insurance Company, Norwalk Fire Insurance Company, London Assurance Corporation, Citizens' Insurance Company of New York, Union Insurance Company of Philadelphia, or Equitable Fire & Marine Insurance Company of Providence, Rhode Island, or their agents, were members of the Underwriters' Social Club of St. Joseph, but, as they have made common cause with the other defendants by the pleadings and joint answer, they will be treated in the same way as the other defendants, and the judgment of ouster will include them.

Burgess, Sherwood, and Brace, JJ., concur in all the opinion. **Gantt, Ch. J.**, and **Robinson, J.**, concur in all except the judgment as to the five companies specified in the last sentence, and dissent as to that.

Gantt, Ch. J., dissenting:

Concurring with my learned Brother that the relator failed to establish by the testimony that five of the defendants or their agents were guilty of the charges against them in the information, I am wholly unable to agree to his conclusion that, because they challenged the constitutionality of the statute under which they are prosecuted in common with their confederates, they should, for that reason, be held to have confessed the allegations of the information. As I understand the law, each defendant is liable only when it is shown to have been a party to the trust. The fact that it was sued in common with others, and filed a joint answer denying its liability, and also the constitutionality of the act, does not amount to a plea of confession and avoidance. I regard this part of the opinion and the conclusion against them as a radical departure in the construction of pleadings, and hence I dissent. **Robinson and Valliant, JJ.** concur with me in these views.

Valliant, J., dissenting:

I entirely agree with the majority of the court in the opinion that the acts charged in the information constitute an offense against the anti-trust statutes of this state, and I also agree that those statutes are constitutional and valid. I further agree that, if the agents through whom the respondents have conducted their business in this state have been guilty of the offense charged in the information, the respondents cannot escape the condemnation of the law on the plea that they did not authorize, or were ignorant of, the unlawful conduct of their agents. But the evidence, in my opinion, is not sufficient to convict them of the offense charged. It is shown by the evidence

that the local agents of the respondent corporations were associated together in an organization called the Underwriters' Social Club, which was, in its general character, more of a business than a social society, though it was not devoid of the latter characteristics. In weighing the evidence, the name of the society adopted falls rather into the side of the scales against the respondents, because it seems to indicate to that extent an intention to mislead. But it appears that that club was the successor of one that had for its purpose, or at least for one of its purposes, the maintaining of certain rates of premiums, which, whatever its legal status might have been before, became, when the anti-trust statutes were adopted, unlawful; and in organizing the new society it may be that the members, in choosing this name, only desired to distinguish it, as far as a mere name could do so, from its predecessor, of which one Lancaster was the active officer. A great deal of the testimony is devoted to what is called the "Fetter book," and the use made of that book by the respondents. The author of the book is W. J. Fetter, an insurance expert of fifty years' experience. It is published on his own account, and sold to all insurance companies who will buy. The general purpose of the book is to indicate to the insurer the rate of premiums to be charged for insurance on the various classes of property in the locality, and to classify the property. According to the evidence, these rates are estimated from data derived from surveys and maps of the city, drawn with special reference to furnishing information to the insurers as to the nature of the risk, and from personal inspection of the property, and are calculated by an experienced actuary. It is a book of technical information for all persons interested in that business, and is estimated in value, like all technical works, in proportion to its reputation, or in proportion to the reputation of its author. When used and relied upon, the effect is that the insurance agent writes a policy without making a personal inspection and survey of the property; and, the book being not only in the hands of the local agent, but also in the home office of the company, the latter may pass on the policy without a special survey and certificate of inspection. The evidence shows that the book is in extensive use, and that a large proportion of the business of the respondents in St. Joseph during the period covered by this inquiry was based on the rates given in the Fetter book. There is nothing unlawful in the character of the book, and nothing unlawful in the insurance companies basing their business ventures on the information it contains; and, even if the evidence showed that all their business was transacted on that basis, that would not, of itself, bring them under the condemnation of the law. The use that a fire insurance company, standing alone, may see fit to make of the book, is no more to be condemned than the use that a merchant may make of the daily price-current reports, or than that which a life insurance company may make

of the tables of experience and of the prices at which such an insurance may be safely carried, compiled, and computed by reputable authors and actuaries. But there is a use to which the book might be put that would be unlawful, and that is the use to which it is charged in the information these respondents have put it; that is, that they have made it a standard of rates, by agreement among themselves, which shall not be lowered. The evidence shows that before the anti-trust statutes were enacted there was a compact to maintain those or similar rates, and it shows that this so-called "social club" was organized just after that law went into effect, and the organizers had that law very much in mind. There was testimony in support of the information tending to show that while the ostensible object of the society was innocent, its real object was to violate the law. But, on the other hand, while the testimony of the respondents was weak in support of the idea of its being a social club, yet it very satisfactorily showed that its main object was the regulation among themselves of the insurance business transacted by its members in particulars in which their mutual convenience was promoted, the public interest not prejudiced, and the law not violated. The testimony in support of the charge of the unlawful agreement to maintain rates is chiefly that of two witnesses, who were, or had been, members of the club, and between whom and the other members there seems to have arisen some unpleasant feeling growing out of their business. While both of these witnesses testify that there was such an unlawful agreement, yet they state it rather as their conclusion; their understanding of a tacit agreement. They say that no written agreement to that effect was made, and they do not state what, if anything, the members said among themselves that would constitute such an agreement. They undertook to give what they said the president said at the organization, which was, in substance, that they could not put anything in writing that would lay themselves liable to prosecution under the anti-trust law, and that whatever was done on the subject of maintaining rates would have to be understood among the members. One of these witnesses said that, if a member wrote a policy below the Fetter rate, the secretary would send it back to him, and he would be required to take it up. When the witness was asked what would happen if the member failed to take up the policy, he said that usually there would be a big row, and a "whitewashing." When asked to state an instance in which a member had been thus disciplined, he was able to remember but one, and that he so vaguely stated that it did not clearly appear either that the member had violated the supposed rule, or that any penalty followed. Another one of these witnesses testified that there was a penalty prescribed for cutting the rate, which was a fine of \$50 for the first two offenses, and, after that, loss of his agency. On cross-examination he said that the agreement to

submit to that \$50 fine was in writing, signed by all the members of the club. That is in contradiction of his own previous statement and that of the other witness just mentioned, to the effect that no agreement on that subject was reduced to writing for fear of the law. The evidence showed that the club had a secretary, whom it paid \$75 a month. This secretary had been obtained by a committee sent by the club to Kansas City to consult Mr. Fetter on the subject, and was recommended by him as an efficient man for their business, he having been a clerk in Fetter's office. All policies written by the members and their daily reports were sent to the secretary, who examined them, and, if the policies were found correct, he forwarded them to the company; if anything wrong was discovered, either in the policies or reports, he sent them back to the agent for correction. The state's testimony tended to show that this was for the purpose of preventing any agent from cutting the rate. The testimony for respondents tended to show that the secretary was selected because of his skill in insurance business, and to aid the members in their technical work. All policies were sent to him for his judgment as to their being properly written. If there was anything wrong in the form of the policy, or in the description of the property, it was his duty to note the correction, and return it to the writer. When a number of policies were written by different agents on the same property, it was desirable that they should all be what in technical language they call "concurrent;" that is, substantially in the same form. It was the secretary's duty to see that such policies were concurrent, and, if one was found to be what they called "nonconcurrent," his duty was to note the difference, and return it to the writer for correction. This could be done only by having a common agent of this kind, or by the more inconvenient method of a meeting of all the agents interested. In a few instances, when he first began his office, the secretary noted on policies that they were written below the rate indicated in the Fetter book, which was the usual standard, and returned them to the writers for such action as they might see fit to take; but it was done as a mere suggestion; the secretary took no further action on it, and he soon discontinued doing so. That he had nothing to do with fixing or maintaining the rates. That he made inspections of risks, and, when changes in the property or occupancy occurred, he reported it to Mr. Fetter at Kansas City, who, if, in his opinion, the change required it, prepared for distribution to all his subscribers slips indicating a change in the rate of premium that should be made. The testimony of the president, secretary, and several members of the club was taken, and they all testify that there was no agreement to maintain rates. It is not every association of men engaged in the same business that is condemned by our anti-trust statutes, even though the object of the association be to facilitate the conduct of their business and promote their mutual in-

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terests. Such associations are not unusual, nor necessarily injurious to the public well-being. It was pointed out by witnesses in this case that there are features of the insurance business which render an association of the kind in question convenient and profitable to men engaged in the business, and that such an association may be conducted without in any particular violating the law. The fact that before the anti-trust laws were enacted insurance companies were banded in an association to maintain rates doubtless conduces to place any society they may now form under suspicion, especially at a period when the public mind is excited on the subject of trusts. But when there is a legitimate purpose for which they may organize, and when we are told by reputable witnesses that such was the purpose of this organization, and that there was no agreement to maintain rates we have no right to disregard the testimony or overweigh it with suspicion. I have given the evidence in this case a careful study, and am satisfied that on the main question of fact the decided preponderance is in favor of the respondents, and the finding should be that they are not guilty of the acts charged, and the judgment that they be discharged.

(Division 1.)

KANSAS CITY, MEMPHIS, & BIRMINGHAM RAILROAD COMPANY, *Rept.*,

v.

SOUTHERN RAILWAY NEWS COMPANY, *Appt.*

(.....Mo.....)

1. A contract by which a news company indemnifies a railroad company against any loss sustained by reason of any injury to employees of the news company, who are carried by the railroad company, is not against public policy.
2. A finding of fact by the court in a case at law is conclusive on appeal.
3. The fact that the amount of a judgment was determined by agreement will not take the judgment out of the protection of a covenant to indemnify the defendant against liability upon the claim on which the judgment is taken, although it will reduce the judgment from conclusive to presumptive evidence of the liability.

(June 14, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover upon a contract by defendant to indemnify plaintiff against liability for injuries to defendant's employees while on plaintiff's trains. *Affirmed.*

NOTE.—For liability of carriers to postal clerks on trains, see *Cleveland, C. C. & St. L. R. Co. v. Ketcham* (Ind.) 19 L. R. A. 339, and *note*.

For express messengers, newsboys, etc., as passengers, see *note* to *Muldoon v. Seattle City R. Co.* (Wash.) 22 L. R. A. on page 796.

The facts are stated in the opinion.

Messrs. Wallace & Wallace, for appellant:

The defendant is not liable on the contract sued on for the reason that the newsboy was killed while acting as a lookout on plaintiff's train, and while outside the line of his employment as news agent.

The engineer in charge of the train had authority, under the circumstances of the case, to call on the news agent for assistance.

Sloan v. Central Iowa R. Co. 62 Iowa, 736; *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 220, 16 L. R. A. 861; *Marks v. Rochester R. Co.* 146 N. Y. 181; *Georgia P. R. Co. v. Propst*, 85 Ala. 203, 83 Ala. 525; *Louisville & N. R. Co. v. Ginley*, 100 Tenn. 472; *Newport News & M. Valley Co. v. Carroll*, 17 Ky. L. Rep. 374; *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637, 48 Am. Rep. 689; *Arkansas S. R. Co. v. Loughridge*, 65 Ark. 300; *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752; *Louisville, N. A. & C. R. Co. v. Smith*, 121 Ind. 353, 6 L. R. A. 320; *Marquette & O. R. Co. v. Taft*, 28 Mich. 289; *Elliott, Railroads*, § 302, pp. 408, 409.

If it should be held that the employment of the newsboy by the engineer was unauthorized, the defendant is still not liable. The contract of the news company was to save the railroad harmless from actions for damages or injury to the employees of the news company. This case does not come within the limits of that contract. At the time of the injury the newsboy was not acting for the defendant nor in the line of his employment.

When the servant either at the request of a third person or at his own volition, for his own purposes, undertakes to do anything not expressly or impliedly called for by the course of the business to be transacted by him, he is universally held to temporarily leave the master's employ.

Church v. Mansfield, 20 Conn. 284; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *M'Manus v. Crickett*, 1 East, 106; *Bard v. Yohn*, 26 Pa. 482; *Lee v. Nelms*, 57 Ga. 253; *Rayner v. Mitchell*, L. R. 2 C. P. Div. 357; *Adams v. Cost*, 62 Md. 264, 50 Am. Rep. 211; *Cavanagh v. Dinsmore*, 12 Hun. 465; *Stevens v. Armstrong*, 6 N. Y. 435; *Brocn v. Purviance*, 2 Harr. & G. 316; *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635; *People's Ice Co. v. Employers' Liability Assur. Corp.* 161 Mass. 122.

Decedent was a volunteer who assumed a position of danger at the request of one of defendant's employees, and was one to whom the company owed no duty, and the railroad company was not liable for his death.

Everhart v. Terre Haute & I. R. Co. 78 Ind. 292, 41 Am. Rep. 567; *Flower v. Pennsylvania R. Co.* 60 Pa. 210, 8 Am. Rep. 251; *Welch v. Maine C. R. Co.* 86 Me. 552, 25 L. R. A. 658; *Georgia P. R. Co. v. Propst*, 85 Ala. 203; *Union P. R. Co. v. Nichols*, 8 Kan. 503, 12 Am. Rep. 475; *Texas & N. O. R. Co. v. Skinner*, 4 Tex. Civ. App. 661, 45 L. R. A.

The contract sued on, in so far as it is relied on to protect or indemnify the plaintiff against the penalty which is incurred under the laws of Alabama through its negligent and wrongful act, is against public policy and void.

Jones v. St. Louis S. W. R. Co. 125 Mo. 666, 26 L. R. A. 718; *Voight v. Baltimore & O. S. W. R. Co.* 79 Fed. Rep. 561; *Starr v. Great Northern R. Co.* 67 Minn. 18; *Magoffin v. Missouri P. R. Co.* 102 Mo. 540; *Mellor v. Missouri P. R. Co.* 105 Mo. 455, 10 L. R. A. 36; *Louisville & N. R. Co. v. Kingman*, 18 Ky. L. Rep. 82; *Chamberlain v. Pierson*, 59 U. S. App. 55, 87 Fed. Rep. 420, 31 C. C. A. 157; *Norfolk & W. R. Co. v. Shott*, 92 Va. 34; *New York O. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Maney v. Chicago, B. & Q. R. Co.* 49 Ill. App. 105; *Delaney v. Robson*, 5 Taunt. 605; *Babcock v. Terry*, 97 Mass. 482; *James v. Hendree*, 34 Ala. 488; *Hayes v. Hayes*, 8 La. Ann. 468; *Rintoul v. New York C. & H. R. Co.* 17 Fed. Rep. 905; *Willock v. Pennsylvania R. Co.* 166 Pa. 184, 27 L. R. A. 228; *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18; *Hall v. Corcoran*, 107 Mass. 253, 9 Am. Rep. 30; *Welch v. Wesson*, 6 Gray, 505; *Harrington v. Crawford*, 136 Mo. 467, 35 L. R. A. 477; *Parsons v. Randolph*, 21 Mo. App. 353; *Harrison v. McCluney*, 32 Mo. App. 481.

Messrs. Pratt, Dana, & Black, for respondent:

The contract made no attempt to limit liability as a common carrier, as appears for at least two reasons:—

First, in making this contract plaintiff was not contracting as a common carrier. It was contracting as a private carrier, or bailee for hire, because, as a matter of accommodation to defendant and at the latter's request, it agreed by the contract to allow a business to be carried on upon its trains which it was not bound to consent to as a common carrier.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; *Hutchinson, Carr.* §§ 44, 73, 77, 111.

Having the right to refuse to perform the services requested by defendant, plaintiff had the right to contract for their performance as a private carrier, and to impose such conditions as it saw fit.

4 *Elliott, Railroads*, 2173; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Chicago, M. & St. P. R. Co. v. Wallace*, 24 U. S. App. 589, 66 Fed. Rep. 506, 14 C. C. A. 257, 30 L. R. A. 161; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353; *Coun v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Robertson v. Old Colony R. Co.* 156 Mass. 525; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 440, 32 L. ed. 791; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 21, 38 L. R. A. 93; *Bates v. Old Colony R. Co.* 147 Mass. 265; *Hosmer v. Old Colony R. Co.* 156 Mass. 507; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Stephens v. Southern P. Co.* 109 Cal. 86, 29 L. R. A. 751;

Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L. R. A. 483; *Kennay v. New York O. & H. R. R. Co.* 125 N. Y. 422.

Second, the contract was not against public policy and not an improper one, because it was merely a contract of indemnity and insurance, by which plaintiff provided additional means and security for meeting the common-carrier obligations which might be imposed upon it in carrying out the terms of the agreement with defendant.

Phœnia Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 324, 20 L. ed. 879; *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730; *American Casualty Ins. Co.'s Case*, 82 Md. 535; *Boston & A. R. Co. v. Mercantile Trust & D. Co.* 38 L. R. A. 97; *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* 60 N. J. L. 246, 44 L. R. A. 213; *Donald v. Chicago, B. & Q. R. Co.* 93 Iowa, 284, 33 L. R. A. 492; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 127; *Pittsburg, O. C. & St. L. R. Co. v. Coz*, 55 Ohio St. 497, 35 L. R. A. 507; *Shaver v. Pennsylvania Co.* 71 Fed. Rep. 931.

The burden rests upon the party claiming that a contract is against public policy to make it plainly and obviously clear that it is contrary to such policy.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 36 U. S. App. 152, 70 Fed. Rep. 207, 17 C. C. A. 62, 30 L. R. A. 193.

Brace, P. J., delivered the opinion of the court:

On the 28th of December, 1889, the plaintiff and defendant entered into a written contract by which the plaintiff, for and in consideration of the sum of \$1,500, and of the covenants of the defendant therein contained, granted to said news company the privilege of selling upon its regular passenger trains during the year beginning January, 1890, "periodicals, newspapers, books, confections, fruits, cigars, cakes, pies, and sandwiches," under certain conditions and regulations therein set out; said contract containing, among others the following covenants upon the part of the defendant, to wit: "And, in consideration of the foregoing grant and the privileges therein specified, said news company releases said railroad company from any right of action, claim, or demand which may accrue to it by reason of the loss of any of its property while being transmitted on any of the trains of the railroad company under the terms of this contract, and further agrees, for such consideration, to indemnify said railroad company and save it harmless from all claims, demands, damages, actions, costs, and charges to which the railroad company may be subject, or which it may have to pay, by reason of any injury to any person or property, or loss of life or property, suffered or sustained by any agent or employee of the news company while in, upon, or about any of the stations, platforms, cars, or other premises of the railroad company, whether such injuries or loss arise from the negligence of the employees of said railroad company or otherwise." This is an action for damages for a breach of the sec-

ond covenant aforesaid, in which the plaintiff recovered judgment in the circuit court of Jackson county for the sum of \$5,000, and the defendant appeals.

The case was tried by the court without a jury, the court finding the facts to be as follows:

"(1) Plaintiff is a railroad corporation owning and operating at the times mentioned in the amended petition a line of railway in the states of Tennessee, Mississippi, and Alabama; and defendant is and was at the same times a corporation organized and existing under the laws of Kentucky, and having an office for the transaction of its usual and customary business in Jackson county, Missouri, and at such times was engaged in selling newspapers, books, periodicals, and merchandise on railroad trains throughout the country, through agents and servants commonly and generally known as 'newsboys,' and in conducting such business it was usual and necessary for such agents and servants to pass back and forth from car to car on the trains while the latter were in motion.

"(2) On December 28, 1889, plaintiff and defendant entered into a written contract, a copy of which is set forth in the amended petition filed herein, on the 22d day of February, 1896.

"(3) That pursuant to the terms of said contract said plaintiff throughout the year 1890 received and carried upon its trains the agents, employees, and merchandise of said defendant placed thereon by the latter, and afforded such agents and employees facilities for selling and offering for sale such merchandise; that among such agents and employees of said defendant was one George W. Davis, who, in the course of his employment, and acting as agent for defendant, did, on the 21st day of October, 1890, at plaintiff's station of Birmingham, Alabama, under the provisions of said contract, enter and go upon one of plaintiff's passenger trains with the merchandise furnished him by said defendant, and for the purpose of selling the same thereon; that on the same day, while said train was moving over plaintiff's said road between said Birmingham and the station of Ensley, and while in said state of Alabama, it came in collision with another train on plaintiff's road, and in consequence thereof said George W. Davis while so on said passenger train as an agent and employee of said defendant as aforesaid received injuries from which he subsequently died. Such collision occurred and such death was caused by the negligence of plaintiff's employees in the operation of such train, and the personal representatives of Davis were thereby damaged in the sum of \$5,000.

"(4) By the laws of Alabama in force at the time, the plaintiff became and was liable to the personal representative of such Davis for such damages as were occasioned by the negligence aforesaid. Section 2589 of volume 1 of the Civil Code of Alabama of 1886, then in force, provided as follows: '2589—(2641, 2642, 2643). Action for Wrongful

Act, Omission, or Negligence Causing Death. A personal representative may maintain an action and recover such damages as the jury may assess for the wrongful act, omission, or negligence of any person or persons or corporations, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death; such action shall not abate by the death of the defendant, but may be revived against his personal representative, and may be maintained though there has not been prosecution or conviction or acquittal of the defendant for such wrongful act or omission or negligence, and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate.

"(5) That the true construction of said statute, as decided by the supreme court of Alabama, which is the court of last resort in that state, is and was that a person entitled to recovery at all thereunder may recover any amount which a jury may see fit to allow; there being no limit fixed by law to the amount of the verdict which a jury may render in an action under said statute.

"(6) George W. Davis received his injuries on the 21st day of October, 1890, and died therefrom on the 29th day of November, 1890; and his administrator instituted a suit in the city court of Birmingham, Alabama, on February 2, 1891, against plaintiff for \$50,000 damages for such injuries received, as claimed, through the negligence of the plaintiff. Plaintiff herein was duly served with process in such suit, which was, on the 18th day of June, 1891, dismissed.

"(7) After the death of George W. Davis, and on the 2d day of February, 1891, the probate court of Jefferson county, Alabama (a court, having under the laws of Alabama, full jurisdiction), appointed Eugene S. Smith as the administrator of said Davis; and under the laws of Alabama said administrator became and was the personal representative of said Davis, and entitled to have and recover the damages authorized by the laws of Alabama for the death of said Davis through the negligence of the employees of plaintiff.

"(8) On the 19th day of June, 1891, Eugene S. Smith, administrator of George W. Davis, deceased, instituted in the circuit court of Walker county, Alabama (a court of competent jurisdiction under the laws of Alabama), a suit against plaintiff for \$50,000 damages for the death of said Davis through the negligence of the plaintiff's employees. The plaintiff herein, as defendant therein, was duly summoned with process in accordance with the laws of Alabama. On the 16th day of February, 1892, said suit was dismissed.

"(9) On the 18th day of September, 1891, Eugene S. Smith, as administrator of George W. Davis, deceased, filed in the city court of Birmingham, Alabama (a court of competent jurisdiction under the laws of Alabama), a suit against this plaintiff for \$20,000 damages for the death of George W. Davis through the negligence of this plaintiff's employees. Process was served on this plaintiff as required by the laws of Alabama, and this plaintiff, as defendant therein, entered its appearance to said suit. A jury was duly impaneled in said cause, and on the 18th day of September, 1891, rendered a verdict for the administrator, assessing the damages at \$5,000, for which amount said court on the 18th day of September, 1891, rendered judgment in favor of the said administrator and against this plaintiff for \$5,000, which judgment this plaintiff on the 18th day of September, 1891, paid to said Eugene S. Smith, administrator of said Davis.

"(10) As a matter of fact the verdict and judgment for \$5,000 were entered by and with the consent of the parties, though the proof of this fact was received over the objection of the plaintiff that such proof was incompetent and immaterial. As a matter of fact, there had been negotiations to compromise the case pending in Walker county, Alabama, and \$5,000 was the best settlement that could be made, and was a reasonable sum to be allowed for the damages; and so it was decided between plaintiff and said administrator, after long negotiations, that there should be a settlement for that amount, and pursuant thereto it was agreed to dismiss the case in Walker county, and institute a new suit in the city court of Birmingham, Alabama, in which the jury should assess the damages at \$5,000, and the court rendered judgment therefor. This was all done in good faith, and was a reasonable settlement.

"(11) This plaintiff did hire doctors and incur expenses for medical treatment and hospital care of George W. Davis while he was suffering from his injuries, and paid therefor \$430.85, which was a reasonable sum to pay therefor. It also hired an undertaker to prepare his body for burial and furnish a coffin therefor, and paid such undertaker \$80, which was a reasonable sum to pay therefor. But the court refused to allow plaintiff for that money so expended as aforesaid, to which refusal of the court the plaintiff excepted.

"(12) This plaintiff on October 8, 1891, demanded of this defendant the \$5,000 on account of the payment of the judgment aforesaid, and also said sum of \$510.85, and this defendant refused to pay either of said sums.

"(13) Upon the 21st day of February, 1891, this plaintiff notified this defendant of the pendency of said suit of said administrator in the city court, and was called upon by this plaintiff to defend the same or settle the claim, but refused to have anything to do with the defense of the case or settlement of the claim, and thereafter, and prior to the rendition of the judgment of the city court of Birmingham in the last case, this defendant was fully notified of the pendency of the

case in Walker county, the negotiations for a settlement, and that the case would be settled for \$5,000; and defendant made no objection to the amount, but said that it was a reasonable sum, and the only objection made by this defendant to the settlement was that it could not take any part in the defense or settlement, because it was insured by some insurance company which had the control of the matter.

"(14) The collision in which the newsboy, George W. Davis, was injured, occurred by reason of the engineer of the passenger train mistaking a signal, and starting from Birmingham with only the baggage car and two passenger coaches attached to his engine; having left the sleeping car, which was to be a part of the train, in Birmingham, and having started without the conductor or brakeman of the train. The engineer learned these facts upon stopping at Ensley, the first station west of Birmingham, and about 5 miles therefrom. The fireman was on the engine with the engineer and baggage-man, in the baggage car attached to the engine. There were a good many passengers in the two coaches. Upon finding that he had left part of the train and the conductor and brakeman in Birmingham, the engineer asked the newsboy, Davis, if the red lights were on the rear end of the coach, and told him to get on the platform of the rear coach, and that the train would be backed up to Birmingham for the conductor, and also told him to signal if he saw anything in the way. Thereupon Davis said he would, and started towards the back end of the train, and was afterwards seen looking through the rear door of the coach, but inside thereof (said rear door was locked), but at the time of the collision was running through the rear coach, in the direction of the engine, and just after the collision was seen crawling on his hands in the aisle of the rear coach, dragging his legs, going towards the engine, and right ahead of a witness seated four or five seats from the rear of the coach. As the collision came, just before they struck, the newsboy came running past two witnesses who sat about the fourth seat from the rear of the coach; the same being the front of the coach while backing towards Birmingham. The newsboy came from towards the rear door of the coach, running towards the engine of the passenger train. The evidence fails to show that Davis obeyed the directions of the engineer, except as above stated. Under the laws of Alabama, railroad companies are liable for negligence of workmen in some cases; and, under the laws of that state, Davis did not, by reason of the directions of the engineer, even had he acted under such directions and obeyed them, become an employee of the railroad company, or cease to be a servant of the news company."

The finding of facts by the trial court is exhaustive, supported by the evidence, and furnishes a sufficient statement for the discussion of the legal questions raised.

1. It is contended that the contract sued on is against public policy, and is for that reason void. The argument in support of 45 L. R. A.

this contention is made from the standpoint of the deceased news agent, and his relation to the railroad company, and is predicated on the well-settled principle that a common carrier cannot by contract limit its liability to a passenger for the negligence of its servants. It may be conceded that the news agent in this case was a passenger on the train in which he lost his life, and that the company could not, by a contract such as this, relieve itself of its duty to him as a common carrier of passengers, or of its liability to him for the negligence of its servants. *Jones v. St. Louis S. W. R. Co.* 125 Mo. 666, 26 L. R. A. 718; *Magoffin v. Missouri P. R. Co.* 102 Mo. 540; *Mellor v. Missouri P. R. Co.* 105 Mo. 455, 10 L. R. A. 36; *Voight v. Baltimore & O. S. W. R. Co.* 79 Fed. Rep. 561, and cases cited; *New York C. R. Co. v. Lockwood*, 17 Wall. 359, 21 L. ed. 634; *Starr v. Great Northern R. Co.* 67 Minn. 18. But the contract in question is not with a passenger; it is not with a person to whom the company owed a duty as a common carrier of passengers; nor does it in terms, as it could not in effect, attempt to relieve the railroad company from any of its duties or liabilities as such. The contract is simply one of indemnity, by which the news company agreed, for a valuable consideration, to indemnify the railroad company against loss which the latter might sustain by reason of the duty it would incur to the news agent, as a common carrier of passengers, in carrying out the contract. In *Phœnix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, it was held by the Supreme Court of the United States that "no rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance he does not diminish his own responsibility to the owners of the goods, but, rather, increases his means of meeting that responsibility." In the subsequent case of *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730, that court was asked to review its announcement of this principle, to which it was replied: "Nor are we disposed to review our decision that common carriers can insure themselves against loss proceeding from the negligence of their own servants. The doctrine in the case cited has been referred to with approval in the subsequent cases of *Orient Ins. Co. v. Adams*, 123 U. S. 67, 72, 31 L. ed. 63, 66, and *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 438, 32 L. ed. 788, 791." That this doctrine is supported by the great weight of authority is manifested by the cases cited in the above cases, by others in the brief of counsel for the plaintiff, and by some of those cited by counsel for the defendant. While in the great majority of the cases the principle has been applied to con-

tracts of indemnity against damages for the loss of property, that it is equally applicable to like contracts against losses for injuries to passengers, has in two very recent cases been directly decided. *American Casualty Ins. Co.'s Case* (1896) 82 Md. 535; *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.* 38 L. R. A. 97; *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* (1897) 60 N. J. L. 246, 44 L. R. A. 213. In these cases the question was maturely considered and thoroughly discussed; and in each, after a review of the authorities, the conclusion reached was that "a contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it is not invalid, as against public policy, because it covers losses resulting from its negligence or the negligence of its servants." To the trenchant argument in support of this conclusion of McSherry, Ch. J., who delivered the opinion of the Maryland court of appeals in the first case, and which was highly commended and followed by the supreme court of New Jersey in the second, no additional force could be added by any words of ours. We shall therefore content ourselves for argument on this branch of the case with the following extract from that opinion: "Whilst the carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very same losses. Consequently he may by insurance indemnify himself against loss of or injury to property intrusted to his care, even where the loss or injury is caused by his own or his servant's negligence. This was decided in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 324, 29 L. ed. 879, and the ground upon which the decision was based was that such insurance did not diminish the carrier's own responsibility to the owner of the goods, but increased the means of meeting that responsibility. Notwithstanding such insurance, the carrier remains liable to the owner or shipper of the goods, and by insuring them he merely contracts, as in every other instance of a reinsurance, with someone else for reimbursement for such loss. The doctrine announced in the *Phoenix Ins. Co.'s Case*, 117 U. S. 324, 29 L. ed. 879, was affirmed in *California Ins. Co. v. Union Compress Co.* 133 U. S. 387, 33 L. ed. 730, and is the settled law of the land. A reasonable restriction by contract of his common-law liability and an insurance by the carrier of goods against loss are recognized by the law, and are not in contravention of its policy to-day, whatever that policy might have been heretofore. It is obvious that a carrier of passengers cannot by contract restrict, diminish, or limit that obligation to the public, or that duty to the passenger, which requires the exercise of the highest degree of care and diligence on his part. A contract

which stipulates for or agrees to such relaxation, and therefore contemplates immunity from the carrier's own negligence, would be utterly void, precisely as would a contract purporting to relieve a carrier of goods from liability for losses occasioned by his own or his servant's negligence. But the policies before us are not contracts of that character. Neither in express terms nor by implication do they profess or purport to abridge in any way the carrier's common-law liability for injuries to passengers, employees, or strangers. These policies leave that liability precisely where and as complete as it was before they were written. They contain no provision impugning or questioning in the slightest degree the full measure of that responsibility. It is perfectly manifest, therefore, that they are not in terms contracts restricting or attempting to restrict the carrier's conceded liability; and, if they contravene public policy at all, it must and can only be incidentally and indirectly. This is all that can be imputed to them. But they are all, it is alleged, repugnant to public policy, because, by furnishing the carrier with a fund with which to reimburse himself for losses caused by his own negligence, their inevitable tendency or effect is to induce less vigilance or to promote greater carelessness on the part of the carrier. Precisely the same reasoning would invalidate, as repugnant to public policy, every species of fire and marine insurance. To the extent that a fire insurance policy affords an individual protection against loss, to exactly the same extent may it be said the assured will become indifferent in guarding against casualties from fire. And in so far as a carrier may have a policy covering goods, and insuring them for his own benefit against losses arising from his or his servant's negligence, just so far will he be either tempted to be negligent or become indifferent as to vigilance. But in neither instance can it be said that, because a temptation to be negligent may possibly result from the possession of an insurance policy, the contract of insurance necessarily begets negligence or conflicts with public policy. Nor can we assume, as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers, who has secured an indemnity to reimburse himself for losses which his own negligence may produce, will, merely because and solely in consequence of having such indemnity,—which, at best, is but limited and partial,—necessarily disregard the duty to exercise the highest degree of care. And, unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured." The only distinction between those cases and the one in hand is that in those the contracts were formal con-

tracts of insurance with insurance companies, while the contract in question is a contract of indemnity by a news company. But a mere contract of insurance is nothing more nor less than a contract of indemnity against loss, as is this with the defendant, and the principles governing must be the same in each; and, as nothing can be predicated of the contract in this case which could interfere with or affect the liability of the carrier to the person injured, there is nothing in it to take it out of the principle of those cases or render it obnoxious to public policy. Hence we conclude that this contract cannot be avoided as against public policy.

2. It is next contended that "the defendant is not liable on the contract sued on, for the reason that the newsboy was killed while acting as a lookout on plaintiff's train, and while outside of his employment as news agent." This theory of fact was presented upon the trial, and upon it the court declared the law to be: "(2) That the plaintiff could not take the newsboy, Davis, from the duties for which he was employed by the defendant, and send him to a place of danger, to assist in the plaintiff's own business, and, while said Davis was at said place of danger by its (the plaintiff's) own negligence, injure said Davis so that thereafter he died, and then in this action recover the amount paid by it on account of the injuries so inflicted by it on said Davis." If the court had found the fact to be as predicated in this contention, under this declaration of law its finding and judgment would have been for the defendant; but the court, in substance, found the fact to be that the newsboy was not in fact killed in a place of danger to which he had been exposed while in the employ of the plaintiff (that is to say, as "a lookout on plaintiff's train"), and the argument in support of it is aimed at the finding of fact, and not at an error of law, and, as the finding of the court is supported by the evidence, that finding is conclusive on appeal, as has been uniformly held in cases at law, where the issues of fact are submitted to the court. *Sutter v. Raeder*, (Mo.) 50 S. W. 813; *Rogers v. Warren*, 75 Mo. App. 271; *Williams v. Monroe*, 125 Mo. 574; *Pitts v. Sheriff*, 108 Mo. 110; *Hamilton v. Boggess*, 63 Mo. 233. This point must be ruled against the defendant.

3. The defendant's next contention is that the judgment of the circuit court is erroneous "for the reason that plaintiff's evidence showed that it compromised the claim made by the administrator, without securing the assent of the defendant." As was said by Wagner, J., in *Strong v. Phenix Ins. Co.* 62 Mo. 289, 21 Am. Rep. 417, the rule to be deduced from the whole current of authorities on this subject is that, "where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it,"—a rule that has

been frequently announced and approved in the decisions of this court. *Garrison v. Baggage Transp. Co.* 94 Mo. 130; *St. Joseph v. Union R. Co.* 116 Mo. 636. That the defendant was notified of the pendency of the litigation which resulted in the judgment against the plaintiff for \$5,000 on a liability against which the defendant by its contract had agreed to indemnify it, and was afforded ample opportunity to control and manage that litigation if it had seen proper to do so, was abundantly shown by the evidence, and was so found by the court (thirteenth finding). The fact that the amount of the judgment was determined by agreement would not take the judgment without the protection of the defendant's covenant "to indemnify the plaintiff for all damage to which it may be subject or which it may have to pay." The only effect the consent could have would be to reduce the judgment from conclusive to presumptive evidence only of the defendant's liability on its contract, and of the amount thereof, and to afford it the right and privilege of showing either that the judgment was procured by a fraudulent collusion, was not founded upon a legal liability, or that it exceeded such liability. *Conner v. Reeves*, 103 N. Y. 527. This the defendant did not attempt to show, but, on the contrary, it affirmatively appeared from the evidence, and the court found, that the settlement was made in good faith, that there was a legal liability, for which the judgment was rendered, and that the amount thereof was reasonable (tenth and fourteenth findings).

We find no error in this record for which the judgment of the Circuit Court should be reversed, and the same is affirmed.

All concur.

Charles P. WONDERLY, *Respt.*,
v.

LAFAYETTE COUNTY, *Appt.*

(150 Mo. 635) 515. W 745

1. An assignment made in another state of a judgment of a Federal court is not made admissible in evidence by an acknowledgment before a clerk in another state or a clerk's certificate such as is required for proof of a judicial proceeding under Rev. Stat. 1889, § 4881.
2. A judgment is vitiated by fraud of the plaintiff, whereby defendant is prevented from making his defense, which rests in the peculiar knowledge of the plaintiff, who conceals it from the defendant.
3. A false pretense that the nominal plaintiff in a Federal court is the owner of bonds sued on, when made to give jurisdiction to that court on the ground

NOTE.—On the question of Federal jurisdiction in suits by assignees, see *Goldsmith v. Holmes* (C. C. D. Or.) 1 L. R. A. 816, and note; *Republic Iron Min. Co. v. Jones* (C. C. N. D. Ga.) 2 L. R. A. 746, and note; *Windsor Sav. Bank v. McMahon* (C. C. S. D. Iowa) 3 L. R. A. 192; and *American Freehold Land & Mortg. Co. v. Thomas* (C. C. S. D. Ga.) 12 L. R. A. 681, and note.

of diverse citizenship of the parties, while the real plaintiff is in fact a citizen of the same state as the defendant, constitutes a fraud, which will render the judgment subject to attack in equity, if the defendant is thereby deceived and prevented by the fraud from making his defense.

4. A state court of equity may entertain a bill to set aside a judgment obtained by fraud in a Federal court.

(May 23, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Lafayette County in favor of plaintiff in an action brought to enforce a judgment holding defendant liable upon certain county bonds. *Reversed.*

Statement by Valliant, J.:

This is a suit begun September 18, 1895, in the circuit court of Lafayette county, upon a judgment rendered October 31, 1885, in the circuit court of the United States for the western division of the western district of Missouri, in favor of one Francis D. Owings against Lafayette county for \$11,791.45, and alleged to have been assigned to the plaintiff, Wonderly. The petition alleges the issuance and service on defendant of the summons, the return of same, and rendition of judgment, and assignment thereof to plaintiff; that the cause of action on which it was founded consisted of bonds and coupons bearing interest at 10 per cent per annum from maturity. The petition did not state facts showing that the suit in which the judgment was rendered was within the jurisdiction of the Federal court, nor did it state that the judgment had not been paid. Defendant, by its amended answer, admitted the rendition of the judgment, and denied the assignment. Then the answer proceeded affirmatively to state a case for equitable cognizance, charging that the judgment was procured by fraud, and praying that it be set aside and annulled. In substance, the charge of fraud was that the bonds and coupons on which the judgment was founded were issued under a certain act of the general assembly of Missouri named, which was in conflict with the Constitution of the state, and was therefore invalid, and the bonds and coupons were null and void; that, under the laws then existing, the circuit courts of the United States within this state had jurisdiction of suits involving more than \$2,000, wherein a citizen of another state was plaintiff and a citizen of this state defendant; that, prior to the institution of the suit in which the judgment sued on was rendered, the supreme court of this state had in numerous decisions adjudged the act of the legislature mentioned unconstitutional and void, and bonds purporting to be issued thereunder of no force and effect, but that the courts of the United States had taken a contrary view, and had decided that the act was constitutional and valid, and bonds issued under it binding obligations; that, prior to the institution of that suit, the plaintiff in this suit was fully advised of

the decisions of the supreme court of this state, and also of those of the United States courts, on that subject, and he knew that, if he sued on those bonds and coupons in a court of this state, the result would be a judgment for defendant, but if he sued in the Federal court, the probability was that the bonds would be held valid, and he would obtain a judgment on them; that, at the time that suit was instituted in the name of Owings, he was not the owner of the bonds or coupons, but the same were the property of the plaintiff in this case, and he and Owings, both knowing how the Missouri courts had held, and also how the Federal courts had held, "combined and conspired together for the purpose of wronging, cheating, and defrauding this defendant, and of imposing and perpetrating a fraud upon the jurisdiction of the United States circuit court within and for the western division of the western district of the state of Missouri, and, in pursuance of such combination and conspiracy, the said plaintiff and the said Owings falsely and fraudulently pretended the said plaintiff had sold and assigned and transferred to said Owings the aforesaid bonds, and thereupon the said Owings, pretending to be the holder and owner of said bonds, instituted said suit in said United States court;" that all the time the plaintiff was and still is a citizen of Missouri, and Owings was and still is a citizen of Illinois; that the pretended transfer to Owings was to enable the plaintiff in that name to use the United States court to obtain a judgment which he knew he could not obtain in his own name; that defendant had no knowledge or information as to the real ownership of the bonds, or of the facts in regard to the pretended assignment, until November, 1895; that, if defendant had had any knowledge or information of the fraud, it would have made the defense in that court, but that the plaintiff and Owings, knowing that the defendant was ignorant of the real ownership and pretended transfer, kept the facts secret, and defendant was thus prevented from raising the question of jurisdiction in that court; and that defendant had no information or intimation of the real ownership of the bonds, and the fraud that had been practised until after the institution of the present suit. There is a prayer asking that the judgment be set aside, etc. Defendant then proceeds, by way of a cross bill, to state the rendition of the same judgment, and that in October, 1895, a writ of scire facias to revive the judgment had issued out of the United States court in the name of Owings, to the use of plaintiff, against defendant. Then the same facts, to show that the judgment was obtained by fraud, as above stated, are pleaded again, and the cross bill concludes with a prayer for an injunction to restrain the plaintiff from further prosecuting the writ until the final determination of this suit. On motion of the plaintiff, the court struck out all of defendant's answer except the first clause, which admitted the rendition of the judgment and denied the assignment, to which the defendant duly ex-

cepted. The cause was tried by the court without a jury. On the trial the plaintiff introduced in evidence a document marked "Transcript of Judgment," which purports to set out a copy of the petition, summons, and return, showing service on defendant and the judgment in question, and a certificate purporting to be signed by the clerk, to the effect that on September 12, 1891, there was presented an assignment of the judgment "duly acknowledged to Charles P. Wonderly, of St. Louis, Mo., dated November 20, 1885." To the whole document there is the attestation of the clerk, duly certified by the judge, that it is a "true copy of the judgment record in the above-entitled cause." Defendant objected on the ground that the certificate of the clerk was not sufficient, the objection was overruled, and defendant excepted. Then plaintiff offered what purported to be an assignment of the judgment dated November 28, 1885, signed by Francis P. Owings, acknowledged before one William H. Bradley, as clerk of the circuit court of the United States for the northern district of Illinois. The defendant objected on the ground that the judgment was in the name of Francis D. Owings, and the purported assignment was in the name of Francis P. Owings, and also on the ground that the purported certificate of acknowledgment was not evidence. Objections overruled, and exception taken. Then there was a certificate of the clerk of the court in which the judgment was rendered, to the effect that he had noted the assignment on the margin of the entry of the judgment, "12th Sept. 1891." This was objected to as incompetent, objection overruled, and exception taken. That was all the evidence for plaintiff. Defendant offered evidence tending to prove the facts alleged in that portion of the answer which had been stricken out, but, on objection of plaintiff, it was excluded, and defendant excepted. The court found for plaintiff, and rendered judgment in his favor for \$23, 928.63. Motions for new trial and in arrest followed, which were overruled, and the cause is here on defendant's appeal.

Messrs. William Aull, J. M. Lewis, and Elijah Robinson, for appellant:

The fact that plaintiff was the actual owner of the bonds which are the basis of the judgment in the Owings case, and that he transferred said bonds to Owings to have suit brought on them in the United States court, constituted a fraud.

Williams v. Nottawa, 104 U. S. 209, 26 L. ed. 719; *Farnington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690.

Fraud in procuring a judgment at law is always good ground for coming into equity to set aside the judgment.

Freeman, Judgm. §§ 489, 491; *Fish v. Line*, 3 N. C. (2 Hayw.) 342; *Noyes v. Loeb*, 24 La. Ann. 48; *Pratt v. Northam*, 5 Mason, 95; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Reed v. Harvey*, 23 Ark. 44.

When the facts are known to plaintiff, 45 L. R. A.

but unknown to defendant, and purposely concealed from defendant by plaintiff, that is sufficient excuse for not setting them up as a defense.

Shinkle v. Letcher, 47 Ill. 216; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129; *Jackson v. Jackson*, 1 Johns. 424; *Peel v. January*, 35 Ark. 331; *Payne v. O'Shea*, 84 Mo. 133; *Bresnehan v. Price*, 57 Mo. 422.

Any facts which would require a court of equity to set aside a judgment may be set up as a defense in an action on the judgment.

Freeman, Judgm. § 435; *Ward v. Quintlin*, 57 Mo. 425.

Mr. Frederick A. Wind for respondent.

Valliant, J., delivered the opinion of the court:

1. The answer of defendant admits the rendition of the judgment, as alleged in the petition. Therefore there was no necessity for plaintiff to introduce in evidence what purported to be a transcript of the judgment, and, if there was any error in admitting it, it was immaterial. The answer, however, does deny the alleged assignment, and the burden of proving that devolved on the plaintiff. The proof offered was a paper purporting to be signed by one Francis P. Owings, and attested by and acknowledged before one William H. Bradley, as clerk of the circuit court of the United States for the northern district of Illinois, and a certificate of the clerk of the court in which the judgment was rendered that he had noted that assignment on the margin of the entry of the judgment. The noting of the assignment on the margin of the judgment entry was, for the purposes of this case, immaterial. The material question related to the fact of assignment. The only evidence on that point was a paper purporting to have been acknowledged before a clerk in Illinois. The acknowledgment was in the form prescribed for proof of a deed to land to be recorded, but the statute on the subject of acknowledgment of deeds, etc., does not provide for the acknowledgment of an assignment of a judgment, and the certificate was not evidence for that purpose. Section 6043, directing how judgments may be assigned, and the assignments entered on the judgment record, relates only to judgments of the courts of this state. The general assembly has no control over the records of a Federal court, and although it might lay down as a law of evidence for use in a state court a rule for the proof of the assignment of judgments of a Federal court in the form that is here offered, yet it has not done so. This alleged assignment, purporting to have been made in Illinois, although it relates to a record of a court of the United States, yet is in no sense a judicial proceeding, within the meaning of § 4881, Rev. Stat. 1889, and therefore not a subject of proof by clerk's certificate. In plaintiff's addition to the abstract of the record it is stated that there was other proof of the assignment besides that certificate. That does not cure the error. The other evidence may or may not have been satisfactory to the trier of the

fact. The attestation of the clerk and the certificate of acknowledgment were not legal evidence of the alleged assignment, and the defendant's objection to it should have been sustained.

2. But the serious question in this case relates to the action of the court in striking out of defendant's answer its equitable affirmative defense. That clause in the answer was shaped to all intents and purposes as a regular bill in equity, in the form of a direct proceeding, making an attack on the judgment upon the ground that it was obtained by fraud, specifying the acts which it is charged constitute the fraud, and praying the relief of cancellation and annulment of the judgment; and it is evident, from reading the answer, that the pleader had in his mind to charge that the fraud complained of was in the procurement of the judgment, as distinguished from fraud in the cause of action. The ground of equity jurisdiction in such case is clearly marked out in recent decisions of this court. *Hamilton v. McLean*, 139 Mo. 679; *Bates v. Hamilton*, 144 Mo. 1. The very able briefs of the counsel in this case discuss the questions of law involved and review the authorities with so much learning and industry that our labors are greatly lightened. In reading a court's decision, it is always important to understand the facts of the particular case, in order to obtain a correct view of the law declared in the opinion. The observance of that precaution is particularly needed in reading the authorities encountered in the search for the law of this case, because one is constantly running across decisions treating of indirect or collateral attacks on judgments, and of judgments of courts of peculiar or limited jurisdictions, and of charges of fraud relating to the cause of action on which the judgment is founded. There are several propositions contended for by the counsel for the plaintiff, which, for the purposes of this case, may be conceded without discussion, viz.: In a suit upon a judgment of a circuit court of the United States it is not necessary to set out in the petition facts to show that the court had jurisdiction; nor can such a suit be defeated on a plea at law that the facts required to confer the jurisdiction did not exist. The judgment of that court is not subject to attack in that way. If the facts conferring jurisdiction do not appear on the face of the whole record, the judgment may be reversed on appeal or writ of error; but the proceedings cannot be treated as *coram non iudice*, as would be the case if it were a court, not only of limited, but also of inferior jurisdiction. The circuit courts of the United States are of limited, but not inferior, jurisdiction. *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202. The judgments of such courts are entitled to equal rank and presumption of regularity as are judgments of the circuit courts of this state. *Reed v. Vaughan*, 15 Mo. 141, 55 Am. Dec. 133. The jurisdictional facts in a suit in a Federal court, although they may be independent of the facts constituting the cause of action, are yet 45 L. R. A.

facts to be pleaded, and, if denied, proved; but, when the judgment is rendered, the presumption goes with it that the court tried all the issues that were raised, and found all the facts necessary on which to found the judgment, and that judgment does not depend for its validity upon the ability of the plaintiff therein to be always ready to verify his statements as to the jurisdictional facts. All of these propositions summed up mean that such a judgment is not subject to a collateral attack; and no one is here contending that it is. But the judgment of a circuit court of the United States, like that of a circuit court of the state, may be attacked in a direct proceeding, in equity, upon the ground that it was concocted and procured by fraud; and no one is here disputing that proposition. The attack made on the judgment in this answer is not collateral, but a direct proceeding, in equity, to annul the judgment. The plaintiff's motion to strike out confesses the facts, and the only question, therefore, is, Do the facts stated make out a case of a judgment concocted and procured by fraud? Taking those statements to be true, the plaintiff was the owner of these county or township bonds, and he knew that this court had in numerous cases decided that the act of the legislature under which they were issued was in violation of the Constitution of the state, and the bonds were invalid; he knew that the United States courts had held that the act was constitutional and the bonds valid; he knew that he could not get a judgment on his bonds in any court in the state; he knew that, if he could sue in the Federal court, he could get a judgment, but, being a citizen of Missouri, he knew he had no right to sue a county of Missouri in a Federal court. Then, to obtain under false pretense what he could not obtain by truth, he impersonated a citizen of Illinois, and under that disguise went into the Federal court and obtained his judgment. He did not go in with his own face or his own name. But equity, which looks at the substance, and not at the shadow, which regards the real, and not the sham, looks through the mask, and recognizes the plaintiff in this suit as the real plaintiff in that suit. The scheme was a fraud on the court, whose jurisdiction was betrayed, and a fraud on the defendant, who was tricked out of its defense. True, the statement in the petition in that suit that Owings, a citizen of Illinois, was the owner of the bonds, is a statement which, under fair conditions, might have been traversed, and the plaintiff put to his proof. But there were no such fair conditions there. The fact that that statement was false was known only to the plaintiff and Owings, and they concealed it for the purpose of preventing defendant from making that defense. Not only was the true ownership of the bonds known to them, but the false appearance of ownership was a fact of their own creation, concocted for the purpose of deceiving the court into entertaining a case which, if the truth appeared, it would have rejected on the ground that it had no jurisdiction. 18 U. S. Stat. at L.

472, chap. 137; *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719; *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114; *Hartog v. Memory*, 116 U. S. 588, 29 L. ed. 725; *Morris v. Gilmer*, 129 U. S. 324, 32 L. ed. 693. Cases are cited to support the contention that a sale made to a nonresident for the purpose of enabling the grantee to sue in a Federal court is not a fraud, within the meaning of the Federal judiciary act; but those cases, if they bear out the contention, do not help the plaintiff in this suit, because, according to the averment in the answer, there was no sale of the bonds to Owings. They were the property of Wonderly while they were in suit under the false pretense that they were the property of Owings. *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825. *Farmington v. Pillsbury*, 114 U. S. 138, 29 L. ed. 114, was a case where municipal bonds of a village in Maine had been issued under an act of the legislature which the supreme court of that state had declared to be unconstitutional and the bonds invalid. The holder of some of them made a collusive transfer to a citizen of Massachusetts for the purpose of suing on them in a United States court. The Supreme Court of the United States in that case, per Waite, Ch. J., said (114 U. S., loc. cit. 143, 29 L. ed. 116): "And upon the question of transfer it was uniformly held that, if the transaction was real, and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted, it was a matter of no importance that the assignee or grantee could sue in the courts of the United States when his assignor or grantor could not. . . . But it was equally well settled that, if the transfer was fictitious, the assignor or grantor continuing to be the real party in interest, and the plaintiff on record but a nominal or colorable party, his name being used only for the purpose of jurisdiction, the suit would be essentially a controversy between the assignor or grantor and the defendant, notwithstanding the formal assignment or conveyance, and that the jurisdiction of the court would be determined by their citizenship rather than that of the nominal plaintiff. . . . Such was the condition of the law when the act of 1875 was passed, which allowed suits to be brought by the assignees of promissory notes negotiable by the law merchant, as well as of foreign and domestic bills of exchange, if the necessary citizenship of the parties existed. This opened wide the door for frauds upon the jurisdiction of the court by collusive transfers, so as to make colorable parties and create cases cognizable by the courts of the United States. To protect the courts, as well as parties, against such frauds upon their jurisdiction, it was made the duty of a court, at any time when it satisfactorily appeared that a suit did not 'really and substantially involve a dispute or controversy' properly within its jurisdiction, or that the parties 'had been improperly or collusively made or joined, . . . for the purpose of creating a case cognizable' under the act, 'to proceed no further therein.' . . . This, 45 L. R. A.

as was said in *Williams v. Nottawa*, 104 U. S. 209, 211, 26 L. ed. 720, 'imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings, and dismiss the suit the moment a fraud on its jurisdiction was discovered.' We have thus quoted at length the language of the Supreme Court of the United States to show that that court denounces the conduct of the parties in such transactions as a fraud on the courts as well as on the defendants. The same unvarnished terms are used in the other cases above cited. The reason of the doctrine that equity will not entertain a bill to set aside a judgment merely on the averment that the cause of action on which it is founded is tainted with fraud is that the party had an opportunity to interpose that defense in the suit in which the judgment was rendered. *Irvine v. Leyh*, 102 Mo. 200, loc. cit. 207. But when the defendant is prevented by the fraud of the plaintiff from making the defense, and when, as in this case, the defense rests in the peculiar knowledge of the plaintiff, and he conceals it from defendant, the fraud attaches to the judgment itself, and vitiates it. It is a fraud in procuring the judgment. Black, Judgm. § 371; *Freeman*, Judgm. § 491; *Fish v. Lane*, 3 N. C. (2 Hayw.) 342; *Reed v. Harvey*, 23 Ark. 44; *Spencer v. Vigneaux*, 20 Cal. 442; *Ocean Ins. Co. v. Fields*, 2 Story, 59. In the case last cited the decision was by Judge Story, wherein he says: "Now, the very reason upon which the present bill is founded, is that this, a perfect and valid defense at law, was by the fraudulent concealment of the defendant, and the total ignorance of the plaintiffs in the facts, incapable of being set up in the original action; and the recovery was therefore inequitable and iniquitous. It would be against all principles of a court of equity to allow one party to practise a fraud upon another innocent party, and by another act of fraudulent concealment recover a judgment against him founded upon the prior act, and then to be permitted to assert this double inequity as a bar to all equitable relief against the judgment." Even if the suit in which the judgment now in question was rendered had been in a state court, it would have been necessary for the nominal plaintiff, Owings, to have averred in his petition that he was the owner of the bonds, because that was a fact essential to his cause of action; but that averment in that case in the Federal court had a double significance,—the one bearing on the plaintiff's right of action, the other on the right of the owner of the bonds to sue in that court. In the one sense it was a fraud on the defendant alone, and in the other it was a fraud on both the court and the defendant. The law which required the owner of the bonds to be a citizen of another state, in order to give the Federal court jurisdiction, was a law of that court, and the plaintiff's act of masking as Owings, and thus gaining entrance, which, with his own face, he could not have gained, was a fraud on that law; and since, by that means, he evaded the law of this state applicable to his

cause of action, as pronounced by this court, his judgment is to be deemed as in fraud of the law of this state, and not entitled to the protection of its courts. Freeman, Judgm. § 566; *Dunlap v. Cody*, 31 Iowa, 260, 7 Am. Rep. 129; *Duringer v. Moschino*, 93 Ind. 495. In the Iowa case, just above cited, the plaintiff's cause of action was barred by the statute of limitations in Iowa, where the defendant resided; and the plaintiff, to evade that defense, by a fraudulent scheme induced defendant to go to Illinois, where the claim was not barred, and there served process on him, and obtained judgment. In a suit on the judgment in Iowa, the supreme court of that state, by Day, Ch. J., said: "Counsel representing plaintiff in this court, and who, it is but justice to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position that the mode of obtaining jurisdiction was fraudulent. They concede that it 'smells somewhat of fraud.' The only palliation which they are able to offer is the suggestion of a doubt whether it may not be considered a 'pious fraud,' in which 'the end justifies the means.' We do not think that it is entitled even to that small measure of charity. An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction, and the attorney whose venality could execute, such a purpose, should alike be disgraced." We quote the words of these high courts and distinguished jurists to show in what estimation they hold the conduct of those who, by cunning, would pervert the administration of justice. There is no difference, in principle, between the fraudulent concoction of a scheme that brings the defendant within the jurisdiction of a court of a foreign state and the fraudulent concoction of a scheme that brings him within the jurisdiction of a Federal court, which otherwise would not have had jurisdiction over him. In whatever aspect we view it, we cannot fail to see that the judgment in question was obtained by a fraudulent abuse of the court which rendered it, and a fraudulent scheme by which the defendant was tricked out of the defense it had a right to make, and could have made in the only forum in which the real plaintiff could have sued.

The point is advanced in plaintiff's brief that a judgment can be annulled, on the ground that it was obtained by fraud, only in the court in which it was rendered. But there is no foundation in reason or authority for that proposition, and the contrary has been declared in *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432; *Payne v. O'Shea*, 84 Mo. 129; *Doughty v. Doughty*, 27 N. J. Eq. 315; Pom. Eq. Jur. § 919. A suit to set aside a judgment is a suit in equity, and it was necessarily in another court than that in which the judgment was rendered when courts of law and courts of chancery were separate, and when the judgment attacked was a law judgment. In the case at bar, if the defendant could have no relief in a state court, it could have none at all. If the suit

at bar had been brought in the United States circuit court, the defendant could not have pleaded the equitable defense it has pleaded here, because, under the practice in that court, only legal defenses can be pleaded to legal actions. The defendant would have been compelled to have filed a separate suit in equity, under that practice, to obtain the relief it seeks. But, being a citizen of this state, it could not have maintained such a suit there, because the doors of that court are not open to this defendant. Hence, if the plaintiff's contention is correct, a citizen of Missouri, against whom a judgment should be obtained by fraud in a United States court, would be absolutely without remedy. A suit in equity to set aside a judgment in no sense assails the court in which the judgment was rendered. It is simply a proceeding in *personam*, and the decree adjudges the rights of the parties *inter sese* in relation to that judgment. Story, Eq. Jur. § 875; Black, Judgm. § 919; *Pearce v. Olney*, 20 Conn. 544; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870. A judgment of a United States circuit court sitting in this state is to be accorded such effect, and such effect only, as a judgment of a circuit court of this state. Black, Judgm. § 938; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614. The Federal circuit courts have never claimed for themselves higher authority than the highest courts of original jurisdiction of the state in which they sit, and the lofty spirit in which those courts administer justice repels the idea that they would claim that a judgment of theirs, procured by fraud and abuse of their jurisdiction, should be held exempt from a direct attack in the only forum in which the injured party could obtain relief. There are decisions to the effect that a state court will not interfere with the due course of a writ issuing out of a Federal court or a trial there; and in like manner, and for the same reason, a Federal court would not interfere with the process of a state court, or with a trial there. But the principle on which those decisions are founded has nothing to do with a proceeding in equity to set aside a judgment on the ground that it was obtained by fraud. In such case a Federal court of equity will entertain a bill to set aside a judgment obtained in a state court, and a state court of equity will entertain a bill to set aside a judgment obtained in a Federal court. The distinction here made is pointed out by the Supreme Court of the United States in *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870. The circuit courts of this state are courts of general jurisdiction, and there is no subject of litigation between citizens of this state beyond their jurisdiction, except such subjects as are by our law conferred on other courts of limited jurisdiction. When a suit on a judgment is brought in a circuit court in this state, the defendant may, under our Code of Civil Procedure, plead as an equitable defense facts showing that the judgment was procured by fraud. *Marx v. Fore*, 51 Mo. 69,

11 Am. Rep. 432; *Ward v. Quinlin*, 57 Mo. 425.

Plaintiff in his brief insists that the defendant has not shown due diligence in discovering the fraud. The answer avers that the fraud was known only to plaintiff and Owings, and by them concealed, so that defendant did not discover it until after the institution of this suit. There could be no laches, on the part of defendant, under those circumstances. The facts pleaded in that portion of the answer now under discussion constitute a complete equitable defense to the suit, and, if sustained on the trial, the defendant will be entitled to a decree annulling the judgment on the ground that it was procured by fraud, and perpetually enjoining the plaintiff from proceeding or attempting in any manner to enforce it or make any use of it whatever. The circuit court erred in striking out that part of the answer.

3. There was another paragraph of defendant's answer also stricken out which contained a statement of the same facts, and the additional fact that the plaintiff had sued out of the United States court a scire facias to revive the judgment, and prayed an injunction to restrain the plaintiff from prosecuting that writ. It will not be neces-

sary for us now to decide whether or not the action of the court in striking out that paragraph was right, because its sole object was to obtain an injunction against the prosecution of the scire facias, which injunction was denied, and that writ has doubtless taken its course, and its force is spent. The suing out of that writ serves to illustrate what has been said above on the point of the jurisdiction of the state circuit court to adjust the rights of the parties according to the equities pleaded in the answer. The defendant in that writ, whatever its equities, was entirely defenseless. That court could hear nothing in answer to that writ, except that the judgment had been paid. No equitable defense could be pleaded, and the defendant, being a citizen of Missouri, could bring no independent suit in equity in that tribunal. It would be a very imperfect system of jurisprudence if the courts of the state, which alone have jurisdiction of both parties, were powerless to enforce justice between them.

The judgment of the Circuit Court is reversed, and the cause remanded, to be retried according to the law as herein expressed.

All concur.

PENNSYLVANIA SUPREME COURT.

Wilbur F. ROSE, *Appt.*,

v.

Charles BARCLAY *et al.*

(191 Pa. 594.)

1. A sale of shares of stock, "including all dividends due or to become due thereon," includes a stock dividend.
2. The failure of a purchaser of stock, "including all dividends," to inform the seller of the fact, of which the purchaser knew he was ignorant, that a stock dividend had been declared, does not avoid the sale, where the dividend had been declared at a regularly called meeting of the stock-

holders and each had abundant and equal opportunities of knowledge on the subject.

(May 23, 1899.)

A PPEAL by plaintiff from a decree of the Court of Common Pleas No. 4, for Philadelphia County, setting aside a contract for the sale of certain corporate stock in a suit by plaintiff to enforce specific performance of it. *Reversed.*

The facts are stated in the opinion.

Mr. John G. Johnson, for appellant:

The plaintiff, under the facts, was entitled to the relief prayed for originally.

The language of the receipt does not re-

NOTE.—*Right to dividends on transfer of stock.*

The general rule is that the dividends belong to the one who owns the stock at the time they are declared. Special circumstances are necessary to take a case out of this rule. *Central R. & Bkg. Co. v. Papot*, 59 Ga. 342; *Southwestern R. Co. v. Papot*, 67 Ga. 675; *Waterman v. Alden*, 42 Ill. App. 294; *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402; *Abercrombie v. Riddle*, 3 Md. Ch. 320; *Brundage v. Brundage*, 65 Barb. 397; *McGill v. Holmes*, 23 Misc. 524; *Dow v. Gould & C. Silver Min. Co.* 31 Cal. 620.

The right to a dividend equitably belongs to the one who is the equitable owner of the stock on the day on which the dividend is declared. *Union Screw Co. v. America Screw Co.* 13 R. I. 673, 11 R. I. 569.

The dividend when declared becomes a debt from the corporation to the one holding the stock at the time it is declared, and does not

pass with a subsequent sale of the stock unless expressly included, and the fact that the dividend is not payable until after the transfer of the stock is immaterial. *Wheeler v. Northwestern Sleigh Co.* 39 Fed. Rep. 347.

A sale of stock will not carry prior dividends although they are not payable until after the sale. *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732.

In the absence of any provision to the contrary in a contract for the purchase and sale of stock, dividends previously declared but made payable thereafter belong to the seller, and are not transferred by the contract. *Hopper v. Sage*, 112 N. Y. 530, Affirming 15 Jones & S. 77.

Where a railroad company enters upon its journals a resolution directing the treasurer to allow interest on instalments of subscriptions as paid, payable in stock, and carry to the account of each stockholder the interest annually, and when the amount is sufficient to issue stock certificates in payment thereof, any transfer of the stock after interest has accrued does

late to "money dividends." It covers "all dividends due or to become due" on the original shares.

Weimer, Pa. Corp. Law, 342; *Com. v. Cleveland, P. & A. R. Co.* 29 Pa. 370; *Com. v. Pittsburgh, Ft. W. & O. R. Co.* 74 Pa. 89; *Allegheny v. Pittsburgh, A. & M. Pass. R. Co.* 179 Pa. 421.

Both of the parties were stockholders of a company which, at its annual meeting, had declared a certain dividend. There was no duty on the part of Rose to speak.

There was silence on the part of Rose in communicating a fact which he supposed and had a right to suppose was known to Barclay. *Bigelow, Fraud*, 590; *Hazlett v. Powell*, 30 Pa. 297.

Even were this a bill for specific performance, there was an intention to sell and to buy all the interest of Barclay in the gaslight company. When the purchase money was paid, Barclay, upon his own dictation, wrote a receipt in which he expressed that the

money had been paid for thirty shares of stock and all dividends due or to become due thereon. There was no imposition or fraud of any kind.

Under a sale of the stock with all dividends due, the stock dividend added to the value; but in agreeing to transfer the stock and all dividends due, Barclay undertook to divest himself, in favor of Rose, of everything he possessed.

Beach, Corp. § 614; *Bispham, Eq.* § 211; *Kintzing v. McElrath*, 5 Pa. 467; *Neill v. Shamburg*, 158 Pa. 263; *Edelman v. Latshaw*, 159 Pa. 647.

It is conclusive presumption of law that a stockholder of a corporation has "constructive notice" of the provisions of its charter and by-laws, and of all acts done by the directors and stockholders of the corporation in their corporate capacity, by virtue of the powers vested in them, an entry of the same being made on the minute book of the corporation.

not give the transferee the right thereto. *Ohio v. Cleveland & T. R. Co.* 6 Ohio St. 489.

As between vendor and vendee or pledgee and pledgee of stock, it is a settled rule that all dividends declared after the sale or pledge of the stock belong to the vendee or pledgee, even though the transfer has not been recorded on the books of the corporation. *Gemmell v. Davis*, 75 Md. 546.

An assignee is entitled to dividends declared after the assignment. *Pabst Brewing Co. v. Montana Brewing Co.* 19 Mont. 294.

Under a sale of stock for a certain amount down and one half of the proceeds of a subsequent sale the seller is not entitled to dividends subsequently declared. *Jones v. Kent*, 80 N. Y. 585.

Undeclared dividends pass with the stock.

Undivided surplus will pass by a transfer of the stock. *Earp's Appeal*, 28 Pa. 368.

An assignment of shares will include all undeclared dividends. *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157.

The right to share in the profits of a corporation which have not been declared is a mere increment of the stock, and will pass as an incident to it. *Nickals v. New York, L. E. & W. R. Co.*, 15 Fed. Rep. 575.

The surplus funds of a corporation whenever they may have accrued are, until declared in a dividend, a part of the stock itself, and will pass under that name in a transfer or bequest. *Phelps v. Farmers' & M. Bank*, 26 Conn. 269.

A purchaser of a life interest in government stock is entitled to a dividend becoming due on the day following the sale. *Anson v. Towgood*, 1 Jac. & W. 637.

A purchaser of stock takes with the shares the right to receive a proportionate share of all profits not then divided. *March v. Eastern R. Co.* 43 N. H. 515.

That the shareholders of a corporation express an intention to divide certain funds among existing stockholders to the exclusion of those who may become such in the future will not give a stockholder a right to his share in case he parts with his interest in the stock before the dividend is declared. *America Wire Nail Co. v. Gedge*, 96 Ky. 513.

A sale or gift of stock carries with it title to all dividends declared after its date, whether from profits made before or not. *King v. Follett*, 3 Vt. 385.
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One who purchases stock in a corporation takes with the stock a right to share in the distribution of stock which has been bought in by the corporation prior to the sale, and which it subsequently decides to distribute among shareholders. *Coleman v. Columbia Oil Co.* 51 Pa. 74.

Although the dividends are guaranteed if they have not been declared prior to the transfer of the stock the transferee will be entitled to them when they are declared, including those for periods which under the terms of the guaranty should have been declared and paid before he received the transfer. *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 483.

Where a corporation which has sold shares of its stockholder for nonpayment of assessments afterwards declares dividends and then attempts to reorganize because of doubt as to the validity of its original organization and to validate acts formerly done, if the reorganization is sufficient to vest the stockholder with rights as such it is also sufficient to cut off his rights and vest the title to the dividends in the one who purchased his stock at the sale for nonpayment of assessments. *Freeman v. Machias Water Power & Mill Co.* 38 Me. 343.

Where a stockholder of a bank pledges the stock to the bank for a loan, and while the stock is in possession of the bank an assessment is made upon it which the stockholder fails to pay, whereupon the stock is sold to a third person, the original stockholder cannot upon subsequently repaying the loan compel the bank to account to him for dividends declared between the date of the assessment and the repayment of the loan. *Marine Bank v. Blays*, 4 Harr. & J. 338.

Rule applies between testator and legatee.

Where three days prior to the death of one who has specifically bequeathed stock a bonus is declared by the corporation payable at a time which proves to be after the testator's death, the bonus will not pass by the specific bequest. *Lock v. Venables*, 27 Beav. 598.

Unreceived dividends do not pass under a bequest of the dividends and interest of all testator's money in the funds to a legatee for life. *Shore v. Weekly*, 3 De G. & S. 407.

Dividends declared prior to the death of the testator are part of his estate, and do not pass under a specific legacy of stock, although they

Gordon v. Preston, 1 Watts, 385, 26 Am. Dec. 75; *Ashhurst's Appeal*, 60 Pa. 317; *Harvey v. Kay*, 9 Barn. & C. 356; *Beach, Corp.* § 383; *Starkie, Ev.* §§ 455, 748, 762; 2 Kent, Com. 268; *Fry, Spec. Perf.* § 734.

The relief demanded was not specific performance of an executory contract, but the completion of a part-performed contract.

Pennsylvania Co. for Ins. on Lives & G. A. v. Franklin F. Ins. Co. 181 Pa. 40, 39 L. R. A. 780; *McManus v. Cooke*, L. R. 35 Ch. Div. 697; *Williams v. Morris*, 95 U. S. 457, 24 L. ed. 362; *Townsend v. Vanderveker*, 160 U. S. 171, 40 L. ed. 383.

Where a contract has been entered into for the sale of specific stock, and the consideration therefor has been paid in full, the equitable title becomes vested in the vendee, and equity considers the vendor a trustee for the purchaser.

Hill, Trustees, 171; *Goodwin Gas Stove & Meter Co.'s Appeal*, 117 Pa. 536; *Cowles v. Whitman*, 10 Conn. 121.

are not payable until after the death occurs. *Re Kernochan*, 104 N. Y. 618.

The moment the dividend is declared the shareholder becomes entitled to it so that in case he dies before it becomes payable having specifically bequeathed the stock the dividend will belong to the estate, and not to the legatee. *De Gendre v. Kent*, L. R. 4 Eq. 283, 16 L. T. N. S. 694.

Where a testator bequeaths a certain number of shares of stock to a certain person, and between the making of the will and the time of the death certificates representing profits are issued by the corporation payable at a future day either in money or stock, these certificates will not pass to the legatee as part of the stock, and the fact that the certificates do not become payable until after testator's death is immaterial. *Brundage v. Brundage*, 60 N. Y. 544. This ruling was expressly placed upon the rule that the will speaks from the death of the testator.

In case of a specific bequest of stock, income from the testator's death follows the shares. *Jacques v. Chambers*, 2 Colly. Ch. Cas. 435, 15 L. J. Ch. N. S. 225, 16 L. J. Ch. N. S. 243, 10 Jur. 151, 11 Jur. 295.

In case of a specific legacy of bank stock if testator dies a few days before the declaration of a dividend it will belong to the legatee, although the profits from which it is declared were earned during testator's lifetime. *Clive v. Clive*, Kay, 600, 23 L. J. Ch. N. S. 981.

If the dividend is not declared until after the testator's death it will belong to the specific legatee. *Maclaren v. Stalton*, 8 De G. F. & J. 202, Reversing 27 Beav. 460, 6 Jur. N. S. 360, 29 L. J. Ch. N. S. 401.

One to whom a life estate in corporate stock is given is entitled to dividends declared after the testator's death. *Murray v. Glasse*, 17 Jur. 816, L. R. 1 Eq. 541.

Dividends declared after the death of the shareholder form part of the income of his estate, and will not be regarded as *corpus*. *Bates v. Mackinley*, 31 Beav. 280, 31 L. J. Ch. N. S. 389, 8 Jur. N. S. 299, 5 L. T. N. S. 783.

Under a bequest of shares to testator's son when he completes his majority he will be entitled to dividends which have been declared since the testator's death. *Wright v. Warren*, 4 De G. & S. 867.

But in *Tift v. Porter*, 8 N. Y. 516, a recovery by the legatee of a dividend which accrued between the time of the testator's death and the 45 L. R. A.

A bill for specific performance will be entertained when its object is to obtain the delivery of certificates of stock which confer the legal title to it.

Bispham, Eq. § 368; *Doloret v. Rothschild*, 1 Sim. & Stu. 590; *Pooley v. Budd*, 14 Beav. 34; *Kerr, Inj.* 120; *Ramsdell v. Butler*, 60 Me. 216; *Baum's Appeal*, 113 Pa. 66; *Harper's Appeal*, 109 Pa. 15; *Brush Electric Co.'s Appeal*, 114 Pa. 574.

Mr. E. Cooper Shapley, for appellees: The plaintiff's bill should have been dismissed.

It will not avail the plaintiff to say that he misconceived the effect of the facts. That is no ground for relief in equity.

Menges v. Oyster, 4 Watts & S. 23, 39 Am. Dec. 50; *Seeley v. Reed*, 25 Fed. Rep. 361.

He cannot claim relief against the contract on the ground of mistake if there were no concealment or unfair dealing by the opposite party.

payment of the legacy was denied where the legacy was a general one consisting of bank stock.

Between life tenant and remainderman.

Dividends declared before the death of the life tenant belong to his estate, although they are not payable until after that event. *Wright v. Tuckett*, 1 Johns. & H. 268.

Where a tenant for life of stock dies on the day on which the dividend becomes due it will belong to his estate. *Paton v. Sheppard*, 10 Sim. 186.

The executor of a life tenant of stock in a corporation has no title to dividends declared after the death of the life tenant, although the profits from which they were declared were earned during the lifetime of the life tenant. *Footo, Appellant*, 22 Pick. 299.

Between pledgee and pledgor.

A pledgee of stock is entitled to the dividends declared while he holds the stock. *Gaty v. Holiday*, 8 Mo. App. 118.

In case of a pledge of stock the pledgee will not be entitled to dividends declared before the pledge, but will be entitled to those declared subsequently thereto. *Fairbank v. Merchants' Nat. Bank*, 132 Ill. 120.

But a pledgee whose claim has been satisfied has no standing in court to contest the right of an assignee of the stock to dividends declared prior to the assignment. *Cross v. Eureka Lake & Y. Canal Co.* 73 Cal. 302.

Sale for future delivery.

In cases of options and sales for future delivery the right to dividends depends upon the question at what time with respect to the declaration of the dividend the title passes. All dividends declared before the passing of the title will belong to the seller, while those after that event will belong to the purchaser.

Upon a sale of stock deliverable at a future day at the option of the seller a dividend declared before the sale, but not payable until the day fixed for the delivery, belongs to the seller. *Spear v. Hart*, 8 Robt. 420.

A contract for sale and purchase of stock by which the purchaser is given liberty to call on the seller for the stock at any time in six months from date, stating that "the buyer is entitled to all the dividends or surplus dividends declared during the time," does not give

Perkins v. Gay, 3 Serg. & R. 327, 7 Am. Dec., 653.

Nothing but fraud or palpable mistake or turpitude of consideration is ground for rescinding an executed contract.

Rockafellow v. Baker, 41 Pa. 321, 80 Am. Dec. 624; *Stephen's Appeal*, 87 Pa. 202; *Bird's Appeal*, 91 Pa. 68.

A mistake as to value is no ground for a rescission of an executed contract.

Hunter v. Goudy, 1 Ohio, 449; *Good v. Herr*, 7 Watts & S. 253, 42 Am. Dec. 236; *Meekley's Estate*, 20 Pa. 478; *Graham v. Pancoast*, 30 Pa. 89; *Bispham, Eq. § 191*; *Ludington v. Ford*, 33 Mich. 123; *Balen v. Hanover F. Ins. Co.* 67 Mich. 179.

An act which has been done intentionally and with full knowledge will not be considered a mistake.

Griffith v. United States, 22 Ct. Cl. 165; *Wier v. Johns*, 14 Colo. 493.

a right to the dividends which were declared prior to the date of the contract, although at the time of the execution of the contract the stock was selling "dividend on." *Lombardo v. Case*, 45 Barb. 96.

There has been some difference of interpretation as to the time the title would pass under the contract. The majority of the cases have been inclined to regard the date of the contract as the date of sale, and to regard the future matters as conditions subsequent, failure to perform which might defeat the title.

Where on the sixth of the month a proposition is made for the sale of stock provided security for the price is furnished by the 24th, in case the security is furnished before that date the purchaser will be entitled to dividends declared since the option was given. *Harris v. Stevens*, 7 N. H. 454.

Where a sale on the 1st of August to be completed on the 29th was silent as to dividends, and a dividend was declared on the 24th out of profits earned prior to the sale, the dividends were held to belong to the purchaser. *Black v. Homersham*, L. R. 4 Exch. Div. 24, 39 L. T. N. S. 671, 48 L. J. Exch. N. S. 79, 27 Week. Rep. 171. In that case one of the judges says it would be strange if the matter were otherwise determined, for we know that the value of such property falls immediately a dividend is paid. The purchaser bought at the value before dividend, and if he does not receive it he will be paying so much more for his shares than he bargained for.

A contract for the purchase and sale of stock at a specified price "payable and deliverable, seller's option, in this year with interest" effects a sale *in present*, and the purchaser is entitled to all dividends on the shares thereafter. *Currie v. White*, 45 N. Y. 822.

But in one case it was held that the buyer will not be entitled to dividends declared pending an option for the purchase or refusal of stock where the contract is silent as to dividends, although it is not payable until after the decision has been made to purchase. *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732.

Special contracts.

Where the owner of stock transfers it with all dividends made after the morning of a certain date, which is the day after the transfer is made, both parties expecting a declaration of dividends on the day the transfer was made, the dividend will, in case it is not in fact made until after the time specified in the contract, belong to the former owner, since that is the 45 L. R. A.

Dean, J., delivered the opinion of the court:

A large amount of the gross earnings of the Camden Gaslight Company having been expended in improvements of its plant, which had also, from other causes, increased in value, it was resolved by the company on 5th of June, 1893, to increase the capital stock from \$300,000 to \$600,000; the increase to represent the enhanced value of the property. It was further directed that this increase of stock should be divided among the stockholders as they appeared of record on 1st of July following, and within twenty days thereafter certificates for the same should be delivered. Charles Barclay, the appellee, was the owner of record of thirty shares of the stock on the 5th of June, when the resolution was adopted, and on the 1st of July, when it took effect. On the 6th of July, before the expiration of the twenty

plain intention of the agreement. *Brewster v. Lathrop*, 15 Cal. 21.

A transfer of stock under an agreement that all profits and dividends up to a certain date shall belong to the seller will not include dividends not declared until after that date, although they were earned before that time. *Hyatt v. Allen*, 56 N. Y. 553, 15 Am. Rep. 449.

A sale of stock and all future benefit and dividends thereof will not pass a right to dividends already declared. *Harper v. Raymond*, 3 Bosw. 29.

Under a will directing the executor to permit testator's wife to take the interest or dividends on certain stock during her natural life, she will be entitled to whatever dividends accrue or are declared or become payable at any time after the death of the testator. *Cogswell v. Cogswell*, 2 Edw. Ch. 231.

Under a will giving a person the use and improvement of testator's estate, real and personal, during life, dividends earned on corporate stock for a period ending during the lifetime of the life tenant will belong to her estate, although the dividends are not declared until after her death. *Johnson v. Bridgewater Iron Mfg. Co.* 14 Gray, 274.

In *Hill v. Newichawanick Co.* 8 Hun, 450, it is said it is understood that sales of stock made at the board of brokers at any time before the day fixed for the closing of the books of transfer of the corporation after declaring a dividend payable at a future day, carry with them the dividends so declared, and the price paid is regulated accordingly. After the books are closed the sales are understood to be ex-dividend, and the price is accordingly affected by the fact that the seller retains and is to collect the dividend.

A custom or usage among brokers that a dividend already declared at the time of the sale of stock shall pass to the purchaser is not admissible to vary the terms of the contract if there is nothing to show that the contract was made with reference to it. *Hopper v. Sage*, 15 Jones & S. 77.

Where a pledgee of stock fraudulently sells it on the stock exchange, it will not, as against the rights of the pledgee, be subject to the custom of the exchange that the sale will carry dividends declared but not paid. *Warner v. Watson*, 4 Misc. 12.

Peculiar circumstances under which dividend was declared.

Where under the charter of the corporation the dividends are to be declared at the half-

days for delivery, Barclay made this contract with Rose, the appellant:

409 Chestnut Street, Philadelphia.

Received, Philadelphia, July 6, '93, of W. F. Rose, \$4,500 in full payment for thirty shares of the capital stock of the Camden Gaslight Company, including all dividends due or to become due thereon.

[Signed] Charles Barclay.

The price was at the rate of \$150 per share. The par value was \$100 per share. The price agreed to be paid was considerably higher than the stock had theretofore sold for; the highest before that being \$135 per

share. The thirty shares were transferred and delivered by Barclay to Rose, on payment to him by Rose of the full consideration. Rose then had the certificate for the thirty shares duly placed in his name on the books of the company, but, when he demanded those embraced by the stock dividend, he was informed that Barclay had given the company notice not to deliver them to him (Rose), as they did not pass by the contract, and, being a mere stakeholder, as between the seller and purchaser, it could not act until the disputed ownership was settled. Rose then brought this bill against both Barclay and the company to compel a transfer of the stock dividend. It is, really, not

yearly meetings, and are to be payable twenty-one days afterwards, no shareholder to receive any dividend after the period at which he ceased to be a proprietor of shares if the testator specifically bequeaths his shares and dies sixty-nine days after a half-yearly meeting but before notice has been given that the dividend is payable, it will go to the legatee and not to his executor. *Clive v. Clive, Kay*, 600, 23 L. J. Ch. N. S. 981.

Where the corporation attempts to pay a dividend of a certain amount on the day of the date when it is declared, and another of like amount at the option of the corporate agent from earnings of last year, owners of stock at the time are entitled to the latter dividend, although it is not declared by the agent until after they have parted with their stock. *Hill v. Newichawanick Co.* 8 Hun, 459, *Affirming* 48 How. Pr. 427.

Where a pledgee fraudulently sells the stock the fact that dividends already declared are made payable at certain times in the future to those who are then the stockholders of record will not carry the dividends to the transferee if he never has the shares transferred to him. *Warner v. Watson*, 4 Misc. 12.

Apportionment.

Some attempt has been made to apply the old equity doctrine of apportionment of income accruing day by day to dividends where different persons were successively interested in the stock. But in the absence of statute this attempt has for the most part been discountenanced, although the doctrine has been applied in a few cases.

Dividends on South Sea annuities cannot be apportioned. *Wilson v. Harman*, 2 Ves. Sr. 672, 1 Ambl. 279.

Where a person is to have all dividends and profits on stock so long as he remains in a certain employment, if he quits before any dividend is made he cannot have an apportionment of a general dividend afterwards declared. *Clapp v. Astor*, 2 Edw. Ch. 379.

A statute providing that income of property given by will until the happening of a contingent event shall be apportioned upon the happening of such event at any time before the end of a year from the time when the whole of the annual amount for the preceding year had become due does not make apportionable dividends from the profits of an incorporated company not declared at the time when the event happens. *Granger v. Bassett*, 98 Mass. 462.

Under the English act of 1870, dividends and other periodical payments in the nature of income are to be considered as accruing from day to day, and are to be apportioned in respect to time accordingly; but this act does not govern in case a testator bequeaths specifically all

dividends so that a dividend declared after the testator's death out of profits partly earned during his lifetime will not be apportioned between the state and the legatee. *Jones v. Ogle*, L. R. 14 Eq. 419, 41 L. J. Ch. N. S. 633, 27 L. T. N. S. 367, 20 Week. Rep. 794.

Where the charter of the corporation provides that dividends shall be declared from net profits at each half-yearly meeting, the dividends as accruing are apportionable under the statute of 4 & 5 Wm. IV. chap. 22, making apportionable all dividends made payable or coming due at fixed periods; but a special dividend of money coming to the corporation through a sale of its stock is not apportionable. *Hartley v. Allen*, 4 Jur. N. S. 500, 27 L. J. Ch. N. S. 621.

In *Ex parte Rutledge*, Harp. Eq. 66, 14 Am. Dec. 696, where a life tenant died a few days before the declaration of the regular semi-annual dividend, the dividend was apportioned between his estate and the remaindermen. The court places the ruling upon the ground that the life estate was created for maintenance, and that the profits out of which the dividends were payable were daily accruing so as to bring the case within the rule as to apportionment.

Where the corporation has promised to pay its shareholders interest at a certain rate upon their stock the right of the shareholder ceases upon the transfer of his stock, although he may recover for the proportion of the interest period during which he retains such ownership. *Bates v. Androscoggin & K. R. Co.* 49 Me. 491.

In case stocks are sold for reinvestment between dividend periods the court will not apportion the undeclared dividends which may enhance the value of the stock as between life tenants and remaindermen. *Scholefield v. Redfern*, 8 L. T. N. S. 487, 2 Drew. & S. 173, 9 Jur. N. S. 485, 32 L. J. Ch. N. S. 627, 11 Week. Rep. 453.

Right to deal with dividend separately.

A stockholder may sell or transfer his shares of stock with or without gains or accrued dividends, and a dividend which has been declared may be made the subject of a contract in the same manner and to the same extent as other kinds of personal property. *Cook v. Monroe*, 45 Neb. 349.

Before the dividend has been declared the right to it cannot be sold separately from the stock. *Manning v. Quicksilver Min. Co.* 24 Hun, 361.

No valid reservation of future dividends can be made upon sale of a stock certificate. *Mable v. Van Wert Nat. Bank*, 3 Ohio C. C. 464.

Right to demand order for dividend as condition of performing contract to purchase.

Although the transferee is entitled to dividends which accrue after the consummation of

a bill for specific performance of a contract between the buyer and seller of stock, but one to compel the performance of an alleged corporate duty by a corporation which has before it the contract, and, by the pleadings, has submitted itself to the order of the court. The court below, after full hearing, decreed a rescission of the contract. Whether the court shall direct the company to transfer to appellant the stock dividend depends on the interpretation and validity of the contract between the parties to it, Rose and Barclay.

We first peruse the writing to ascertain the terms of the contract. The paper is not, as argued by appellee, a memorandum. It is a contract complete in all its parts, with

no omission of expression of intention. We do not see in it the least sign of ambiguity. It was written by Barclay, a lawyer of standing in the profession, who certainly must be presumed to have known the legal effect of the words he adopted to describe his own property, the subject of the sale. He sold thirty shares of stock, "including all dividends due or to become due thereon." It is argued that only cash dividends were intended by these words. That, however, is not the meaning of the word "dividend." In *Weimer on Pennsylvania Corporation Law* this definition of dividend is given (page 342): "A dividend is that portion of the profits and surplus funds of a corporation

the contract, he is not entitled to refuse to perform his contract of purchase because the seller refuses to execute an order upon the corporation for the payment of the dividends to the transferee. *Phinizy v. Murray*, 83 Ga. 747, 6 L. R. A. 426.

Right as between corporation and transferee.

The corporation is bound to pay dividends to the registered owner until notice of a transfer. *Bell v. Lafferty*, 1 Pennyp. 454.

If stock stands in the name of a pledgee the corporation is bound to pay dividends to him. *Boyd v. Conshohocken Worsted Mills*, 149 Pa. 368.

The corporation is protected in paying dividends to the registered owner until notice of the transfer. *Smith v. American Coal Co.* 7 Lans. 317; *Brisbane v. Delaware, L. & W. R. Co.* 25 Hun, 438; *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483; *Brisbane v. Delaware, L. & W. R. Co.* 94 N. Y. 204; *Gemmell v. Davis*, 75 Md. 546.

In *Bank of Utica v. Smalley*, 2 Cow. 770, 14 Am. Dec. 526, it is intimated that the bank will be protected in paying dividends to the one in whose name the stock stands without regard to any secret transfer.

After the corporation has recognized the transferee as the owner of the stock by transferring it to his name it is estopped to deny his title to the dividends subsequently declared. *Richmondville Mfg. Co. v. Prall*, 9 Conn. 487.

A pledgee of stock is entitled to dividends as against the corporation which has notice of the pledge. *Central Nebraska Nat. Bank v. Wilder*, 32 Neb. 454.

An assignee of stock who has notified the corporation of his rights may compel payment of dividends to him as against the claim of the corporation to apply them upon indebtedness of the former stockholder to it. *Timberlake v. Shippers' Compass Co.* 72 Miss. 323.

In *Kellogg v. Stockwell*, 75 Ill. 73, the rule is recognized that the transferee is entitled to dividends, although the transfer is not entered on the books of the corporation.

Where a person holds a full and perfect equitable title to stock of which the corporation has notice he is also entitled in equity to the dividends thereafter accruing on it. *Conant, E. & Co. v. Reed*, 1 Ohio St. 298.

In the absence of specific contract a pledgee of stock has the right to collect the dividends and apply them to the debt, and if with notice of the pledge the corporation pays the dividends to the pledgee it will be liable to account to the pledgee therefor. *Guarantee Co. of N. A. v. East Rome Town Co.* 96 Ga. 511.

But in *Sargent v. Essex Marine R. Corp.* 9 Pick. 202, it is said that a transferee cannot compel the corporation to pay the dividends to

him until he has obtained a transfer of the shares on the books of the corporation as required by the by-laws.

As between the corporation and the stockholder the dividends may be paid to the one who is the registered owner of the shares when the dividends become payable, where the resolution by which the dividend is declared provides for a closing of the books for a short time before each dividend period, thereby indicating that the dividend shall be payable to the registered owner. *Burroughs v. North Carolina R. Co.* 67 N. C. 376, 12 Am. Rep. 611. In that case, however, the court takes the general position that he who is the stockholder when the dividend becomes payable is entitled to it.

In case an administrator transfers stock without authority the corporation will be compelled to pay the dividends to the rightful owner notwithstanding the transfer. *Southwestern R. Co. v. Thomason*, 40 Ga. 408.

If shares of stock are sold for nonpayment of taxes under proceedings which are apparently legal the corporation will be justified in transferring the stock to the name of the purchaser, and in paying the accruing dividends to him. *Smith v. Northampton Bank*, 4 Cush. 1.

Where the rule of the corporation forbids a transfer of the stock until it has been fully paid, and the corporation obtains an equitable lien on the shares for a claim against the subscriber before notice of the transfer, it may retain dividends declared on the stock to be applied upon such indebtedness prior to the time that the stock becomes fully paid. *Bates v. New York Ins. Co.* 3 Johns. Cas. 238.

The corporation may, under the West Virginia statutes, go by its books in determining who is entitled to receive dividends, for the purpose of determining whether or not it may retain them to apply upon indebtedness of the stockholder. *Donnally v. Hearndon*, 41 W. Va. 519.

Where one in whose name stock has been standing for a long period of time purchases it from the equitable owner without inquiring of the corporation as to the true state of the title he is bound to give the corporation notice of his claim, and upon his failure to do so he cannot hold the corporation liable for dividends which have been paid to a third person who has acquired title to the stock under attachment against the former owner. *Sabin v. Bank of Woodstock*, 21 Vt. 353.

Where a bondholder surrenders his bonds and takes stock in lieu thereof he will be entitled, as against the corporation, to share in dividends subsequently declared, although the profits were earned before he made the exchange. *Jones v. Terre Haute & R. R. Co.* 57 N. Y. 196, Affirming 29 Barb. 353.

H. P. F.

which has actually been set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the stockholders, according to their respective interests, in such a sense as to become segregated from the property of the corporation, to become the property of the shareholders distributively. It is a matter of no difference whether the dividend is declared in stock, or paid in cash, and thereafter converted into stock by the shareholders. In either event it is a distribution of the surplus profits of the corporation." And this text is amply supported by *Com. v. Cleveland, P. & A. R. Co.* 29 Pa. 370, which was followed in *Com. v. Pittsburgh, Ft. W. & C. R. Co.* 74 Pa. 89, and then by *Allegheny v. Pittsburgh, A. & M. Pass. R. Co.* 179 Pa. 421.

The express language of the contract, therefore, passed to Rose absolutely the stock dividend, and Barclay is bound by his own words, unless Rose perpetrated a fraud upon him. It is not sufficient answer for him to say, "I did not know of the stock dividend, and consequently did not mean what I said." A lunatic, or one under some mental disability, such as gross ignorance or intoxication, might perhaps make such answer; but it cannot avail a lawyer, who ought to be presumed to know, not only the common meaning of common words, but also their legal signification. Nor was there any evidence of overreaching, or of such constraint as at times is exercised over a weak and impecunious owner by a hard and grasping buyer. According to Barclay's own evidence, when, in a casual conversation, he learned that Rose would have given \$150 for the one share he had sold to Stiles for \$135 his cupidity was at once aroused, and he within an hour sought out Rose, and solicited him to buy his remaining shares at \$150. There is no evidence that, before this second interview, Rose even knew that Barclay owned other than the one Stiles share. The party claiming to have been wronged hunted up the wrongdoer, and besought him to purchase his wares. Hard and fraudulent bargains are not often thus initiated. Then, the question of dividends was not a mere trivial incident of the negotiations, which might have inadvertently crept into the contract by reason of its insignificance. It was the one prominent point of the bargain over which they "higgled." Rose exacted, as a prerequisite to negotiations, this concession on part of the seller, and peremptorily refused to buy unless the dividends passed by the contract. Nor was the bargain such a hard one as is assumed in the argument. There was no such disparity between the value and the price paid as suggested. The \$600,000 of stock stood for precisely the same value as the \$300,000. The increased issue only operated to make available the increased value to the individual stockholders. In a certain sense, they simply divided what they had theretofore held in common. Rose paid \$150 per share for thirty shares, and with the stock dividend was entitled to thirty more, or sixty shares. For these he paid

\$4,500. But the stock soon after dropped to \$100 per share, making the whole sixty shares worth \$6,000, only \$1,500 more than he had paid, instead of being worth \$4,500 more, as argued. In fact, at the time of the purchase, it was largely a matter of opinion as to a probable future profit. There was no such hardship in the bargain as shocks equity, and of itself gives rise to a suspicion of fraud.

Up to this point, there is nothing in the contract itself, the subject of it, or in the conduct of the party claiming its enforcement, to move a chancellor to destroy it. But three other facts are found by the learned judge of the court below, on which, in the main, he bases his conclusion that the contract should be set aside: (1) Rose knew, before he purchased, that the stock dividend had been declared. (2) Barclay did not know it. (3) Rose did not disclose his knowledge of the stock dividend to Barclay. It will be noticed this dividend was declared at a regularly called meeting of the stockholders. The corporate action was binding on all the stockholders. As to them the resolution was public, and, constructively, all knew of it. Both of the parties were stockholders. It was the case of two stockholders of the same corporation, men of equal intelligence and business shrewdness, dealing at arm's length about property concerning which each had abundant and equal opportunities of knowledge; for the office of the company was within five minutes' walk of the room where they bargained. The seller reposed no trust in the buyer, and relied on no representation of his as to value, or circumstances affecting the value. The buyer made no representation. The seller sold for the highest price he thought he could get. It may be that, in bargaining, each of the parties should disclose to the other his real belief as to actual value of the thing to be sold; that is, Rose's conscience should have been tender enough to impel him to say to Barclay, "A stock dividend has been declared on this stock, which, in my opinion, will enable me to make a profit." And, as we understand it, that is the rule of the civil law, which, in theory, denies any rule of action except that derived from a rigorous inspection of the anatomy of conscience. But, as said by Gibson, Ch. J., in *Kintzing v. MoElrath*, 5 Pa. 467: The civil law "professes to deal with principles of morality too subtle for administration by an earthly tribunal, and to enforce duties which are not regarded by the common law." The rule, too, he further says, "is predicated of the duty of the vendor, who alone is presumed to know the quality and condition of the commodity, and I doubt very much whether even a Roman judge would have set aside a sale of land containing a mine which was known only to the vendee." Says this court in *Hazlett v. Powell*, 30 Pa. 297, quoting with approval Atkinson on Marketable Titles: "When the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of

them does anything to impose on the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract." And this is the common-law rule as stated by Story, Contr. § 516. It is also laid down by Chief Justice Marshall in the celebrated case of *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. ed. 214; and it is said, in *Hershey v. Keembortz*, 6 Pa. 128, referring to *Laidlaw v. Organ*, "a severer rule of morality would be impracticable in a commercial community."

Therefore, assuming the facts to be as the learned judge of the court below found them, they did not warrant him in decreeing a rescission of this contract. We hold that, Barclay by his contract having divested himself of the stock dividend, which was thirty additional shares, and the contract having been presented to the company, and a transfer requested by Rose, it was the duty of the company to transfer to him on its books, not only the thirty old shares, but also to issue in his name and deliver to him the thirty new shares embraced in the terms of the resolution of the 5th of June, 1893; and it is accordingly decreed that such transfer and delivery be made by said company.

Further, the decree of the court below of the 2d of February, 1899, declaring the contract between Rose and Barclay rescinded, etc., is reversed and set aside, at the costs of Charles Barclay, the appellee.

Hiram DE WALT'S APPEAL.

Re J. F. BOYLE'S RETAIL LIQUOR LICENSE.

(190 Pa. 577.)

1. The state has power to regulate the sale of intoxicating liquors, and, in the exercise of that power, to authorize the granting of licenses to fit persons, under such conditions as the legislature may impose.
2. The construction or application of the Constitution of Pennsylvania is not involved for the purpose of an appeal to the supreme court by reason of a so-called constitutional question, which has theretofore been raised, fully considered, and more than once definitely settled.
3. An application for an appeal to the supreme court of Pennsylvania should be by petition stating clearly and distinctly the reasons, so that the court or any of its justices may readily determine whether it is within the letter as well as the spirit of the superior court act.

(April 3, 1899.)

APPEAL by remonstrant from a judgment of the Superior Court affirming an order of the Court of Quarter Sessions for Phila-

NOTE.—The constitutionality of statutes regulating and licensing sales of intoxicating liquors, which has been sustained in many cases against the contention of those engaged in the traffic, has been recently attacked in several cases by those who contend that the state has no power

delphia County granting a retail-liquor license to James F. Boyle. *Dismissed.*

The facts are stated in the opinion.

Mr. Hiram De Walt, in propria persona:

The record showing that the case involves the construction of the Constitution of the United States and of Pennsylvania, no special allowance was necessary.

Re Melon Street, 182 Pa. 397, 38 L. R. A. 275.

The retail liquor saloon or dram shop is a common nuisance.

License Cases, 5 How. 626, 12 L. ed. 311; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620.

The retail liquor saloon or dram shop exists only by permission of the acts of legislature.

Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; *State v. Hipp*, 38 Ohio St. 206.

There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the state or of a citizen of the United States.

Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620; *Raudenbush's Petition*, 120 Pa. 342.

On the contrary, our law creates a monopoly in this business, but not in any other business.

The effort to muddle this question by specious allusions on the part of advocates of the system of saloon licensing, to the police power of the state, does not dim nor obscure the fact that the saloon as it now exists and is conducted is *malum in se*.

Acts of legislature creating, permitting, or attempting to regulate the retail liquor saloon or dram shop are unconstitutional and void.

The United States Constitution in its preamble declares that it was ordained and established in order to insure domestic tranquillity and to promote the general welfare.

The Constitution of Pennsylvania in its declaration of rights declares that all men have certain inherent and indefeasible rights, among which are those of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

No law can be enacted by Congress or the state legislature contrary to these.

What is wrong cannot be law.

If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the Constitution.

A statute creating a retail-liquor saloon

to permit the sales. This contention has been uniformly rejected by the courts. See *Haggart v. Stehlin* (Ind.) 22 L. R. A. 577, and *Plumb v. Christie* (Ga.) 42 L. R. A. 191, which agree with the present case on this point.

or dram shop does not promote the general welfare.

I contend against the constitutionality of the feature creating the dram shop. This is a new contention in our state, and the courts must now consider it as a new question.

Sterrett, Ch. J., delivered the opinion of the court:

This appeal from the judgment of the superior court affirming the order granting a retail-liquor license to James F. Boyle is here without any allowance by that court or by this court or any of its justices.

It is claimed by appellant, who appears in person, that the appeal is rightly here, because, in his opinion, "the case involves the construction or application of the Constitution of the United States," as well as "the construction or application of the Constitution of Pennsylvania." Superior Court Act, June 24, 1895, Pub. Laws, 217. He says, the retailing of intoxicating liquors "is a common nuisance," which exists only by permission of acts of the legislature. His broad proposition is, that any act of assembly which regulates or attempts to regulate the retail sale of spirituous, vinous, or malt liquors is necessarily and essentially unconstitutional; and, applying that principle to the facts of this case, his contention is that our acts of assembly providing for the granting of hotel, saloon, and restaurant licenses, and regulating the sale of intoxicating liquors thereunder, are, *ex necessitate rei*, unconstitutional and void, and should be so declared by the courts, notwithstanding the fact that the same question has been repeatedly presented to them, and, after full consideration, such acts have been adjudged constitutional.

Adhering to that line of decisions, the superior court in this case said [8 Pa. Super. Ct. 523]: "And notwithstanding the very earnest argument of the appellant, who appeared in person, we see no reason to doubt the constitutionality of the law under which the license was granted. The power of the state to regulate the sale of intoxicating liquors, and, in the exercise of that power, to authorize the granting of licenses to fit persons under such conditions as the legislature may impose, is too well settled to be open to discussion." We unanimously concur in this conclusion; and if we thought that this case should be disposed of on its merits alone, we would affirm the judgment of the learned court below for the reason so accurately and tersely stated in the last sen-

tence of the foregoing quotation from its opinion.

But, aside from the want of merit, we are of opinion that, according to the true intent and meaning of the provision above referred to, this case does not involve any such constitutional "construction" or "application" as is contemplated by the superior court act. It contemplates only actual, open, and unsettled constitutional questions—not so-called questions that have theretofore been raised, fully considered, and more than once definitively settled, as had been appellant's supposed question in this case. It was never intended that such practically dead issues of law should be revived and re-revived and agitated *ad infinitum*. The *ipse dixit* of an appellant, that his case involves a constitutional question, does not make it so; and it is the duty of this court or one of its justices to be satisfied, preliminarily, that the case is one in which a right of appeal is contemplated by the act. If it is not a case in which the right of appeal from the judgment or decree of the superior court is given, the sooner that fact is determined the better for all parties concerned. Such a course of practice will, in many cases, avoid useless expenditure of time and money, and tend to prevent useless and vexatious delays.

In addition to all that, regular and orderly practice requires that applications for all appeals should be by petition, setting forth clearly and distinctly the reason therefor, etc., so that this court or any of its justices may readily determine whether the application is within the letter as well as the spirit of the superior court act. In this connection it is worthy of notice that the last sentence of § 18 of the act May 19, 1897, Pub. Laws, 71, appears to contemplate, that, as the first step in the proceeding, petitions for allowance of appeals be filed with the prothonotary of this court, so that a record of the same may be kept, etc. If the court is in session, they will be laid before it and acted upon; if not, they will be forwarded to such justice or justices as the petitioners may suggest. Our established practice is that, as far as practicable, each member of the court shall participate in the disposition of such petitions.

Without further elaboration, our opinion is that there is no ground on which an appeal in this case can be based, and hence *the appeal is quashed*, and it is ordered that the appellant pay the costs.

TENNESSEE SUPREME COURT.

Robert LOUD

v.

N. A. HAMILTON, *Appt.*

(.....Tenn.....)

1. Duress is not a defense to notes and a deed given by a man to settle a

claim against his son-in-law and release him from arrest for felony, when he enters into the transaction deliberately, after maneuvering for a compromise, and on an understanding with his daughter that the payment shall constitute an advancement to her.

NOTE.—As to contracts procured by threats of prosecution of a relative, see *Clity Nat. Bank* 45 L. R. A.

v. Kusworm (Wis.) 26 L. R. A. 48, and *note*. See also *Mack v. Prang* (Wis.) *post*, 407.

2. It will be presumed that the law of another state as to which there is no proof is the same as that of the forum in respect to public policy.
3. An obligation given for the settlement of a claim for embezzlement by an agent of a private person, although the purpose of the transaction is to prevent a prosecution of the embezzler, is not void on grounds of public policy.
4. Oral evidence that a deed was given merely as security for notes can be given by the grantee to disprove a claim by the grantor that the deed was intended to pay the notes.

(March 2, 1899.)

A PPEAL by defendant from a decree of the Court of Chancery Appeals reversing a decree of the Chancery Court for Lincoln County which dismissed the bill filed to enforce payment of certain promissory notes. *Affirmed.*

The facts are stated in the opinion of the Court of Chancery Appeals, which was delivered by NEEL, J., and was as follows:

The complainant filed his bill seeking to recover judgment of the defendant on four promissory notes, of \$247 each, and interest due. With the bill, and as an exhibit thereto, is filed an instrument executed by defendant to complainant, conveying certain real estate, and bearing the same date as the note sued on, which appears in form to be a deed, but which complainant insists is, in effect, and was at the time, intended to be simply security for the note, and hence should be construed as a mortgage, and the real estate subjected to the satisfaction of the judgment sought on the notes. The notes were each dated August 14, 1893, and due, respectively, at six, twelve, eighteen, and twenty-four months after date. The bill was filed on December 5, 1895. On March 13, 1896, the defendant filed his answer, in which he denied that the deed was given merely as security for the notes, and averred that the deed and notes were given under the following circumstances, namely: That he had a daughter who had married one W. C. Murphy; that the said Murphy became the agent or salesman of the complainant for the sale of pianos and organs; that, after Murphy had acted as such agent or salesman for a while, a difference arose between the complainant and the said Murphy, in which the complainant charged said Murphy with not having accounted for the amounts received by him for the complainant; that complainant, at Decatur, Alabama, had Murphy arrested, charged with felony in not accounting for what complainant alleged he was liable for; that defendant was telegraphed for to come to Decatur, where he went, and found there complainant and said Murphy, that defendant's daughter was then advanced in pregnancy, and was prostrated with grief on account of the arrest of her husband charged with felony; that, after some talk with complainant and Murphy and wife, defendant agreed to give the complainant a deed to the house and lot described in the bill, for the release of said Murphy from arrest, and from the 45 L. R. A.

charge of felony, and in full discharge of said Murphy's liability to complainant; that, upon this being agreed to by the complainant, the notes above referred to were drawn up and signed by the defendant for the purpose of showing an indebtedness of defendant to complainant upon which to base the consideration for the deed to the house and lot, that, so far as defendant was concerned, he gave the deed in full discharge of the notes, and for the discharge of Murphy, as above stated; that the reason the complainant did not deliver the notes to defendant, but, on the contrary, retained them, was that defendant agreed with Murphy and wife to give them this property as an advancement out of his estate, and Murphy and wife desired to repossess themselves of the house and lot conveyed in said deed, or get it by paying off the notes to complainant, the intention being to pay off the notes to complainant, and that complainant should make a deed thereto to said Murphy or Murphy and wife; that defendant's daughter Mrs. Murphy died in February, 1894, and that from that time Murphy ceased to manifest any desire to secure the house and lot by paying off the notes held by the complainant. It is further averred that the consideration above mentioned for the execution of said note, as well as said deed, was against public policy and illegal.

On the 8th of March, 1897, the defendant filed a cross bill, in which, after setting out the contents of the original bill and the answer, the following allegations were made: "That, in addition to the allegations contained in his said answer, this complainant states and charges that the defendant, Loud, had complainant's son-in-law Murphy arrested on the charge stated in the answer above set forth, for the purpose of extorting the notes and deed referred to, and to extort money from this complainant; that said notes and deed were executed by this complainant without any consideration whatever, and were executed by compulsion and duress of this complainant by the defendant, Loud, in having complainant's son-in-law arrested, while complainant's daughter was in the condition set forth in the said answer, for the unlawful purpose of coercing payment, or a contract from the complainant to pay the whole of the alleged demand of the said Loud against complainant's son-in-law, the said Murphy." The prayer of the cross bill is that the notes and deed be declared void and canceled.

On the 8th of March, 1897, cross defendant, Loud, filed his answer, in which he denied that he had complainant's son-in-law arrested for the purpose of extorting the notes and the deed referred to, and to extort money from complainant, and that said deed and notes were executed by complainant without consideration, or under duress, or that Murphy was arrested for the unlawful purpose of coercing payment or a contract on the part of complainant to pay the whole of cross defendant's demand or any part thereof. The answer admits that Murphy had been

arrested in Alabama, and at the instance of cross defendant, for having collected and for appropriating to his own use certain moneys belonging to cross defendant, and that Murphy was at that time cross complainant's son-in-law, but denies all knowledge as to the condition of Mrs. Murphy's health. It is also denied that the notes were for the release of said Murphy from arrest, but it is averred they were given in settlement of what Murphy really owed cross defendant, the amount he collected for the latter, and appropriated to his own use, and failed to account for. It is further averred that at the time of this settlement, at the earnest solicitation of Murphy and his wife and cross complainant, cross defendant did agree to withdraw the prosecution of Murphy, so far as he was concerned, but that no part of the consideration of settlement was paid, or agreed to be paid, to cross defendant for his withdrawal of said prosecution, and that in fact the settlement was made wholly upon the basis of what Murphy owed cross defendant; that what was done in the way of arranging said indebtedness was not of cross defendant's procurement or solicitation, but was done out of considerations moving between cross complainant and his son-in-law.

The facts are as follows: Mr. Murphy, the son-in-law of defendant, Hamilton, was agent of complainant, Loud, for the sale of pianos and organs, and at the time of his arrest, referred to in the pleadings, was short in his accounts the amount of the above-mentioned notes, being something over \$989. At the instance of complainant, Loud, he was arrested on the charge of embezzling the funds of his employer, and had so embezzled them. At the time of his arrest, Mr. Murphy's wife was considerably advanced in pregnancy. She was deeply disturbed over the arrest of her husband, and telegraphed to her father, at Elora, Tennessee, that she and her husband were in deep trouble, and asked him to come to Decatur. The proceedings at Decatur in behalf of complainant, Loud, were in the hands of his attorney, Mr. Ocoila Kyle. Mr. Kyle gives the following account of the matter: "Murphy, who was Hamilton's son-in-law, had become indebted to complainant in the sum of \$989.21, as I remember now. This money had been embezzled by Murphy from Loud, and we were threatening Murphy with a criminal prosecution therefor. He (Murphy) begged for time, some three days, saying he had telegraphed for his father-in-law, Mr. Hamilton, and that he would come from Elora, Tennessee, on the first train, and satisfactorily adjust the shortage. To the best of my recollection, within about two days thereafter, defendant, Hamilton, came to Decatur, and was introduced to me and complainant, Loud, as being Murphy's father-in-law. He at once agreed to make good the amount owing by Murphy to Loud, but claimed that he did not have cash money, but would give his notes, and would make his deed to certain real estate, situated in Elora, Tennessee; it being agreed by and between Loud and Ham-

ilton that when the notes were paid, with interest thereon, the said real estate was to be reconveyed by Loud to Hamilton. In order that there should be a valuable consideration for the agreement, and before the same was put in writing, at my suggestion, Loud transferred and assigned to defendant, Hamilton, all of his right, title, and interest in and to the debt owing to him by Murphy, absolutely. This agreement was made, and Murphy was released from any obligation to Loud on account of said debt. . . . It was not agreed and understood that the house and lot were transferred absolutely in full settlement of Murphy's release. On the contrary, it was agreed and understood that, on the payment of the notes with interest, the property was to be reconveyed to Hamilton. It was agreed that Loud should give Hamilton credit on the notes for whatever amount the house and lots should rent for." Being asked at whose suggestion the matter was thus arranged, he said: "I do not know how to answer this question, further than to say that, when Murphy was confronted with embezzlement, he begged for time until his father-in-law could come, claiming that he would adjust it. When defendant, Hamilton, came, the principal negotiations were in trying to find out from Murphy the full amount and extent of his defalcation. Hamilton seemed willing to do anything, except he was anxious to have the amount made as small as possible, and that the rents as received by Loud should be credited on the notes." Mr. Kyle further states that Mrs. Murphy was not present at the time of the negotiations above-referred to, and that they took place at his office in Decatur, Alabama. He says that he had seen Mrs. Murphy a few days before at her home in New Decatur, when her husband was under arrest, and about two or three days before her father, Mr. Hamilton, came; that she looked worried about her husband's condition, but otherwise seemed well; that she seemed at this time about six or seven months advanced in pregnancy. He further states that Mr. Hamilton was not represented by any attorney or counselor in making the arrangements above referred to.

We adopt the foregoing statement of Mr. Kyle as setting forth the facts of the transaction, with the following additions and modifications: Mr. Loud testifies that, when the negotiations were first entered into, Mr. Hamilton wanted him to take the property in settlement for the claim, but he would not agree to this, as he did not consider that the property was of sufficient value. He says: "We refused to release Murphy from arrest on this settlement, and Mr. Hamilton then agreed to give his notes for the full amount of the claim." Mr. Hamilton testifies: "The consideration for the deed was the release of Murphy. Mr. Murphy was under arrest at Decatur, Alabama. The complainant stated that if this conveyance was not made, and Murphy released, he would have him put in the coal mines, and work it out at 40 cents per day, and he stated this in my presence, after I had got to Decatur." This

statement is not denied by Mr. Loud. We find, then, as a fact, that the purpose of the transaction was to release Murphy from arrest, and to quiet his prosecution for the offense of embezzlement; and, further, that it was entered into after the above-mentioned threat was made.

Mr. Hamilton testifies that when the papers were executed by him he was very much excited, and hardly knew what he was doing, on account of the condition of his daughter. This statement, however, is not borne out by the other facts in the record. The negotiation was begun in the morning, and the terms agreed on, but the papers were not executed until the afternoon of the same day. Mr. Hamilton's daughter told him that, if he would execute the deed to the house and lot in Elora, she would consider it as her part of his estate, and would ask no more from him. When asked about this matter in cross-examination, as to why his daughter made such a proposition to him, and if he was hesitating about making the deed, he answered: "Well, I did not know what I would do. I did not know what kind of a compromise I could make with Mr. Loud." This is not the conduct of a man overwhelmed with grief, or whose self-poise is overthrown by mental excitement. It seems rather the act of one who was holding back, or feigning to do so, with expectation, or hope, at least, of getting better terms. In addition to this, after he returned home, he went to Nashville to see Mr. Loud, and said to him that it was not right for him to hold both the property and the note. This was on the theory that seemed to be entertained by Mr. Hamilton at the time that the deed was an absolute conveyance. As he returned from Nashville, he consulted his attorneys at Fayetteville. These gentlemen, on the 28th of August, 1893, just two weeks after the transaction, addressed the following letter to Mr. Loud:

Dear Sir:—Mr. N. A. Hamilton, of Elora, Tennessee, has submitted to us a copy of a deed made by himself and wife to you to property in Elora, and an assignment by you to him of one W. C. Murphy's indebtedness to you, and, if we understand the transaction had between you and Mr. Hamilton, an injustice has been done Mr. Hamilton, perhaps unwittingly, and we write to get your explanation of it, which we hope you will kindly give us, as you understand it. It appears that you have an absolute deed to the property in Elora covered by the deed, and also Hamilton's note, amounting to \$989.20, and that Hamilton only gets Murphy's indebtedness to you of \$800. What was Murphy indebted to you, and was the deed only to secure that? And, if it was, why was it that Hamilton gave you his note for the \$989.20? By giving us a full explanation, in your own way, you will oblige us very much. Was the deed intended as a security, or as absolute and unconditional? Let us hear from you on receipt of this.

This letter was turned over by Mr. Loud 45 L. R. A.

to his attorney, Mr. Kyle, who, on August 30, 1893, replied as follows:

Gentlemen:—Mr. Robert L. Loud, of Nashville, Tenn., requests me to reply to your favor of the 28th inst., directed to him. W. C. Murphy was indebted to Mr. Loud in the sum of \$989.20. This was transferred by Mr. Loud to Mr. Hamilton. Mr. Hamilton makes a deed to certain real property, its estimated value being \$800, and Hamilton executes his notes for \$989.20. When the notes are paid, with interest, the real property is to be reconveyed to Hamilton. That was the oral agreement made, as I remember it, prior to the execution of the deed and bill of sale. I do not recollect what provision, if any, the notes provide in the event there is default in payment. You will see, from this, Mr. Loud does not claim \$1,789.20 from Mr. Hamilton, but only \$989.20.

To this Mr. Hamilton's attorneys replied on September 2, 1893, to Mr. Kyle as follows:

Dear Sir:—Yours of the 30 ult. received. Your explanation of the transaction between Mr. Hamilton and Mr. Loud comports with Mr. Hamilton's statement to us. The ground of complaint on the part of Mr. H. is that the papers do not properly express the transaction, nor the rights of the parties, in this: that the conveyance of the real estate of Mr. H. to Mr. Loud appears to be a deed in fee to the property, whereas it should have been, and was only intended as, a mortgage security to the \$989.20 note. In the deed there should have been the expression of a defeasance to the effect that, upon payment of the note (\$989.20), the conveyance should be void, or reconveyance of the property. In the absence of such expression, it is within the power of Loud to transfer the note and the real estate to innocent persons without notice, thereby causing Mr. Hamilton to pay the note and also lose the real estate. We would suggest that this can be remedied by Mr. Loud making a deed to the real estate to Mr. Hamilton, retaining a lien, in the deed, for the payment of the \$989.20 note. If this meets your approval, we will draw the deed and send it to you for examination.

The matter rested in this condition until the original bill was filed, on the 5th of December, 1895, more than two years thereafter. During all this time there was no intimation, so far as the record shows, that Mr. Hamilton had acted under duress, or while in such a state of mind as he testifies to in his deposition. When the answer was filed, also, on the 13th of March, 1896, nearly three years after the transaction, there was still no intimation of duress. In this pleading the defense was placed upon two grounds: First, that the defendant, Hamilton, was not liable on the notes, because the deed had been given in payment of them; and, secondly, that the transaction was illegal, as we infer from the answer, on the ground that the consideration given was that a felony was com-

pounded. Finally, on the 8th of March, 1897, nearly four years after the transaction, the cross bill was filed, charging duress. This was the first intimation of duress in the record, and the first complaint of that character which Mr. Hamilton made. Under these circumstances, we cannot believe that he was so overwhelmed with excitement and grief at the time he gave the deed and notes that he hardly knew what he was doing, as he testifies. Nor can we believe that he was seriously influenced by the threat which he proves that Mr. Loud made about putting Mr. Murphy in the penitentiary, and thence in the coal mines, to work at 40 cents per day. We do believe, however, that, while Mr. Hamilton did purchase the indebtedness of Murphy to Loud, that was merely subsidiary to the main consideration, which was to release his son-in-law from custody and from prosecution for the embezzlement of which he was guilty, and we find that this was the chief consideration of the transaction, as understood by both Hamilton and Loud, and that in view of this the deed and notes were executed.

As to the contention that the deed to the land was given in satisfaction of the notes, the weight of the evidence is very decidedly to the contrary. This is shown both by the testimony of Mr. Loud and Mr. Kyle; also by the fact that Mr. Loud retained the notes, and that there was an agreement that the rents of the place should be collected by Mr. Hamilton, and that he should have credit therefor on his notes when he should forward the amount to Mr. Loud; and also by the correspondence which we have above copied. The chancellor, upon the hearing below, dismissed the original bill, and taxed the complainant with all of the costs, except the costs of filing Hamilton's cross bill and of taking Hamilton's deposition. Upon the cross bill he decreed that Hamilton was not entitled to have the deed to the house and lot set aside, and the title reinvested in him, and as to this matter he decreed that the cross bill should be dismissed, but, further, that Hamilton was entitled to have the four notes above mentioned declared void and canceled, and a decree was so entered. He taxed Hamilton with the costs of filing his cross bill and with taking his own deposition. The complainant appealed from so much of the decree as dismissed the original bill. The defendant, Hamilton, appealed from so much of the decree as denied him relief against the deed. Both appeals were granted, but only the first was prosecuted. But the defendant assigns error upon the chancellor's failure to grant relief against the deed. The complainant's assignments are as follows: First, the court erred in dismissing complainant's bill, because the proof clearly shows that the instrument was intended as a mortgage; second, the court erred in not dismissing defendant's cross bill, because the proof fails to show that defendant signed the deed under any misapprehension or duress, and does show that the transaction was supported by

a valid consideration, and was clearly understood and freely entered into.

First, as to the subject of duress. In the earliest case we have upon this question (*Blair v. Coffman*, 2 Overt. 176, 5 Am. Dec. 659), it is said: "Upon an issue of duress, the inquiry must necessarily be as to the state of mind of the person pleading it; and not as to the existence of some fact, such as acts done or things which are susceptible of demonstration from the senses. . . . Evidence of conversation, acts before, at the time, and after the supposed duress, would be proper to show the state of mind in which the act was done. In the nature of things, it is the best evidence of which the case is capable; for no man can swear particularly how another felt at the time he did an act. It is not the mere affair of a person being in prison, or under circumstances of hardship, that will enable him to avoid an act. Such things may exist, and yet no coercion. Hence the necessity of the inquiry as to the state of the plaintiff's mind, and no evidence so proper as his own acts and conversation to show it." In the case of *McSween v. Miller*, 1 Heisk. 104, note, it is said: "The rule is, where a threat of unlawful mischief or injury to the person, property, or good name of a party is of sufficient importance to destroy his free agency, the law, because of such duress, will not enforce any contract which he may be induced by such threats to make. The controlling question is, Was the threat of such a character as, under the circumstances surrounding the parties at the time, was sufficient to overcome the mind and will, or, in other words, to destroy the free agency, of a person of ordinary firmness, and, his free agency being thus destroyed, was he thereby induced to give his assent to the contract? If so, the contract can have no validity whatever, because it is wanting in the essential elements of a valid binding contract, to wit: the free and voluntary assent of the minds of the parties making it." In the case of *Rollings v. Oate* it was held that, in order to constitute "duress," in its legal sense, it must appear that the party acted under "some threatening of life, or member, or of imprisonment, or beating of the party acting, or of his wife, with the view to procure the execution of the deed or other instrument, and the danger existing or threatened" should affect the person or goods or property. 1 Heisk. 97, reaffirmed in *Bogle v. Hammons*, 2 Heisk. 141, 142. In *McCartney v. Wade*, 2 Heisk. 369, 374, it is said: "It is not necessary, in the view of a court of equity, to show that a party acted under the influence of extreme terror in making a contract. If he acted under threats or apprehensions, short of duress, but under such circumstances as to show that he was not a free agent, and was unable to protect himself, the contract will be annulled." In *Johnson v. Roland*, 2 Baxt. 203, 206, it is said: "The threat must be of such a character as to overcome the mind and will, and destroy the free agency, of a person of ordinary firmness." To the same general effect, see *Belote*

v. *Henderson*, 5 Coldw. 471, 98 Am. Dec. 432; *Wilkerson v. Bishop*, 7 Coldw. 24; *Looper v. Philips*, 1 Shannon, 269; *Coffman v. Lookout Bank*, 5 Lea, 232, 40 Am. Rep. 31. The last-mentioned case is very striking in its facts. The substance of it is that a father was called into the back room of a bank, in the presence of some of its officers, and suddenly informed that his son had forged two notes, of \$900 each, and got the money on them from the bank, and the notes were exhibited to the father. He was greatly agitated, and, as the court said, "literally overwhelmed by the calamity." The bank officers said that he was greatly moved and distressed, and wept bitterly. He himself said in his testimony that during his interview with the bank, owing to the suddenness of the communication, and the nature of the calamity, he was incapacitated from entering into any contract with full knowledge of its scope. The proof of his brother and his neighbors was that he was thoroughly unnerved by the calamity; "almost in a state of mental aberration," to use the language of a neighbor and a physician; "and wellnigh crazy," to use the words of other witnesses. This was the state of mind in which he executed the note to the bank. Promptly, within a few days after the transaction, he repudiated it, and demanded back his note which he had given to cover the two \$900 notes. In this case it seems that there was no imprisonment of the son, nor any threat to prosecute him, or promise to refrain from doing so. The case goes off on the idea that, owing to the shock, surprise, and grief under which the father labored when he executed the note, he was not in such a mental condition as to enable him to execute a contract.

We are referred by counsel to the case of *City Nat. Bank v. Kusvoorn* (Wis.) 26 L. R. A. 48, and the full note attached thereto, and especially to pages 64 and 65, or the section of the note there appearing. The doctrine referred to in the pages last mentioned may be prefaced with this statement from Lord Bacon's maxims: "So, if a man menace me that he will imprison or hurt in body my father or my child, except I make unto him an obligation, I shall avoid this duress, as well as if the duress had been to my own person." In section VI. of the note referred to it is said that the doctrine applies to other relations besides those of husband and wife or parent and child. Continuing, it is said: "Yet, when such a state of mind ensues upon the prosecution or oppression of a brother, and the conveyance, or other obligation, is thereby extorted, relief will not be granted as readily as where the conveyance or contract has been extorted from either a father or son by the duress of the other. In such cases, circumstances of oppression or imposition must clearly appear, and it must not be simply a case where a party may have purchased immunity for his brother from lawful prosecution,"—citing *Davis v. Luster*, 64 Mo. 43. It is said in the same note that in *Sharon v. Gager*, 46 Conn. 189, the court refused to foreclose a mortgage executed by

an aunt to secure her nephew's defalcation as town treasurer, procured by one of the selectmen under threats and menace of the prosecution of the nephew; and that, in *Bradley v. Irish*, 42 Ill. App. 85, where the notes were extorted through fraud and duress, in connection with the criminal process issued against a grandson charged with embezzlement and forgery, the mortgage and notes in question being obtained by means of a scheme whereby a warrant was procured for his arrest, the accused being taken by the deputy sheriff to his grandmother's home, where, by threats of putting him in the penitentiary, knowing her great affection for him, the note and mortgage in question were procured, the court held the mortgage null and void, and directed it set aside as a cloud upon title and delivered up for cancellation, and enjoined its enforcement. Referring, again, to the case of *Davis v. Luster*, it is said in the same note that this was a case where it was sought to set aside a conveyance procured by means of threats of prosecution of the plaintiff's brother, and that the court held that, in order to entitle the plaintiff to the relief sought, he must show that it was given for the express purpose of freeing his brother from prosecution upon an innocent charge, and that the prosecution was unlawful, and also must show that the deed was executed upon the belief that its non-execution would lead to a criminal prosecution. We are referred by defendant's counsel especially to the case of *Snyder v. Willey*, 33 Mich. 483, mentioned in the same note. In this case it appears that a joint and several promissory note was given, and a material part of the consideration was the stifling of two criminal prosecutions, one for forgery, commenced by the plaintiff against defendant's son-in-law, and it was held that the notes were void, and their collection could not be enforced, the consideration being illegal. In the case just referred to the father-in-law's signature was procured mainly by the entreaties of the daughter, urged on, and her fears played upon, by the plaintiff, the court admitting her evidence as to the inducement as part of the *res gestæ*. The case last cited does not go to the extent of holding that a son-in-law would stand in the same relation with regard to the question we now have in hand as would a son or wife, the case going off on a different ground altogether. But we are inclined to the opinion that where a son-in-law and his wife are living in harmony, and there is nothing to show any estrangement between the father-in-law and the son-in-law, the latter would stand in the same relation, so far as concerns the present question, as would the daughter herself. It is without doubt true that the danger to the son-in-law, and the consequent grief and terror of the daughter, would act upon the father's heart with substantially the same force as if the daughter herself were in danger, or, at least, nearly so. We may go further and hold, as was done in the case of *Coffman v. Lookout Bank*, 5 Lea, 232, 40 Am. Rep. 31, that if a party's mind is so agi-

tated from the peril in which a near relative stands, even though there is no prosecution or threat of prosecution, as that his free agency is substantially canceled, a contract made by him under such circumstances could not stand. But it is said in some of the cases that if a father is appealed to to take upon himself a civil liability, with the knowledge that, unless he do so, his son will be exposed to a criminal prosecution, with the moral certainty of conviction, even though that is not put forward by any party as a motive for the arrangement, he is not a free and voluntary agent, and the agreement he makes, under such circumstances, is not enforceable in equity. See cases cited on page 56 of 26 L. R. A., and *note*. We cannot yield our assent to the full extent of the doctrine thus stated. We do not think it can be said with truth that, owing to parental affection, such a proposition made to a father for the release of his son,—that is, by the execution of the father's obligation,—would leave him no alternative but to execute the obligation, and thus substantially for the time destroy his free agency. If this were a sound view, few bail bonds, where the father executes them as surety for the son, could be held good, and the same infirmity would exist in obligations executed for counsel fees. The principle would be the same. What we mean to say is that a proposition of the nature referred to, made to a father, would not be such as, under the normal operation of the principles and emotions governing human conduct, would necessarily command his compliance, or deprive him of his free agency. The situation referred to would no doubt be very strong evidence to support a charge of duress, and, in the absence of other evidence, sufficient, but not necessarily conclusive. In the face of these facts, it may yet be shown that the father was in such a state of mind as that he was able to consider the propriety of the act proposed, not only from the standpoint of parental affection, but also from the standpoint of moral and legal duty. This we say with regard to legal prosecutions. Of course, the same situation may also arise in case of the threat of a prosecution without legal justification. Whether obligations so obtained would not be invalid for another reason—that is, as being without consideration, and against public policy, as, in the case of legal prosecutions, the compounding of felonies—is another matter, the above observations being confined merely to the defense of duress.

And in this connection it is proper to observe that confusion occurs in citing cases under the law of duress, if we fail to distinguish between those instances in which obligations are given for the purpose of compounding criminal prosecutions and those in which a party may be lawfully released from custody upon the payment of a sum of money. It is said that, in order to put a party under duress by imprisonment,—that is, legal duress,—the imprisonment must be unlawful, or there must be an abuse of, or an

oppression under, legal process or legal detention. 6 Am. & Eng. Enc. Law, p. 62. In a note to the above authority, it is said that where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, the rule is that, in either of the events, the party arrested, if he is thereby induced to enter into a contract, may avoid it as one procured by duress. Again, it is said that it is a general rule that imprisonment by order of the law is not duress; but, to constitute duress by imprisonment, either the imprisonment, or the duress after, must be tortious and unlawful. If, therefore, a man, supposing that he has a cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily executes a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action, but although the imprisonment be lawful, unless the deed be made freely and voluntarily, it may be avoided by duress; citing *Watkins v. Baird*, 6 Mass. 506, 4 Am. Dec. 170. Again, it is said (p. 64) a contract made by one under arrest, through lawful process, as a condition of his deliverance from imprisonment, cannot be avoided on the ground of duress, although it be shown that no cause of action really existed; citing *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157, and numerous other authorities. The case last referred to was as follows: The plaintiff, Clark, advanced money to Henry E. Turnbull, in the city of New York, to the amount of about \$4,000. She insisted that he received the money, as her agent, to invest for her in good interest-bearing security, and that he fraudulently appropriated the money to his own use. The defendant, who was a brother of Henry E. Turnbull, claimed that the money so advanced to him—that is, to Henry E. Turnbull—was placed with him as a stock broker, under instructions to invest in stock speculations on margins, and that it was used in such gaming transactions, and lost. To assert her claim for this money as a debt, the plaintiff brought suit against Henry F. Turnbull in one of the courts of New York, under which legal proceedings the defendant therein was arrested and taken into custody. While so in custody, in an arrangement to settle that suit, Walter A. Turnbull, his brother, the defendant in the case above referred to, was called in to participate, and did so by advancing for Henry \$1,200 in cash, and giving to him the promissory note sued on, which Henry indorsed to the plaintiff for the balance. Henry was thereupon released from his imprisonment, and the suit against him was subsequently discontinued. This state of facts it was held did not support the defense of duress. So, in this state, it is held that, under our statute, an agreement based upon the settlement of an embezzlement by a private agent of the funds of his principal would be a legal agreement, even if

there were included in a part of it a stipulation not to prosecute the agent criminally. *Allen v. Dunham*, 92 Tenn. 257, 269. The making of a contract to be released from imprisonment in such a case could not be defeated by the defense of duress put forward by the embezzler himself, and a *fortiori* could not be defeated by a near relative who should execute such a contract for the deliverance of the prisoner.

To apply what has been said: We are of opinion that the facts stated fail to show that the defendant acted under duress; and that they also show that he ratified the contract. The absence of duress is shown by the deliberation with which the contract was made at Decatur; by the understanding had between the father and daughter as to the advancement; by his own statement that he was maneuvering for a compromise; by his trip to Nashville, and conference with complainant, Loud; by the correspondence instituted on his behalf by his attorneys, with his sanction; and by the long delay to bring forward any objection to the contract on the ground of duress. The ratification is shown by the same acts, above referred to, which happened subsequent to the execution of the contract, and also by the delay mentioned. Where a contract is sought to be avoided as procured under duress, the party wronged must proceed promptly. If he remain silent, keeps the property received, or recognizes the contract by affirmative acts, he will be held to have waived the duress. 6 Am. & Eng. Enc. Law, p. 88. We have also an authority in this state to the effect that contracts procured by duress may be ratified. *Belote v. Henderson*, 5 Coldw. 471, 476, 98 Am. Dec. 432.

As to the point that the consideration of the obligation given was the compounding of a felony, and therefore that it was void on grounds of public policy, this is met by the case of *Allen v. Dunham*, 92 Tenn. 257, 269, and the discussion in connection therewith. It is true that the transaction occurred in Alabama, but, there being no proof as to the law of Alabama in this class of cases, we must presume that it is the same as our own. We therefore hold that the contract was not void, as against public policy.

It is insisted by defendant that it was not

proper to hear proof below to show on behalf of complainant that the deed above referred to was a mortgage, and not a deed. It is said that such proof is competent in favor of the maker of an instrument, but no authority authorizes its introduction in behalf of the vendee. No objection was urged in the court below on this ground. But the objection itself has no real weight, as we think, in any event. It was certainly competent for the complainant to defend the charge of the cross bill, and show, as a matter of fact, the notes were not paid, or intended to be paid, by the deed. We have held that this was very clearly proved. The defendant also insisted, in the correspondence which we have copied, that the deed was only intended as security for the notes, and the complainant admits that this was true. So it is established that the deed was in fact a mere security. It is established in the manner just stated, and also by the direct proof of two witnesses, as against the defendant's testimony alone. But if it be conceded that the deed was indeed absolute, inasmuch as it is shown that the notes were never paid the defendant could not be heard to object that the complainant should sell his own land for their payment. However, as stated, it is fully proved that the notes are unpaid, and that the deed was intended as a mere security.

The result is *the decree of the chancellor dismissing the original bill, and decreeing relief against the notes under the cross bill, must be reversed*, and a decree must be entered here in favor of the complainant, Loud, against the defendant, Hamilton, for the amount of the notes and interest, and also to sell the land described in the bill for the payment thereof. The decree will direct a sale on a credit of twelve months, and in bar of the equity of redemption, a special prayer to this effect appearing in the bill. The defendant will pay the costs of this court and of the court below.

All the Judges concur.

Messrs. Chambers & Zarecor for appellant.

Messrs. Holman & Carter for appellee.

The above decision was affirmed by the supreme court March 2, 1899, without any written opinion.

WISCONSIN SUPREME COURT.

Bertha MACK, Guardian of Alma Mack,
Appt.,
v.

Marie PRANG, Impleaded, etc., *Resp't.*

(.....Wis.....)

1. Threats to arrest a man for embezzlement unless his wife will execute a

NOTE.—As to effect of duress on relatives, see case of *Loud v. Hamilton* (Tenn.) *ante*, 400, also note to *City Nat. Bank v. Kusworm* (Wis.) 26 L. R. A. 48.

As to the defense of fraud against bona fide holder of a negotiable instrument, see note to *Green v. Wilkie* (Iowa) 36 E. R. A. 434.
45 L. R. A.

mortgage constitute duress, which will avoid the mortgage made by her, if they were sufficient to control her will.

2. A guardian is a bona fide holder of an unmatured note taken from a former joint guardian, who has resigned, to pay an indebtedness to the ward for property which the resigning guardian has had and failed to account for.

3. The defense of duress is one of the defenses to negotiable paper which is cut off by transfer to a bona fide holder.

(June 22, 1899.)

A PPEAL by plaintiff from a judgment of the Superior Court for Milwaukee County in favor of defendant in a proceeding to foreclose a mortgage which defendant alleged to be void for duress. *Reversed.*

Statement by Winslow, J.:

This is an action of foreclosure of a note and mortgage for \$2,500 executed June 10, 1892, by the defendant Marie J. Prang and her husband, William Prang, and delivered to one Herman S. Mack, and assigned by him to the plaintiff, as guardian of Alma Mack, December 19, 1894, and before maturity. The mortgage covered real estate in the city of Milwaukee, which was the property of the defendant Marie Prang, and both note and mortgage were given to secure payment of an indebtedness then owing by the husband, William Prang, to Herman S. Mack. The defense was that both note and mortgage were executed by the defendant Marie Prang under duress, consisting of threats of imprisonment of her husband, William Prang. The action was referred to W. J. McElroy, Esq., to hear, try, and determine the same. The referee found that prior to the 10th of June, 1892, William Prang was a traveling salesman in the employ of H. S. Mack & Co., of Milwaukee, and that at said time he had appropriated to his own use, of the moneys of said firm, more than \$5,000; that during three days prior to and on the 10th day of June, 1892, Herman S. Mack, directly and through the defendant William Prang, threatened Marie that, if she did not execute the note and mortgage in question, he would prosecute her husband, William Prang, and have him sent to prison, and that Marie executed said note and mortgage only under the fear that, if she refused to execute the same, her husband would be prosecuted and sent to prison; that no money was ever paid or authorized to be paid by the defendant Marie Prang upon said note and mortgage, nor had she knowledge of any payment being made thereon; that the amount due on the note from William Prang to the plaintiff amounted to the sum of \$3,321.25. And as conclusions of law the referee found that the defendant Marie Prang was entitled to judgment of dismissal of the action with costs, and that as to her, said note and mortgage be canceled, and that the plaintiff was entitled to judgment against William Prang for the amount of the note with costs. Upon motions being made by the plaintiff to modify said report, and by the defendant to confirm the same, the court modified the findings by adding a finding, in effect, that the plaintiff was and is a bona fide purchaser, for value and before maturity, of the note and mortgage in question, and also that at the time of the execution of said mortgage the will of said Marie Prang was overpowered by said threats, and that the execution of said mortgage by her was not her voluntary act. Thereupon judgment was entered in favor of the defendant Marie J. Prang, setting aside the said note and mortgage as to her, and from that judgment this appeal is taken.

45 L. R. A.

Messrs. Miller, Noyes, Miller, & Wahl, for appellant:

The evidence on behalf of the defendant does not show that there was any danger of the alleged threat being immediately carried out, nor that such threat implied any harsh or unusual use of criminal process. Under these circumstances the defense of duress was not made out.

Wolff v. Bluhm, 95 Wis. 257; 6 Am. & Eng. Enc. Law, pp. 64-69; *Compton v. Bunker Hill Bank*, 96 Ill. 301; *Nealley v. Greenough*, 25 N. H. 325; *Alexander v. Pierce*, 10 N. H. 494; *Eddy v. Herrin*, 17 Me. 338, 35 Am. Dec. 261; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Higgins v. Brown*, 78 Me. 473; *Hilborn v. Bucknam*, 78 Me. 482, 57 Am. Rep. 816; *Taylor v. Jaques*, 106 Mass. 291; *Landa v. Obert*, 45 Tex. 539.

The defense of duress cannot be set up as against the appellant, who was a bona fide purchaser before maturity for value, of the note and mortgage.

4 Am. & Eng. Enc. Law, 2d ed. p. 334; 10 Am. & Eng. Enc. Law, 2d ed. p. 335; *Martineau v. McCollum*, 3 Pinney, 455; *Andrews v. Hart*, 17 Wis. 298; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133; *City Nat. Bank v. Kusworm*, 91 Wis. 166; *National Bank v. Wheelock*, 52 Ohio St. 534.

The respondent ratified the note and mortgage, and is estopped to deny their validity. 10 Am. & Eng. Enc. Law, 2d ed. p. 337.

Where a party relies upon duress in equity as a ground for avoiding his security, he ought, as in other cases of fraud, to move promptly and not sleep upon his rights. If he goes on and by his conduct assumes the contract to be in force until the position of the other party in respect to it has changed, he ought to be held to have affirmed it.

Lyon v. Waldo, 36 Mich. 346; *Eberstein v. Willots*, 134 Ill. 101; 10 Am. & Eng. Enc. Law, 2d ed. p. 337; *Schultz v. Culbertson*, 46 Wis. 313; *Hildebrand v. Tarbell*, 97 Wis. 446; *Franey v. Wauwatosa Park Co.* 99 Wis. 40.

Messrs. Sylvester, Scheiber, & Orth, for respondent:

An arrest, even upon a legal warrant and upon a criminal charge to compel the payment of a mere debt, would be misuse of legal process, and the threat of such an arrest may constitute unlawful duress.

Taylor v. Jaques, 106 Mass. 294; *Hackett v. King*, 6 Allen, 58; *Morse v. Woodworth*, 155 Mass. 252.

The facts proved and found by the court constitute duress.

Kuelkamp v. Hidding, 31 Wis. 503; *Schultz v. Culbertson*, 46 Wis. 313, 49 Wis. 122; *Schultz v. Catlin*, 78 Wis. 611; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 26 L. R. A. 48; *Taylor v. Jaques*, 106 Mass. 291.

Duress is available as a defense against a bona fide purchaser for value before maturity.

Story, Bills of Exchange, § 185; 1 Dan. Neg. Inst. 858; 1 Parsons, Notes & Bills, 276; *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 469; *Barry v. Equitable Life Assur. Soc.* 59

N. Y. 587; *Hatch v. Barrett*, 34 Kan. 233; *Duncan v. Scott*, 1 Campb. 100; *Tiedeman*, Com. Paper, § 287.

The extorted act is nothing more nor less than the act of H. S. Mack, who used the helpless person of Mrs. Prang as the influence of forging her name.

Earle v. Norfolk & N. B. Hosiery Co. 36 N. J. Eq. 192; *Jordan v. Elliott*, 12 W. N. C. 56.

Fraud in the inception of a negotiable note, whereby the supposed maker was misled into the signing of the note, he innocently believing it to be a paper of a different kind or character, and being free from fraud or negligence on his part, renders it void in the hands of innocent purchasers for value before maturity.

Walker v. Ebert, 29 Wis. 194, 9 Am. Rep. 548; *Kellogg v. Steiner*, 29 Wis. 626; *Tischer v. Beckworth*, 30 Wis. 55; *Andrews v. Thayer*, 30 Wis. 228; *Butler v. Carns*, 37 Wis. 61; *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1; *Roberts v. McGrath*, 38 Wis. 52; *Griffiths v. Kellogg*, 39 Wis. 290; *Bowers v. Thomas*, 62 Wis. 480.

Appellant is not a bona fide holder for value of the mortgage in question.

Herman S. Mack had no right to invest his ward's money in his (Mack's) business. By so doing he was guilty of a conversion thereof and made himself personally liable to the estate for the amount. Consequently the ward could not be compelled to accept the note and mortgage in payment of his guardian's liability to him.

Martin v. Davis, 80 Wis. 378.

Plaintiff is chargeable with notice of the acts of Mack, and took the note and mortgage subject to all equities.

Conceding that he obtained it for himself as an individual, nevertheless whatever knowledge he acquired in that capacity—to say nothing of his express acts—is imputable to him as guardian.

McDonald v. Fire Asso. of Philadelphia, 93 Wis. 348.

The plaintiff and Herman S. Mack were coguardians at the time, and their acts as such were joint and entire. The act of one must be taken to have been the act of both. They are one and the same person in legal effect.

Schouler, Exrs. & Admsrs. § 400.

There was no consideration for the assignment of the note and mortgage from Mack to her.

Bowman v. Van Kuren, 29 Wis. 200, 19 Am. Rep. 554; *Black v. Tarbell*, 89 Wis. 390; *Burnham v. Merchants' Each. Bank*, 92 Wis. 277.

Winslow, J., delivered the opinion of the court:

It is admitted that this was a mortgage given by the wife, upon her own property, to secure the debt of her husband, but it is claimed by the appellant that there was not sufficient evidence to establish the defense of duress. We cannot agree with this contention. The defendant William had been for several years a traveling salesman for Her-

man S. Mack, the original mortgagee, and was short in his accounts to the amount of \$5,000. The evidence of both Marie and William Prang was to the effect that both Mack and his bookkeeper personally came to see Mrs. Prang, and threatened to prosecute William for embezzlement, and send him to jail, unless she would give the mortgage; that she at first refused, and that they gave her a day or two to think the matter over; that she was greatly excited and alarmed at these threats, and had fainting spells both before and after she executed the mortgage, and that she only executed it to prevent her husband being sent to jail. It is true, this testimony was substantially contradicted by Mack and the bookkeeper, but we cannot say that the findings on this point were against the weight of the evidence. Facts substantially similar to these have frequently been held to constitute duress which renders voidable a security or contract executed under their influence. *McCormick Harvesting Mach. Co. v. Hamilton*, 73 Wis. 486; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 26 L. R. A. 48, and cases cited in opinion. It is true that the will of the person making the contract must be overcome so that the act is not his voluntary act, but that fact is found in the present case, upon evidence which we think sufficient. Nor is this doctrine in any way in conflict with what was said by this court in *Wolff v. Blum*, 95 Wis. 257. That was a case, as distinctly stated in the opinion, where the evidence showed that the will was not overcome, and the party acting under the alleged duress was free to act as he chose, and only acted after consulting his friends and neighbors. It was also there said that in order to constitute duress "the threat must be of such a nature, and made under such circumstances, as to constitute a reasonably adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by such person while in such condition."

The fact of duress being found upon sufficient evidence, two further questions require consideration, namely: Was the plaintiff a bona fide holder? and, if so, does such fact cut off the defense of duress?

The court below found that the plaintiff was a bona fide holder before due, and this was plainly correct. The facts were these: Herman Mack and Bertha Mack, the plaintiff, were joint guardians of Alma Mack, an infant. Herman received \$10,000 of the property of Alma, and in December, 1894, was in failing circumstances, and unable to account for it. Thereupon he resigned his guardianship, which resignation was accepted by the county court, leaving Bertha sole guardian. After resigning, he turned over this note and mortgage to Bertha, who received it in payment, *pro tanto*, at its face value, upon Herman's indebtedness to his ward. It had not matured when thus sold to Bertha. No reason is perceived why the remaining guardian might not receive the mortgage in payment of the former guard-

ian's liability to the ward,—at least, to the amount of its actual value. A transfer of negotiable paper before due in payment of a pre-existing debt constitutes the purchaser a bona fide holder. *Shufeldt v. Pease*, 16 Wis. 659; *Kellogg v. Faucher*, 23 Wis. 21, 99 Am. Dec. 96.

There is some conflict in the authorities upon the question whether the defense of duress by threats can be successfully urged against a bona fide holder for value of negotiable paper, but the better opinion and weight of authority is that such defense stands upon the same footing as other defenses which may be made as between the original parties, but is cut off when the paper reaches the hands of a bona fide holder. *Fairbanks v. Snow*, 145 Mass. 153; *Farmers' & M. Bank v. Butler*, 48 Mich. 192; *Clark v. Pease*, 41 N. H. 414; *Beals v. Neddo*, 1 Mc-

Crary, 206, 2 Fed. Rep. 41; *Martineau v. McCollum*, 3 Pinney, 455; 4 Am. & Eng. Enc. Law, 2d ed. p. 334. Duress which consists of threats of imprisonment of a husband or a child is a species of fraud, which renders the contract made under its influence voidable only, and not void. *City Nat. Bank v. Kusworm*, 91 Wis. 166. If it be simply a voidable contract, then it follows naturally that, when the contract consists of negotiable paper, the defense is cut off by transfer to a bona fide purchaser before maturity, in the same manner that other defenses upon the ground of fraud are cut off. The conclusion is that the plaintiff was entitled to a judgment of foreclosure notwithstanding the duress.

Judgment reversed, and action remanded, with directions to enter the usual judgment of foreclosure and sale.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Julia E. HOFFMAN, Exrx., etc., of Lee Hoffman, Deceased,
v.

John McMULLEN.

(48 U. S. App. 596, 83 Fed. Rep. 372, 28 C. C. A. 178.)

1. An agreement between bidders for public work to pool their interests, procure the contract at the highest price possible, each having knowledge of the other's bid for that purpose, and divide the profits while representing themselves as rival bidders, is void so that in case the contract is procured in the name of one of them, the work done and the money paid to him, the others will have no standing in court to compel an accounting.
2. That a municipal corporation has accepted work done under a contract let upon competitive bidding, and paid the price with knowledge of a partnership agreement between the bidders which enhanced the contract price, will not entitle the partners to an account of the profits from one of their number who received the money on the ground that the municipality was not injured by the illegal partnership agreement.
3. A contract by intending bidders for public work to procure the contract for a price as high as possible and become partners in its execution is not, after the work has been done, and the money paid to one of them, within the rules that a contract will be enforced even if incidentally connected with an illegal transaction, provided it is supported by an independent consideration, and that after the illegal contract has been fully executed one party in possession of the gains will not be tolerated to interpose the objection that the business was in violation of law, so as to enable the other parties to compel an accounting.

(October 4, 1897.)

NOTE.—As to the effect of preventing or checking bids upon the validity of sales at auction, see *note* to *Herndon v. Gibson* (S. C.) 20 L. R. A. 545.
45 L. R. A.

CROSS-APPEALS from a decree of the Circuit Court of the United States for the District of Oregon in a suit to compel an accounting of alleged partnership transactions; defendant appealing from so much of the decree as sustained the partnership and directed the accounting, and plaintiff appealing from so much as allowed the managing partner his salary and refused to allow interest and costs. *Reversed on defendant's appeal.*

The facts are stated in the opinion.

On writ of certiorari from the Supreme Court of the United States the decision in this case was affirmed May 22, 1899. See *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117.

Messrs. Dolph, Mallory, & Simon, for appellant:

Any agreement which in its object or necessary operation tends to diminish competition for the obtainment of a public or quasi-public contract to the detriment of the public or those awarding the contract is void.

Gibbs v. Smith, 115 Mass. 592.

Nor is it any answer to show that no injury has been done to the party selling.

Atcheson v. Mallon, 43 N. Y. 141, 3 Am. Rep. 678; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Holman v. Johnson*, 1 Cowp. 343; *Belding v. Pitkin*, 2 Cal. 147; *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627; *Swan v. Chorpenning*, 20 Cal. 182; *Gulick v. Ward*, 10 N. J. L. 107, 18 Am. Dec. 389; *Weld v. Lancaster*, 56 Me. 453; *Hannah v. Fife*, 27 Mich. 172; *Hunter v. Pfeiffer*, 108 Ind. 197; *Sharp v. Wright*, 35 Barb. 236; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Scott v. Duffy*, 14 Pa. 18; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Wootton v. Hinkle*, 20 Mo. 290; *Noyes v. Day*, 14 Vt. 384; *Kelly v. Devlin*, 58 How. Pr. 487;

Loyd v. Malone, 23 Ill. 43, 74 Am. Dec. 179; *Woodruff v. Berry*, 40 Ark. 251; *Jones v. Caswell*, 3 Johns. Cas. 29, 2 Am. Dec. 134; *Thompson v. Davies*, 13 Johns. 112.

The law looks to the general tendency of such contracts. The vice is the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate.

Richardson v. Crandall, 48 N. Y. 348; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Swan v. Chorpennig*, 20 Cal. 182; *Weld v. Lancaster*, 56 Me. 453; *Hunter v. Pfeiffer*, 108 Ind. 197; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 504; *Greenhood*, Pub. Pol. 178; *Holladay v. Patterson*, 5 Or. 177.

The question of the validity of a contract does not depend upon the circumstance whether it can be shown that the public has, in fact, suffered any detriment, but whether the contract is in its nature such as might have been injurious to the public.

Gibbs v. Smith, 115 Mass. 592; *Engelman v. Skrainka*, 14 Mo. App. 438; *Woodruff v. Berry*, 40 Ark. 251; 2 Pom. Eq. Jur. § 934; 2 Kent, Com. 11th ed. 466, 467.

The courts of justice will allow the objection that the consideration of the contract was immoral or illegal to be made by the guilty party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on the general principles of policy.

Hope v. Linden Park Blood Horse Asso. 58 N. J. L. 627.

The rule is the application of the maxim, *Ex turpi causa non oritur actio*.

Den, Wooden, v. Shoticell, 23 N. J. L. 474; *Holman v. Johnson*, 1 Cowp. 343; *Marlatt v. Warwick*, 19 N. J. Eq. 439; *Nellis v. Clark*, 20 Wend. 24; *Fermor's Case*, 3 Coke, 78a; *Cadogan v. Kennett*, 2 Cowp. 434; *Smith v. Hubbs*, 10 Me. 71; *Cockshott v. Bennett*, 2 T. R. 763; *Clugas v. Panaluna*, 4 T. R. 406; *Wamell v. Reed*, 5 T. R. 599; *Bayley v. Taber*, 5 Mass. 286, 4 Am. Dec. 57; *Lynch v. Rosenthal*, 144 Ind. 86, 31 L. R. A. 835; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728.

In an action upon a void contract, the defendant may prove illegality or fraud which renders it void, although the plaintiff may not disclose the infirmity in making a prima facie case.

McMullen wholly failed to make good his agreement to furnish funds at a time when it appeared that the enterprise was liable to fail for want of them.

Hoffman, on the 16th of September, 1893, dissolved the copartnership, and refused thereafter to recognize McMullen as a partner, and proceeded to complete the work on his own account.

If a partnership be without any definite period any partner may withdraw at a moment's notice, when he pleases, and dissolve the partnership.

3 Kent, Com. 11th ed. 60, *53, 55; 2 Lindley, Partn. 571; *Skinner v. Tinker*, 34 Barb. 333; *McElvey v. Lewis*, 76 N. Y. 373; *Fletcher v. Reed*, 131 Mass. 312; *Blake v. Sweeting*, 121 Ill. 67; *Walker v. Whipple*, 45 L. R. A.

58 Mich. 476; *Solomon v. Kirkwood*, 55 Mich. 256; *Stemmer's Appeal*, 58 Pa. 168, 98 Am. Dec. 255; *Carlton v. Cummins*, 51 Ind. 478; *Lawrence v. Robinson*, 4 Colo. 567; *Pine v. Ormsbee*, 2 Abb. Pr. N. S. 375; *Berry v. Folkes*, 60 Miss. 576; *Whiting v. Leakin*, 66 Md. 255; *Blaker v. Sands*, 29 Kan. 551; *Mason v. Connell*, 1 Whart. 381; *Sweeney v. Neely*, 53 Mich. 421; *Skinner v. Dayton*, 19 Johns. 513, 10 Am. Dec. 286; *Miller v. Brigham*, 50 Cal. 615; *Bank v. Carrollton R. Co.* 11 Wall. 624; *Fourth Nat. Bank v. New Orleans & C. R. Co.* 20 L. ed. 82; *Marquand v. New York Mfg. Co.* 17 Johns. 525; *Berry v. Folkes*, 60 Miss. 576; *Gaty v. Tyler*, 33 Mo. App. 494; *Blake v. Dorgan*, 1 G. Greene, 537; *Kinloch v. Hamlin*, 2 Hill, Eq. 19, 27 Am. Dec. 441.

Messrs. William A. Maury, R. Percy Wright, and L. B. Cox, for appellee:

The contract of March 6, 1893, established the relationship of partners between Hoffman and petitioner, and out of this relationship and not out of the partnership agreement, grew the rights which petitioner is seeking to enforce in this suit.

After the partnership has once been launched, if a controversy arises between the partners, the cause of action grows out of and rests upon the partnership relation; and if a claim to property is involved, it is the property right of the partner, growing out of the partnership relation, although the extent of the right may be defined by the contract, which gives him his standing in court.

Lindley, Partn. 2d Am. ed. 2; *Mechem, Elements of Partnership*, 3; 1 *Bates, Partn.* § 78; *Pollock, Digest of Partnership*, § 1; *Parsons, Partn.* 4th ed. § 6, note d; *Story, Partn.* § 1; *Cox v. Hickman*, 8 H. L. Cas. 268.

A partner who receives money or other property on behalf of a partnership owes substantially the same duty as an agent owes to his principal, viz., to account for and deliver the money or property received.

1 *Lindley, Partn.* 2d Am. ed. *107, 108; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473.

The underlying principle in *Brooks v. Martin* and cognate cases is, that the plaintiff in each of them had a property interest in the subject of the suit and a right to require the defendant to respond to his demand, growing out of the relationship between the parties; and the plaintiff's right to recover could not be defeated by showing that he had participated in some illegal transaction which had been consummated before the subject of the controversy came into existence.

Sharp v. Taylor, 2 Phill. Ch. 801; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *McBlair v. Gibbs*, 17 How. 232, 237, 15 L. ed. 132, 134; *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473; *Union R. Co. v. Durant*, 95 U. S. 576, 24 L. ed. 391; *Burke v. Flood*, 6 Sawy. 220; *Western U. Teleg. Co. v. Union P. R. Co.* 1 McCrary, 418; *Wann v. Kelly*, 2 McCrary, 628; *Lewin, Tr.* 68; *Hall v. Corcoran*, 107 Mass. 251; *Woodman v. Hubbard*, 25 N. H. 67, 7 Am. Dec. 310.

If respondent's contention as to the character of the verbal agreement between Hoffman and petitioner which antedated the bidding were true, the matters set up by her cannot avail as a defense, for the reason that the stipulations which she contends were entered into were divisible, and the legal part of the agreement would stand alone.

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; *Pickering v. Ilfracombe R. Co.* L. R. 3 C. P. 250; *Bank of Australasia v. Breillat*, 6 Moore, P. C. C. 201.

It was the respondent who brought into the case the matters which the court of appeals found to be fatal to the petitioner's right of recovery.

Welch v. Wesson, 6 Gray, 505; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747; *Swan v. Scott*, 11 Serg. & R. 155.

Hawley, District Judge, delivered the opinion of the court:

This is a suit in equity brought by John McMullen against Lee Hoffman for an accounting for the profits earned on a contract to construct a pipe line by which the city of Portland is supplied with water. Pending the suit, Lee Hoffman died, and the suit was revived against Julia E. Hoffman, executrix of the last will and testament of Lee Hoffman, deceased. The water committee representing the city of Portland having advertised for bids to construct the line, the original parties hereto entered into an agreement by which the defendant, Hoffman, bid for the work, in the name of Hoffman & Bates. The plaintiff, McMullen, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some \$49,000 higher than the bid of the defendant. The contract having been awarded to the defendant, a written agreement of partnership was entered into by the parties for the execution of the contract to be entered into by the defendant with the city, which agreement reads as follows:

"This agreement, made and entered into by and between Lee Hoffman, of Portland, Oregon, doing business under the name of Hoffman & Bates, party of the first part, and John McMullen, of San Francisco, California, party of the second part, witnesseth: That whereas, said Hoffman and Bates have, with the assistance of said McMullen, at a recent bidding on the work of manufacturing and laying steel pipe from Mount Tabor to the head works of the Bull Run water system for Portland, submitted the lowest bid for said work, and expect to enter into a contract with the water committee of the city of Portland for doing such work, the contract having been awarded to said Hoffman and Bates on said bid: It is now hereby agreed that said Hoffman and said McMullen shall and will share in said contract equally, each to furnish and pay one half of the expenses of executing the same, and each to receive one half of the profits, or bear and pay one half of the losses,

which shall result therefrom. And it is further hereby agreed that, if either of the parties hereto shall get a contract for doing or to do any other part of the work let or to be let by said committee for bringing Bull Run water to Portland, the profits and losses thereof shall in the same manner be shared and borne by said parties equally, share and share alike."

The contract awarded on defendant's bid was formally entered into by the water committee, of the one part, and by the defendant in the name of Hoffman & Bates, of the other. The contract proved to be a profitable one, the profits thereunder amounting to nearly \$140,000. Hoffman refused to account to McMullen for any part of these profits, upon the ground that the bids made by them tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and could not be enforced in equity, and upon the further ground that McMullen wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement to share the earnings of the contract with the complainant was made.

The whole transaction grows out of the enterprise undertaken by the city of Portland to conduct the water of Bull Run river some 30 miles to the city. The water was to be conveyed through steel pipes, and had to be conducted across streams which required the construction of bridges, and expensive and permanent works had to be erected at Bull Run river, where the water was diverted from the river to the pipe. The construction of this work was placed by the legislature in the hands of a committee composed of fifteen persons, who managed the business for the city. This committee decided to let this work at a public letting to the lowest bidder, and to that end the work was divided into the following general classes: (1) Head works; (2) bridges; (3) wrought-iron plates; (4) steel conduit from head works to Mt. Tabor; (5) manufacturing and laying wrought-iron or steel pipes from head works to Mt. Tabor; (6) steel plates for pipe; (7) conduits from head works to Mt. Tabor, of cast iron; (8) cast-iron pipe for Mt. Tabor to City Park; and (9) submerged pipes,—and separate bids invited for each. The letting was the ordinary public letting upon sealed proposals. Hoffman and McMullen each undertook to secure contracts to do this work, or some portion of it, by bidding for it, in response to the invitation of the water committee. Bids for each of the following items were accordingly submitted by them to the water committee, Hoffman bidding in the name of Hoffman & Bates, and McMullen bidding in the name of the San Francisco Bridge Company: Head works: Hoffman & Bates, \$17,800; San Francisco Bridge Company, \$16,550. Bridges: Hoffman & Bates, \$33,562.94; San Francisco Bridge Company, \$31,993. Steel conduit from head works to Mt. Tabor: Hoffman & Bates, \$359,278; San Francisco

Bridge Company, \$348,781. Conduit from head works to Mt. Tabor, of steel or wrought iron, making and laying pipe: Hoffman & Bates, \$465,722; San Francisco Bridge Company, \$514,775.

McMullen submitted a bid in the name of the San Francisco Bridge Company for the submerged pipe of \$97,340. For this work Hoffman did not bid. They agreed in advance upon what items of the work they should bid, upon what their respective bids should be, and upon what portion the bid of the San Francisco Bridge Company should be cheapest. There was also an understanding between them, as to some portions of the work, that the lowest bid should be withdrawn in the event that there were no other outside bids lower than those of Hoffman & Bates. In other words, they were to pool their bids, and so arrange matters that the highest bid, as between themselves, should, if possible, be accepted, and they would divide the proceeds of the contract. Suggestions were freely made as to the propriety of taking in other bidders, and also the secretary of the committee, so that honest bids might be withheld, and others ascertained, by fraudulent and improper means. The following extract from a letter written by McMullen to Hoffman fairly illustrates the means they proposed to use to accomplish the object they had in view:

"I do not want to let go on that submerged pipe; want to get the job. I think we can make \$25,000 on that job, but we must pool it. To do this, we will have to let the secretary, Frank T. Dodge, in, and, if any bids come without personal representatives, have him not receive them until after the letting, and then return them unopened; and we will gather in everybody that is personally represented. Don't think there are many."

The circuit court, upon final hearing, rendered a decree in favor of McMullen for \$52,241.18, and one half of the assets, consisting of plant and tools, furniture, and camp fixtures, of the cost value of \$7,557.36, and a disallowed claim against the city of Portland for \$16,961.25. From this decree Hoffman appeals. There is also a cross-appeal taken by McMullen from the decree of the court allowing Hoffman a salary of \$1,000 per month, and from the refusal of the court to allow him interest on the money found due and refusal to allow him costs. The appeal of Hoffman will first be considered.

The contention of appellant is that the manner in which the parties hereto presented their bids, and sought thereby to procure contracts from the committee, was illegal. It is not seriously denied that the city of Portland could have successfully defended any action that might have been brought against it by the contractors, Hoffman & Bates, upon the ground that the contract was secured by illegal means. It did not do so. It paid the money to Hoffman. The question here presented is: Can the defendant avail himself of this defense? The authorities answer this question in the affirmative.

It is true that the objection that a contract was immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. But it is not for his sake that the objection is ever allowed. The refusal of courts to enforce such contracts is always founded on general principles of public policy, which the defendant may take advantage of, contrary to the real justice of the case, as between the parties plaintiff and defendant. It is the duty of all courts to keep their eye steadily upon the interests of the public, and when they find an action is founded upon a claim which is injurious to the public, and which has a bad tendency, to give no countenance or assistance to it *in foro civili*.

In dealing with illegal contracts, courts do not and cannot look alone to those who are parties to the illegal transaction. The law regards the welfare of society as paramount, and in enforcing the law, courts will not impair its efficacy or cripple its operations by considerations affecting the interests of those who are *particeps criminis*. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon immoral or illegal acts. If, from the plaintiff's own showing or otherwise, the cause of action appears to arise *ex turpi causa*, or out of a transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were bringing his action against the plaintiff, the latter would have the advantage of it; for, where both are equally at fault, *potior est conditio defendentis*. *Bartle v. Nutt*, 4 Pet. 184, 189, 7 L. ed. 825, 827; *Providence Tool Co. v. Norris*, 2 Wall. 45, 54, 17 L. ed. 868, 870; *McCausland v. Ralston*, 12 Nev. 195, 206, 28 Am. Rep. 781 *et seq.*, and authorities there cited; *Western U. Teleg. Co. v. Union P. R. Co.* 1 McCrary, 418, 427, 3 Fed. Rep. 1; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Hannah v. Fife*, 27 Mich. 172, 181; *Den, Wooden, v. Shotwell*, 23 N. J. L. 465; *Price v. Polluck*, 37 N. J. L. 44; *Belding v. Pitkin*, 2 Cal. 147; *Leonard v. Poole*, 114 N. Y. 371, 379, 4 L. R. A. 728; *Hope v. Linden Park Blood Horse Assn.* 58 N. J. L. 627.

In *Bartle v. Nutt* the court said: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud, which, when detected, deprives him of anticipated profits, or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws."

A contract to prevent competition and bid-

ding for public work is contrary to public policy, and cannot be enforced. The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy and are void. *Gulick v. Ward*, 10 N. J. L. 102, 18 Am. Dec. 389; *Swan v. Chorpennin*, 20 Cal. 182, 185; *Hannah v. Fife*, 27 Mich. 172, 180; *Weld v. Lancaster*, 56 Me. 453, 457; *Noyes v. Day*, 14 Vt. 384; *Gibbs v. Smith*, 115 Mass. 592; *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Johns. 444; *Thompson v. Davies*, 13 Johns. 112; *Kelly v. Devlin*, 58 How. Pr. 487; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Hunter v. Pfeiffer*, 108 Ind. 197, 200; *King v. Winants*, 71 N. C. 469, 474, 17 Am. Rep. 11; *Durfee v. Moran*, 57 Mo. 374, 379; *Lavinin v. Bradley*, 13 Mo. App. 361; *Engelman v. Skrainka*, 14 Mo. App. 438; *Woodruff v. Berry*, 40 Ark. 252, 267; *Hyer v. Richmond Traction Co.* 42 U. S. App. 522, 80 Fed. Rep. 839, 844, 26 C. C. A. 175.

Do the facts and circumstances of this case bring it within this general rule? Can this case, consistently with the reasoning of the authorities, be excepted from it? Does it infringe in any manner upon any principle of public policy? It is argued by appellee that the bidding was not illegal, because the proof shows that McMullen and Hoffman were jointly interested in the bid, and that the law allows two or more persons to combine together for the purpose of making one bid. This is true where no fraudulent purpose is involved. An honest co-operation between two or more persons to accomplish an object which neither could gain if acting alone in his individual capacity is not within the rule, although, in a certain sense and to a limited degree, such co-operation might have a tendency to lessen competition. There may be a competition that saves as well as a competition that kills. The amount of work to be performed, the necessity of obtaining means to properly carry on the contract, the responsibility of the parties, their ability to complete the work, etc., are matters which are liable to make it absolutely necessary for rival contractors to combine their forces and unite together, not only in order to secure the contract, but to enable them, if it is obtained, to complete it without financial embarrassments or other difficulties which are liable to arise in cases of individual responsibility. There is no valid objection to such voluntary combinations if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner the courts should never hesitate to protect parties in their agreements with each other, and compel them to comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim *In pari delicto* applies.

45 L. R. A.

In *Atcheson v. Mallon*, 43 N. Y. 147, 151, 3 Am. Rep. 678, the court said: "A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain, at least, the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

In *Gibbs v. Smith*, 115 Mass. 592, the court, in drawing the line of distinction in an analogous case, said: "An agreement between two or more persons that one shall bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either because they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar honest or reasonable purpose, is legal in its character, and will be enforced; but such agreement, if made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy, and in fraud of the just rights of the party offering it, and therefore illegal." See also *Lavinin v. Bradley*, 13 Mo. App. 361; *Cocks v. Izard*, 7 Wall. 559, 19 L. ed. 275.

The fraud, if any, in the present case, was in withholding the truth,—in fraudulently representing and holding themselves out to the committee and to the public as rival bidders, when in fact they were not. The learned judge who tried this case, in his opinion upon the exceptions to the defendant's answer, said: "When the parties presented themselves as competitors for the work, they were guilty of a fraud. The tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that, in plaintiff's opinion, the work could not be profitably done for less than a figure \$35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount \$75,000 less than that at which the contract was let. Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case." *McMullen v. Hoffman*, 69 Fed. Rep. 509, 518.

Upon the final hearing, he came to the conclusion that his former opinion was erroneous, and held that the contract and agreement of the parties were valid as between themselves. *McMullen v. Hoffman*, 75 Fed. Rep. 547.

This case, in principle, cannot, in our opinion, be distinguished from *Atcheson v. Mal-*

lon, 43 N. Y. 147, 151, 3 Am. Rep. 678, although the facts here as to the illegal character of the transaction are much stronger than in that case. There the parties simply showed each other their bids, and agreed to divide the profits. Mallon was the lowest bidder, and obtained the contract. The money due on the contract when completed was paid to him. The profits amounted to \$400. Mallon refused to divide. Atcheson brought suit to recover his share of the profits. The court refused to enforce the contract. After announcing the general rule which we have stated, and declaring the general principles applicable thereto, the court said: "If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove Atcheson from the number of earnest bidders, and thus, by lessening competition, to detriment the public. And the agreement which was made, laying open to Mallon just what was the judgment of Atcheson of a profitable bid, and removing, in effect, an interested rival, tended to affect Mallon's action. While Atcheson, confident that, if Mallon succeeded, it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce."

Nor can this case be distinguished in principle from *Swan v. Chorpenning*, 20 Cal. 182, 185. In that case both parties to the agreement were mail contractors. Swan put in a bid for carrying the mail over a certain route, and agreed with Chorpenning to withdraw his bid, and use his influence to induce the government to give to Chorpenning a contract for a longer route, including the one bid upon, in consideration that, if Chorpenning obtained the contract, Swan should have an interest in it, or be paid an equivalent pecuniary compensation. Chorpenning obtained the contract, and, after receiving payment, refused to divide the profits. The court, after quoting *Gulick v. Ward*, *supra*, said:.

"We see no difference in principle between the question in that case and the one now presented, and the cases clearly fall within the same category. In respect to the consideration, it is impossible to distinguish them; for an agreement not to bid and an agreement to withdraw a bid already put in are certainly obnoxious to the same legal objections."

Now, the agreement in the present case was substantially to the same effect. In consideration of sharing in the profits, McMullen did not put in an honest bid. He put in a bid much higher than he would otherwise have done but for the agreement. His object, evidently, was to deceive the committee,—to convey the idea that he was a rival bid-

der, when in fact he was not. Such conduct certainly tended to destroy competition, and to preclude the advantages which inevitably resulted from it. Equally strong in its similarity as to the effect of the agreement between the bidders is the case of *Hannah v. Fife*. That was an action brought by Fife and Haviland against the plaintiffs in error, as the sureties of one Oscar L. Noble in a contract between said Noble and Fife and Haviland, by which Noble agreed to enter into and perform a contract with the state for the construction of a swamp-land state road, for the building of which said Fife and Haviland had been the lowest bidders, and to give them, as a bonus for being allowed to take their place in the contract, eight sections of swamp lands to be received from the state for the performance of the work. Noble's bid, in the first instance, was in reality less than the bid of Fife and Haviland, but it was not made out in accordance with the plan submitted by the state, and could not be accepted. The bidders obtained a continuance, and, before the bid was let, the agreement in question was made, and Noble got the contract. The court, in the discussion of the case, said: "Now, if these bidders, Noble, on one side, and Fife and Haviland, on the other, had, before or at the time of making their respective bids, entered into a secret agreement, for their mutual profit and to avoid competition with each other, that, for the purpose of getting a contract from the state for building this road at the highest rate or greatest quantity of land allowed by the law, only one of the parties should put in a bid, which in its terms would accord with the plan of the road adopted by the state, and with the notice given, while the other, though not in accordance with that plan or notice, should in all other respects appear to be in accordance with the terms proposed by the state, and better in some respects than the bid of the other, but which, nevertheless, could not be accepted, because not in accordance with the plan (thus securing in advance the letting of the contract to one of the parties . . . without danger of competition from the other, while keeping up the appearance of competition) and that the contract should be performed by one of the parties for the mutual profit of both; or that the party taking the contract and doing the work should give to the other, as his share of profit, eight sections or any other portion of the land to be received from the state,—if such had been the previous arrangement between the parties, it will not be pretended that such an understanding, or any agreement resting upon it or calculated to carry it into effect, could have been sustained. It would have been so manifestly fraudulent, as against the state, and so subversive of the intentions and objects of the legislation, that no court could hesitate for a moment to declare it illegal and void."

There was no evidence in that case except such as could be legally drawn from the facts that there was any such previous agreement. But the court said it was difficult to resist

the conclusion that the facts as proved tended "pretty strongly to show the existence of some such previous understanding," and that the putting in of the bid "by Noble in a mode which, under the notice, could not have been accepted, is not, when considered with reference to the subsequent acts of the parties, easily explained upon any other rational theory than that of previous concert for the purpose already intimated." The court further said: "But whether there was, in fact, any such secret understanding or fraudulent collusion between the bidders or not, is, in my opinion, entirely immaterial to the decision in the present case. It seems to me clear that the tendency of all such contracts between bidders as that here in question, if recognized as valid by the courts, must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder."

In the present case it is evident that McMullen and Hoffman understood each other; that their intention was to prevent open competition, which the law encourages. In their confederacy they were aiming at the same result,—that of compelling the city to pay a higher price for the work than McMullen believed it was worth.

Breslin v. Brown, 24 Ohio St. 565, 570, 15 Am. Rep. 677, is perhaps the strongest case presented in favor of appellee herein as to the right of parties who had intended to bid, and did bid, upon public improvements that were to be let to the lowest bidder, to enter into an agreement to become partners in the work in the event that the contract should be awarded to either, and that the contract, when awarded, should inure to the benefit of the firm. But that case, in its facts, is clearly distinguishable from the case at bar in many of its essential particulars. There separate and independent bids were filed by the respective parties. "The bid of each was based upon his own judgment and filed at his own discretion." It did not appear that either had knowledge of the other's bid, and these facts led the court to the conclusion that the agreement made between the parties, and the result of the bidding, did not have a tendency to stifle competition at the letting of the bid. Here the parties agreed in advance as to what their bids were to be. Each knew what the bid of the other was. The intent, object, and tendency of their co-operation in the contract, as is fully and clearly shown by the testimony, was to deceive the committee, and commit a fraud upon the public.

In *Hunter v. Pfeiffer*, *supra*, the appellant and the appellee were about to bid for the construction of a public work, but the appellant was induced to withhold his bid in consideration that he should be taken into partnership, and be permitted to share in the profits of any contract which appellee might secure. The court said: "Upon all such

partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of the profits anticipated or accrued. . . . If the court should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is presented, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder." At the close of the opinion the court said: "If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work with the knowledge of the officers letting the same, a question of a different character is presented. Such a transaction bears some similitude to the contract which was upheld in *Breslin v. Brown*, 24 Ohio St. 565, 15 Am. Rep. 627, a case which, on account of the liberal view taken of the contract there involved, is not universally indorsed. That case, however, affords no aid to the appellant here."

The cases are too numerous to be specifically reviewed. The dividing line is always sharply drawn with reference to the particular facts of each case, and the conclusion reached that where the parties have acted openly and honestly, and entered into an agreement which neither in its purpose, effect, nor natural tendency is to prevent a fair competition, it can be and should be enforced. But, where there is a secret combination,—call it partnership or any other name,—the effect of which is, or the natural tendency of which is, to abate honest rivalry or prevent fair competition, it is to be and is condemned, as violative of public policy, and held to be absolutely void. All the authorities hold that, where either the intention, the effect, or the necessary tendency of the combination is to stifle or limit competition, it is contrary to public policy, and, when discovered, will be stamped with marks of disapproval in any court of law or of equity. Were any of the subsequent acts of the parties, or the condition of the contract as to its completion, or any other fact or circumstance established at the trial, of such a character as to take this case out of or away from the general rule hereinbefore stated in relation to illegal contracts?

It is claimed that, before the money was paid by the city, it had knowledge of the true relations existing between McMullen and Hoffman, and, with such knowledge, accepted the work, and paid the contract price therefor, and that the city was not in any manner injured by the illegal acts of the plaintiff and defendant herein. But the law is well settled that the question of the validity of the contract does not depend upon the circumstance whether the public has, in fact, suffered any detriment, but whether the contract is in its nature such as might have

been injurious to the public. That which renders the contract illegal is not the injury the parties have actually occasioned, but the purpose they must have contemplated when it was made. Its validity is tested, not by its results, but by its objects, as shown by its terms. In addition to the authorities heretofore cited, see *Gibbs v. Smith*, 115 Mass. 592; *Atcheson v. Mallon*, 43 N. Y. 147, 149, 3 Am. Rep. 678; *Woodworth v. Bennett*, 43 N. Y. 273, 278, 3 Am. Rep. 706; *Weld v. Lancaster*, 56 Me. 453, 457; *Richardson v. Grandall*, 48 N. Y. 348, 362. It is not therefore necessary, in the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental or beneficial to the city of Portland.

Appellee argues that the case as presented comes within the rule, so frequently announced in the authorities, that a contract or an agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, so that the plaintiff will not require the aid of the illegal transaction to make out his case. This principle is undisputed. *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 434, 469, 33 L. ed. 747, 760, and authorities there cited. See also *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Gilliam v. Brown*, 43 Miss. 642, 660; *Western U. Tele. Co. v. Union P. R. Co.* 1 McCrary, 558, 562, 3 Fed. Rep. 423; *Swan v. Scott*, 11 Serg. & R. 155; *Wright v. Pipe Line Co.* 101 Pa. 204, 208, 47 Am. Rep. 701.

This argument, with the authorities cited in its support, will be considered in connection with the further contention of appellee that the case, upon its facts, comes within the general principle that, after the illegal contract has been fully executed, one party, in possession of all the gains and profits resulting from the illicit traffic and transaction, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law. *McBlair v. Gibbs*, 17 How. 232, 237, 15 L. ed. 132, 134; *Union R. Co. v. Durant*, 95 U. S. 576, 578, 24 L. ed. 391, 393; *Sharp v. Taylor*, 2 Phill. Ch. 801, 817; *Gilliam v. Brown*, 43 Miss. 642, 664; *Lestapies v. Ingraham*, 5 Pa. 71, 81; *Hipple v. Rice*, 28 Pa. 406; *Willson v. Owen*, 30 Mich. 474; *Richardson v. Welch*, 47 Mich. 309; *Wann v. Kelly*, 2 McCrary, 628, 630, 5 Fed. Rep. 584; *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 296; *Thomson v. Thomson*, 7 Ves. Jr. 470; *Owen v. Davis*, 1 Bail. L. 315.

There are certain underlying principles—clear and well-defined—which govern and control the propositions announced in these authorities; and, from a careful consideration thereof, it can readily be ascertained whether they have or have not any binding force in their application to the facts of this case.

Armstrong v. American Exch. Nat. Bank, 133 U. S. 434, 469, 33 L. ed. 747, 760, which 45-L. R. A.

was a suit upon a draft and certificate of deposit, may be taken as a representative case under the first proposition. Armstrong was the receiver of the Fidelity National Bank of Cincinnati, Ohio. The Fidelity National Bank of Cincinnati drew a draft for \$100,000 on the Chemical National Bank of New York City, payable to the order of the American Exchange National Bank of Chicago, and put it into the hands of one Wilshire, who delivered it, for value, to C. J. Kershaw & Company, and they indorsed it for deposit to their account in the Chicago bank, which credited its amount to them, and paid their checks against it. The court held that Wilshire did not act as the agent of the Cincinnati bank, and that in a suit by the Chicago bank against the receiver of the Cincinnati bank, which had failed, to recover the amount of the draft, the Chicago bank was a bona fide holder of it for value, and want of consideration could not be shown by the receiver. One defense set up to the suit on the certificate of deposit was that Harper, vice president of the Cincinnati bank, its assistant cashier, and Wilshire, of Wilshire, Eckert, & Co., conspired to defraud that bank by using its funds in speculating in wheat in Chicago, through C. J. Kershaw & Co., so as to make a "corner" in wheat. The court held that the plaintiff could not refuse to honor the checks of C. J. Kershaw & Co. against the deposit, on the ground that C. J. Kershaw & Co. intended to use the money to pay antecedent losses in the gambling wheat transactions; and that, where losses have been made in an illegal transaction, a person who lends money to the loser with which to pay the debt can recover the loan, notwithstanding his knowledge of the fact that the money was to be so used. It was these facts, and rulings of the court, that led up to the announcement of the legal principles under consideration. In the discussion of that case the court said (at p. 466): "When the plaintiff received the deposit from Kershaw & Co., it was bound to honor their checks against it; and it could not refuse to pay them on the ground that Kershaw & Co. intended to make an improper use of the money. If Wilshire, Eckert, & Co. and Kershaw & Co. were engaged in gambling, and the former had deposited money in the Fidelity Bank to be transferred to the plaintiff, in order that Kershaw & Co. might check out the amount from the plaintiff's bank in payment of losses sustained in the gambling transactions, and both banks knew that the money was to be so used, still the Fidelity Bank, having received the deposit, could not refuse to pay it over to the plaintiff, and the plaintiff, having received it, could not refuse to honor the checks of Kershaw & Co. drawn against it."

The *Armstrong Case* is in line with the early English cases of *Tenant v. Elliott*, *Farmer v. Russell*, *Sharp v. Taylor*, and others heretofore cited, to the effect that A, having received money to the use of B on an illegal contract between B and C, shall not be allowed to set up the illegality of the contract as a defense in an action brought by B

for money had and received. The principle of these cases cannot be questioned. But a bare statement of the facts upon which the principles were there applied shows, beyond question, that the facts of the present case are not, and cannot be, brought within the rule there announced. This case belongs to a different class. The distinction between the class of cases is clearly set forth in *Thomson v. Thomson*, 7 Ves. Jr. 470. The master of the rolls, after declaring that the agreement there under consideration was illegal, said: "There is an equity against the fund, I admit, if you can get at it by a legal agreement. The defense is very dishonest, but in all illegal contracts it is against good faith as between the individuals to take advantage of that. A man procures smuggled goods, and keeps them, but refuses to pay for them. So, in the underwriter's case, an insurance contrary to the act of Parliament, the brokers had received the money and refused to pay it over; and it could not be recovered. No matter who complains of it, the thing is illegal. You have no claim to this money except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself. If the case could have been brought to this, that the company had paid this into the hands of a third person for the use of the plaintiff, he might have recovered from that third person, who could not have set up this objection as a reason for not performing his trust. *Tenant v. Elliott* is, I think, an authority for that. But in this instance it is paid to the party, for there can be no difference as to the payment to his agent. Then, how are you to get at it except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises, as in the case of stock-jobbing differences. Here you cannot stir a step but through that illegal agreement; and it is impossible for the court to enforce it."

Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732, is relied upon by appellee to show that the contract and agreement between the parties had been fully executed and completed. There the parties were partners in buying up soldiers' claims, contrary to law. When the suit was brought, all the claims of the soldiers illegally purchased by the partnership, with money advanced by the complainant, had been converted into land warrants, and all the warrants had been sold or located. The original defect in the purchase had in many cases been cured by the assignment of the warrant by the soldier after its issue. A large proportion of the land so located had also been sold, and the money paid for some of it, and notes and mortgages given for the remainder. There were, then, in the hands of the defendant, lands, money, notes, and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced. It was to

have an account of these funds, and a division of these proceeds, that the suit was brought. Upon this statement of the facts the court said: "Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute enacted for the benefit of the soldier is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner; or what rule of public morals will be weakened by compelling him to do so? The title to the lands is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case."

In support of these views, the court quotes *in extenso* from *Sharp v. Taylor*, 2 Phill. Ch. 801, 817, which closed with the statement that "the difference between enforcing illegal contracts and asserting title to money which has arisen from them is distinctly taken in *Tenant v. Elliott* and *Farmer v. Russell*, and recognized and approved by Sir William Grant in *Thomson v. Thomson*," thus clearly indicating the class of cases to which the case then under consideration belongs. The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, to be gleaned from all the authorities, is substantially this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or through the medium of the illegal contract or transaction, or when it appears that he was privy to the original illegal contract or transaction, then he is not entitled to recover any advance made by him in connection with that contract or money due him as profits derived from the contract; but that when the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right of the party to recover is not dependent upon that contract, and his case may be proved without reference to it, then he is entitled to recover.

The doctrine of *Brooks v. Martin*, *supra*, and kindred cases is, and always should be, applied in cases where the fraud complained of is between individuals, which does not in any manner affect the public interest. If McMullen and Hoffman had agreed to continue their partnership, by investing the profits received by Hoffman under the illegal contract in the purchase of property, mortgages, bonds, or other securities, neither of them would be permitted, as against the other, to set up the fact that the money so invested was derived as profits from an illegal transaction, in which the rights of the public were involved. Numerous instances

are found in the books which present the distinction existing between the two lines of cases under consideration in a very clear light.

In *King v. Winants*, 71 N. C. 469, the court, in reviewing the principles announced in *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732, said: "Two men enter into a conspiracy to rob on the highway, and they do rob; and, while one is holding the traveler, the other rifles his pocket of \$1,000, and then refuses to divide; and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abused. Now, if these robbers had taken the \$1,000, and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732, so much relied on by plaintiff."

The learned counsel for appellee, recognizing the force of reasoning of the authorities, admits, for the purpose of his argument, that if, after the award was made to Hoffman, he had refused to enter into the partnership arrangement, McMullen could not have compelled him so to do, or have collected any damages for his refusal, "because the grounds then existing as the basis of appellee's claim would have been that he had rendered service in securing the award, and, necessarily counting upon that service, he would have had to bring in into the court, and its character would have been a subject for investigation. But, when Hoffman entered into the partnership agreement, all that matter, as between them, became a dead letter." If this position could be maintained, it would furnish a very convenient way for escaping the penalty which the law imposes upon all persons who have secured contracts in an illegal and unlawful manner. A contract secured by corrupt means—the bribing of public officers, buying off all rival bidders, thus stifling all competition where contracts are to be let to the lowest bidder—could always be enforced by a simple agreement of partnership by the parties guilty of the fraud. The fraud, under this rule, is a thing of the past,—has become "a dead letter," or is made honest by a single stroke of the pen, creating a new agreement to share and share alike in performing the illegal contract. What would there be left to discourage parties in their illegal combinations to defeat the ends of justice if this rule should be adopted and enforced by the court? The illegality of the contract could always be avoided as between the parties to the partnership agreement. We prefer to tread in the beaten path; to follow the safe road which has always been kept clean, in good condition

and order, and which furnishes a safe method of protection to the public who honestly travel thereon, and provides a penalty to all parties who depart therefrom by crooked ways, which naturally lead and always tend to destroy the public interests. It is manifest to every layman and lawyer, as well as to the courts, that such agreements would destroy all competition in the letting of contracts for public works. In the language of the authorities, such agreements are always declared void. Why? Because men with these agreements in their hands, and relying upon them for gain, do not act towards the public and third persons as they would without them, under the stimulus of competing opposition.

This suit is brought for an accounting between the parties of the profits realized on the contract made with the committee for the city of Portland upon its award to Hoffman & Bates upon the bid of Hoffman. The foundation of the case rests upon the legality of that contract. The case could not be proved without first showing the contract, and then proving the amount of money received and expended thereon. If Hoffman had admitted that a specified sum of money was due to McMullen, it may be that McMullen could have maintained an action upon an account stated between them. *Hanks v. Baber*, 53 Ill. 292; *Chace v. Trafford*, 116 Mass. 532, 17 Am. Rep. 171; 1 Am. & Eng. Enc. Law, 2d ed. p. 437. But it does not appear that any such admission has been made. No promise has been given by Hoffman to McMullen since the completion of the contract upon which a recovery is sought. This suit, as before stated, is for an accounting, and the amount found due in the circuit court was only ascertained, and could only be determined, by an investigation of the transaction between McMullen and Hoffman arising out of the contract with the committee. The relief prayed for required the court to investigate all of the various transactions of the parties from the beginning to the end, and adjust the differences between them. We are called upon to examine all the evidence as to the manner in which they agreed with each other to put in their bids, and decide which was most faithless to the other, and determine which got away with the most of the spoils, and to help them to make a just and equitable division. This is just what the courts in all cases of illegal contracts, agreements, or enterprises have universally refused to do. The act of Hoffman in refusing to divide the profits cannot be too strongly condemned. But it has often been said that courts are not organized to enforce the saying that there is honor among wrongdoers, and the desire to punish the man that fails to observe this rule must not lead the court to a decision that such persons are entitled to the aid of courts to adjust their differences arising out of, and requiring an investigation of, their illegal transactions.

The conclusions reached upon this branch of the case render it unnecessary to consider

the question argued by counsel as to whether or not the partnership between Hoffman and McMullen was dissolved long prior to the completion of the contract, or to examine any of the questions presented in the cross-

appeal by McMullen against Hoffman. The views herein expressed are decisive of the whole case.

The judgment and decree of the Circuit Court are reversed.

CALIFORNIA SUPREME COURT.

F. BERKA, *Respt.*,

v.

J. G. WOODWARD, Treasurer of Santa Rosa, *Appt.*

(.....Cal.....)

1. An officer cannot recover on an implied contract with a municipality for materials supplied to it, where the statutes prohibit him from being "directly or indirectly interested in any contract" with the city, and make a violation thereof a misdemeanor.
2. The allowance by a city council of a claim on an invalid contract does not give to it a validity which it otherwise did not possess.

(June 17, 1899.)

APPEAL by defendant from a judgment of the Superior Court for Sonoma County in favor of plaintiff in an action brought to compel defendant to pay certain warrants which had been issued by the city of which he was treasurer. *Reversed.*

The facts are stated in the opinion.

Messrs. O. O. Webber and J. R. Lepo, for appellant:

The contracts, in payment of which the alleged warrants were drawn, are void.

The sale of the lumber and other materials by the plaintiff, and its purchase by the city of Santa Rosa, constituted a contract. When the plaintiff filed his verified claim against the city for the purchase price of the merchandise, he admitted the character of the transaction, for the sole foundation of his claim was that the city had contracted to pay for the goods furnished.

Pacific Undertakers v. Widber, 113 Cal. 205.

Both the city charter and the Political Code prohibit him from being interested, directly or indirectly, in any contract made by the city or city council.

If § 71 of the Penal Code is operative and the law of California, and a person guilty of a violation of the section can be punished by imprisonment in the state prison, it is because the acts mentioned are unlawful, and, being unlawful, any contract growing out of them or based upon them is absolutely void.

Bank of United States v. Owens, 2 Pet. 538, 7 L. ed. 512; *Coppell v. Hall*, 7 Wall. 558, 19 L. ed. 247; *Fowler v. Scully*, 72 Pa.

456, 13 Am. Rep. 708; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617; *Swanger v. Mayberry*, 59 Cal. 93; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 390; *Gardner v. Tatum*, 81 Cal. 370.

It is the duty of this court to dismiss this action if the contract is unlawful, even although the objection be not made by the defendant.

Morrill v. Nightingale, 93 Cal. 458; *Visalia Gas & E. L. Co. v. Sims*, 104 Cal. 332; *Wyman v. Moore*, 103 Cal. 214; *Power v. May*, 114 Cal. 210; *Capron v. Hitchcock*, 98 Cal. 430; *Alexander v. Johnson*, 144 Ind. 82; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671, note; *Smith v. Albany*, 7 Lans. 14, 61 N. Y. 444; *Wickersham v. Crittenden*, 93 Cal. 29; *Edwards v. Estell*, 48 Cal. 196; *Finch v. Riverside & A. R. Co.* 87 Cal. 602; *Shakespeare v. Smith*, 77 Cal. 640.

Courts will not aid parties in the enforcement of contracts thus interdicted by the law.

Jones v. Hanna, 81 Cal. 509; *Davis v. Rock Creek Lumber Flume & Min. Co.* 55 Cal. 364, 36 Am. Rep. 40; *Wilbur v. Lynde*, 49 Cal. 292; *San Diego v. San Diego & L. A. R. Co.* 44 Cal. 112; *Rice v. Haywood's Trustees*, 107 Cal. 401; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 707; *Gulick v. Ward*, 10 N. J. L. 102, 18 Am. Dec. 389; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665, and note; *Bowman v. Phillips*, 41 Kan. 364, 3 L. R. A. 631; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Spence v. Harvey*, 22 Cal. 341, 83 Am. Dec. 69; *Buckley v. Humason*, 50 Minn. 195, 16 L. R. A. 423; *Goodrich v. Tenney*, 144 Ill. 422, 19 L. R. A. 371; *Levy v. Spencer*, 18 Colo. 532; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728.

When the court determines that injury might have resulted, it is enough to invalidate the transaction.

Spence v. Harvey, 22 Cal. 342, 83 Am. Dec. 69; 1 Dill. Mun. Corp. § 444, pp. 514-516.

Messrs. D. R. Gale and J. T. Campbell, for respondent:

An implied contract is one the existence

NOTE.—As to the power of an officer to contract with the public body or municipality which he represents, see note to *Tippecanoe County Comrs. v. Mitchell* (Ind.) 15 L. R. A. 45 L. R. A.

520; *Findlay v. Perts* (C. C. App. 6th C.) 29 L. R. A. 188; and *Capital Gas Co. v. Young* (Cal.) 29 L. R. A. 463.

and terms of which are manifested by conduct.

Civil Code, 1621; *Kennedy v. Miller*, 97 Cal. 433.

Contracts are executory and executed in their nature. It is only while a contract remains uncompleted or executory that the privilege of avoiding it may be exercised. Such contracts are not expressly prohibited but are voidable.

Concordia v. Hagaman, 1 Kan. App. 35.

In cases where the officer has dealt fairly with the city in furnishing goods the law allows fair compensation though no contract was made, and when the contract has been avoided reasonable compensation follows.

Ibid.; *Call Publishing Co. v. Lincoln*, 29 Neb. 149.

The legislation seems to be directed alone to express, and not to implied, contracts, and no considerations of public policy will justify the refusal of a *quantum meruit*.

Spearman v. Tewarkana, 58 Ark. 348, 22 L. R. A. 855; *Gardner v. Butler*, 30 N. J. Eq. 720; *Pickett v. School Dist. No. 1*, 25 Wis. 558, 3 Am. Rep. 105; *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670; *Maoon v. Huff*, 60 Ga. 221; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Morville v. American Tract Soc.* 123 Mass. 129, 25 Am. Rep. 40; *McConoughey v. Jackson*, 101 Cal. 265; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659.

Although a contract may be void, yet as the borrower has the lender's money, the law presumes a promise to repay on demand.

Swift v. Swift, 46 Cal. 266; *Pimental v. San Francisco*, 21 Cal. 362; *Argenti v. San Francisco*, 16 Cal. 282; *Marsh v. Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 153; *Chapman v. Douglas County*, 107 U. S. 356, 27 L. ed. 381; *Ashhurst's Appeal*, 60 Pa. 290; *Miltenerberger v. Cooke*, 18 Wall. 429, 21 L. ed. 866; *Currie v. School Dist. No. 26*, 35 Minn. 163; *Capital Gas Co. v. Young*, 109 Cal. 140, 29 L. R. A. 463; *Brown v. Pomona Bd. of Edu.* 103 Cal. 531.

The party receiving the benefit, although illegal, is held to accountability, and the law implies an obligation to pay.

Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238; *Chapman v. Douglas County*, 107 U. S. 356, 27 L. ed. 381.

Henshaw, J., delivered the opinion of the court:

This is an appeal from a judgment in mandate ordering the treasurer of the city of Santa Rosa to honor and to pay two warrants issued in favor of plaintiff by the common council of the city. The warrants were in payment of lumber and materials "had and received by the city from Berka." At the times when the material was supplied, at the times when Berka presented his bills and demands for payment, 45 L. R. A.

and at the time when the city council allowed and approved his claims, Berka was an officer of the city and a member of its common council. These facts appear by the petition. The defendant interposed a demurrer both general and special. This demurrer was "overruled without leave to answer," and a peremptory writ of mandate was ordered to be issued.

The question of first importance presented upon this appeal is that of the right of an officer of the city to recover upon an implied contract with the municipality. The following provisions of the law, and of the charter of the city of Santa Rosa, have direct bearing upon this consideration: "No councilman to be directly or indirectly interested in any contract made by them, or in any pay for work done under their direction or supervision." Charter Santa Rosa (Stat. 1875-76, p. 255). "All bills, claims, and demands against the city shall be . . . filed by the city clerk, who shall present it to the council, and they shall allow or reject the same in whole or in part." Charter Santa Rosa (Stat. 1875-76, p. 257). "Members of the legislature, state, county, city, and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." Pol. Code, § 920. "State, county, township, and city officers must not be purchasers at any sale, nor vendors at any purchase made by them in their official capacity." Pol. Code, § 921. "Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein." Pol. Code, § 922. "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip or other evidence of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than \$1,000 or by imprisonment in the state prison not more than five years, and is forever disqualified from any office in this state." Penal Code, § 71. "That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals." Civil Code, § 1667. "The consideration of a contract must be lawful within the meaning of § 1667." Civil Code, § 1607. "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void." Civil Code, § 1608.

It would seem that the need of discussion is foreclosed by the mere quotation of our express laws, but respondent contends, and in his contention prevailed in the trial court, that these provisions have no application to an implied contract such as this admittedly is, and that in the case of implied contracts which are not *malum in se*, even though

they may be against public policy, the rule is that, if the consideration has passed,—if the contract upon the one hand has been wholly executed,—the party who has so performed will be allowed a recovery upon *quantum meruit* or *quantum valebat*, as the case may be. The importance of this question, the right of an officer of the city to recover upon an implied contract with his municipality, its gravity and far-reaching consequence, demand something more than a passing consideration.

By subdivision 1 of § 1667 of the Civil Code reference is had to contracts expressly prohibited. These will be discussed hereafter. Within subdivisions 2 and 3 of the same section are embraced the multitude of contracts which, though not expressly prohibited, are refused recognition upon grounds of public policy. These contracts, in contemplation of their subject-matter, may be divided into two distinct classes: The first, where the consideration is base and against good morals,—*malum in se*; the second, where the consideration is in itself lawful, but where the mode is unauthorized, or where, because of some fiduciary relation between the parties, the law will not permit the contract to be made, nor countenance it when made. As to the first, it is said in *Blachford v. Preston*, 8 T. R. 95: "A plaintiff cannot recover in a court of justice whose cause of action arises out of a contract made between him and the defendant in fraud, or to the prejudice of third persons." Of the second Lord Mansfield and the court of King's bench, in *Jones v. Randall*, 1 Cowp. 39, declared: "Many contracts which are not against morality are still void, as being against the maxims of sound policy." The first class of contracts embraces the infinite number of those made to further crime, or to interfere with the administration of the law, or to obstruct the course of justice,—all contracts affecting the rights and prerogatives of the government, as well as the personal rights of the citizen. In the second class no baseness is inherent in the essence of the contract, but there is either some defect in the mode of creation or the manner of performance, or some incapacity in one or the other of the parties because of nonage, mental disability, or the fiduciary relation which they sustain to each other. Within this second class, as has been said, are the contracts of one who stands in a fiduciary relation to another with that other. Because of the tendency to abuse, the temptation to take undue advantage, these contracts, even when not expressly prohibited by law, are still looked upon with disfavor, and, they may be avoided at the instance of the other party in interest; but, where the trustee or other fiduciary agent has fully carried out the terms of the contract, the contract itself being fair, public policy, which is not punitive, is satisfied to leave the right of rescission to the other party. If he shall elect to rescind, he does so upon the equitable condition of restoring what he has re-

ceived. If, however, he chooses to retain the consideration, he is not bound by the terms and conditions of the contract, but the courts permit an action to establish and to recover the reasonable value of the thing sold or the service rendered. Such, it may be said, is the general rule, but in this state the line has been more closely drawn. Such contracts are against public policy. Being against public policy, the making of them is not to be encouraged. But to permit a profit is thus to encourage them. Therefore, in this state, when a recovery is permitted, it is not for the reasonable or market value, which naturally includes within it the contemplation of a profit, but, where possible, the recovery is limited to the actual cost. *Fox v. Hale & N. Silver Min. Co.* 108 Cal. 369.

Where contracts of public officials with their counties or municipalities have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a *quantum meruit* or *quantum valebat*. *Spearman v. Texarkana*, 58 Ark. 348, 22 L. R. A. 855; *Pickett v. School Dist. No. 1*, 25 Wis. 551, 3 Am. Rep. 105; *Concordia v. Hagaman*, 1 Kan. App. 35; *Gardner v. Butler*, 30 N. J. Eq. 702; *Call Publishing Co. v. Lincoln*, 29 Neb. 149; *Maccon v. Huff*, 60 Ga. 221; *Currie v. School Dist. No. 26*, 35 Minn. 163; *Niles v. Murray*, 33 Mich. 61, 20 Am. Rep. 670. But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration is base, or the contract is against the express prohibition of the law. Thus, in *Call Publishing Co. v. Lincoln*, 29 Neb. 149, the publishing company had sued the city to recover for printing. Bushnell was a stockholder in the plaintiff company, and was chairman of the city council's committee on printing during the time of the publications in question. The court held that the statute of Nebraska prohibiting officers from being interested in any contract with their municipalities referred to express contracts; that the contract under consideration was an implied contract. It therefore concluded that the contract was not one expressly prohibited by law, and proceeded to discuss and decide the question upon the doctrine of public policy. In *Concordia v. Hagaman*, 1 Kan. App. 35, the prohibitory statute was "An Act to Restrain State and County Officers from Speculating in Their Offices." The contract there was a contract made by Hagaman when he was a member of the city council, for the printing of the ordinances of the city. The court conceded that no recovery could be had if the contract were one expressly prohibited by law, but determined that the legislature had

ex industria excluded municipal officers, and had limited the operation of the law to state and county officers. That being so, the contract was left to be considered upon the grounds of public policy alone. And in discussing that question the court says: "In considering the question of illegality of the contract, it is proper that a distinction be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties. . . . When the contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it, nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence the courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals. When, however, the thing accomplished is proper and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."

This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the Supreme Court of the United States in *Bank of United States v. Owens*, 2 Pet. 527, 7 L. ed. 508: "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law? . . . There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in *Coppell v. Hall*, 7 Wall. 45 L. R. A.

542, 19 L. ed. 244, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation." And in our own state it has been said (*Swanger v. Mayberry*, 59 Cal. 91): "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy." Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. "The test," says Judge Duncan in *Swan v. Scott*, 11 Serg. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him, whatever his claims in justice may be upon the defendant." And this must be so; for, while, as a matter of private justice between individuals, it would be but fair that one, under such an illegal contract, should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore there is no place for equitable considerations, presumptions, or estoppels. *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699. *Ex turpi causa non oritur actio*. Whenever such a contract comes before the court, the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found in some of the cases to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned.

The rule, further, is that, where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void nor expressly prohibit it. *Swanger v. Mayberry*, 59 Cal. 93; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 390; *Gardner v. Tatum*, 81 Cal. 370; *Morrill v. Nightingale*, 93 Cal. 458; *Wyman v. Moore*, 103 Cal. 214;

Vialia Gas & E. L. Co. v. Sims, 104 Cal. 332; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671; *Fowler v. Scully*, 72 Pa. 456, 13 Am. Rep. 699; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617.

Applying these principles to the contract before us, it is most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public officer the entering into it. We can yield no assent to the contention that our laws apply only to express contracts. The statute itself is general in its terms. Both in the charter provision above quoted, and in § 920 of the Political Code, these officers are forbidden to be interested in "any contract" made by them. The only difference between an express contract and an implied contract is that in the former all of the terms and conditions are expressed between the parties; in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties. Generally, express contracts with a municipality are made under the system of competitive bidding. Usually this is made compulsory by law. To say that implied contracts were not prohibited would be to destroy the purpose and efficiency of the laws, and leave the people at the mercy of careless or unscrupulous officers. The case of *Smith v. Albany*, 61 N. Y. 444, is very similar to the one at bar. The council of the city, of which plaintiff was a member, appropriated \$2,500 for defraying expenses of a Fourth of July celebration. Upon the day plaintiff furnished horses and vehicles for use in the celebration, and the fair value of their use was the sum of \$139. The New York statute made it unlawful for a member of any common council to become a contractor under any contract authorized by the common council, and authorized such contracts

to be declared void at the instance of the city. Here was an implied contract, but it was one prohibited by the statute law as well as by considerations of public policy, and the plaintiff was denied any recovery. Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this, where the contractor is a member of the common council, whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any position where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be the law will not suffer him to occupy a position so equivocal and so fraught with temptation. Note the situation here presented. This material was obtained from a member of the city council, and he, as a member of that council, sits in judgment upon the validity and amount of his own claim. If he does not act, still the city is deprived of its right to his services and judgment in determining these very questions.

The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess. *Santa Cruz Rock Pav. Co. v. Broderick*, 113 Cal. 628. The duty of treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law. *Gardner v. Tatum*, 81 Cal. 370.

For the foregoing reasons the judgment is reversed, with directions to the trial court to sustain the general demurrer to plaintiff's complaint.

We concur: Temple, J.; McFarland, J.

INDIANA SUPREME COURT.

John LEFFLER, Appt.,

v.

STATE of Indiana.

(.....Ind.....)

1. A false pretense need not be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence, in order to be indictable.
2. A false representation by a man that he is unmarried, on the faith of which money or property is obtained, may constitute an indictable false pretense.

(June 28, 1899.)

NOTE.—That a person cannot himself be a false token in the case of representing himself to be unmarried, see *State v. Renick* (Or.) 44 L. R. A. 266.
45 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Fayette County convicting him of obtaining money under false pretenses. *Affirmed*.

The facts are stated in the opinion.

Messrs. R. N. Elliott and I. T. Tuesler for appellant.

Mr. George L. Gray, for appellee:

Whether the pretenses were of such a character as to impose upon the prosecutor is a question of fact to be left to the jury as they must necessarily vary with each particular case.

2 Wharton, Crim. L. § 2133; *Miller v. State*, 79 Ind. 198; *Wagoner v. State*, 90 Ind. 504; *Shaffer v. State*, 100 Ind. 365; 7 Am. & Eng. Enc. Law, p. 707; *Gillette's New Ind. Crim. L.* 253, 254; 1 Bishop, Crim. L. § 436; *Johnson v. State*, 36 Ark. 242; *State v. Montgomery*, 56 Iowa, 195; *Bowen v.*

State, 9 Baxt. 45, 40 Am. Rep. 71; *Watson v. State*, 16 Lea, 604; *State v. Williams*, 12 Mo. App. 415; *State v. Mills*, 17 Me. 211; *Smith v. People*, 47 N. Y. 303; *People v. Pray*, 1 Mich. N. P. 69; *Colbert v. State*, 1 Tex. App. 314.

Why should the credulity of the victim be any defense to crime? Are the purpose and intent of the perpetrator any the less criminal because he has been successful in finding an easy prey to the fraud?

It is held a false pretense in law for a person to falsely represent himself to be an officer, holding a warrant for the arrest of another and thereby obtaining money as a consideration of not making the arrest (*Perkins v. State*, 67 Ind. 270, 33 Am. Rep. 89); to obtain money; the charges for carriage of goods, by falsely pretending to have carried and delivered the property (7 Am. & Eng. Enc. Law, p. 750, note 3); to obtain money by falsely pretending that more postage is due on a letter than the correct amount (*Reg. v. Byrne*, 10 Cox, C. C. 369); to obtain a warrant for money and payment on the same by falsely representing that certain materials had been furnished to a municipal corporation (*People v. Genet*, 19 Hun, 91); to obtain money by a person falsely representing himself to be the authorized collector for a directory sold by subscription (*Reg. v. Speed*, 46 L. T. N. S. 174); to obtain money by falsely representing that a greater sum is owing by the debtor than actually is owing by him (*Reg. v. Taylor*, 15 Cox, C. C. 265); and to obtain money on a false representation of being an unmarried man (2 Bishop, Crim. L. § 422).

Any false representation of an existing fact by which a person obtains the loan of money is within the statute.

7 Am. & Eng. Enc. Law, pp. 752, 753; *Reg. v. Villeneuve*, 2 East, P. C. 830.

The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves.

McKee v. State, 111 Ind. 381; *Miller v. State*, 79 Ind. 198; 2 Wharton, Crim. L. §§ 1186, 1187; 2 Bishop, Crim. L. §§ 433, 434; *Smith v. State*, 55 Miss. 410; 16 Am. L. Reg. 321-325.

Monks, J., delivered the opinion of the court:

Appellant was indicted, tried, and convicted of the offense of obtaining money under false pretenses. The only error assigned is that the court erred in overruling the motion to quash the indictment. It is insisted by appellant that the false pretenses alleged were not such as a person of ordinary caution and prudence would credit, and for that reason the indictment was insufficient. It is alleged that appellant "designedly, knowingly, falsely, and feloniously" pretended and represented "to the said Annie Kidwell that he, said John Leffler, was then and there a single man; that he was divorced from his wife; that there was then and there a judgment for alimony against 45 L. R. A.

him in the Rush circuit court of Rush county, Indiana; that there was then and there an unpaid balance of \$15 on said judgment against him; that he wanted and needed said \$15 from said Annie Kidwell, with which to pay off and liquidate said claim and judgment standing against him as aforesaid." The part of the statute upon which the indictment is based reads as follows: "Whoever, with intent to defraud another, designedly, by . . . any false pretense, . . . obtains from any person any money, or the transfer of any bond, bill, receipt, promissory note, draft, or check or thing of value, . . . shall be imprisoned," etc. Acts 1883, p. 126; Burns's Rev. Stat. 1894, § 2352 (Horner's Rev. Stat. 1897, § 2204). It was said in some of the earlier cases in this state that to support any indictment the false representations must be of such existing facts as would deceive a person of ordinary intelligence and prudence. *State v. Magee*, 11 Ind. 154; *Leobold v. State*, 33 Ind. 484; *Bonnell v. State*, 64 Ind. 498. But the later cases of *Shaffer v. State*, 100 Ind. 365; *Wagoner v. State*, 90 Ind. 504, and *Miller v. State*, 79 Ind. 198, hold that, whether or not the false pretenses are such as are calculated to deceive a person of ordinary caution and prudence, is not a question of law for the court, but a question of fact for the jury under all the circumstances. In *State v. Burnett*, 119 Ind. 392, however, it was again held, on a motion to quash the indictment, that the false representations must be of such a character that a man of common understanding is justified in relying upon them. In England, and many of the states, the rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment, although it would not have deceived a person of ordinary prudence. 2 Russell, Crimes, 9th Am. ed. 619-700; Roscoe, Crim. Ev. 7th Am. ed. 487, 488; 2 Bishop, Crim. L. §§ 433-436; *Reg. v. Woolley*, 1 Den. C. C. 559, 4 Cox, C. C. 191, 3 Car. & K. 98; 2 East, P. C. chap. 18, pp. 827-831; *Reg. v. Jessop*, Dears. & B. C. C. 442, 7 Cox, C. C. 399; *Reg. v. Giles*, Leigh & C. C. C. 502, 10 Cox, C. C. 44; *Johnson v. State*, 36 Ark. 242; *State v. Fooks*, 65 Iowa, 196 and 452; *State v. Montgomery*, 56 Iowa, 195; *People v. Pray*, 1 Mich. N. P. 69; *State v. Williams*, 12 Mo. App. 415; *Colbert v. State*, 1 Tex. App. 314; *Re Greenough*, 31 Vt. 279-290; *Watson v. People*, 87 N. Y. 561, 41 Am. Rep. 397; *People, Phelps, v. New York County Court of Oyer & Terminer*, 83 N. Y. 436-449; *People v. Cole*, 48 N. Y. S. R. 351; *People v. Rice*, 128 N. Y. 649; *State v. Mills*, 17 Me. 211; *Smith v. State*, 55 Miss. 513; *Watson v. State*, 16 Lea, 604; *Boven v. State*, 9 Baxt. 45, 40 Am. Rep. 71; *Com. v. Henry*, 22 Pa. 256; *Thomas v. People*, 113 Ill. 531; *Cowen v. People*, 14 Ill. 348; *Bartlett v. State*, 28 Ohio St. 669, 670. In discussing this question an eminent author said: "But must the pretense be such as is calculated to mislead men of ordinary prudence? Some of the older cases lay down the doctrine that it must. But in reason, and, it is believed,

according to the better modern authorities, a pretense calculated to mislead a weak mind, if practised on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind practised on the latter. . . . Practically, it is impossible to estimate a false pretense otherwise than by its effect. It is not an absolute thing, to be handled and weighed as so much material substance; it is a breath issuing from the mouth of a man, and no one can know what it will accomplish except as he sees what in fact it does. Of the millions of men on our earth there is not one who would not be pronounced by the rest to hold some opinion, or to be influenced in some affair, in consequence of considerations not adapted to affect any mind of ordinary judgment and discretion. And no man of business is so wary as never to commit, in a single instance, a mistake such as any jury would say on their oath could not be done by a man of ordinary judgment and discretion. These things being so, plainly a court cannot, with due regard to the facts of human life, direct a jury to weigh a pretense, an argument, an inducement to action in any other scale than that of its effect." 2 Bishop, Crim. L. 7th ed. §§ 433, 436. In *Reg. v. Jessop*, Dears. & B. C. C. 442, 7 Cox, C. C. 399, the defendant passed to another for change a bank note, saying that it was for £5, when it really was, as he knew, for only £1, and received the change for a £5 note. He was held to have committed the offense, although the person to whom he passed the note could read. Lord Campbell, Ch. J., said: "We are all of opinion that the conviction was right. In many cases a person giving change would not look at the note; but, being told that it was a £5 note, and asked for change, would believe the statement of the party offering the note, and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretenses." In *Young v. King*, 3 T. R. 98, Kenyon, Ch. J., in defining the offense, gave "ordinary caution" as an ingredient; but Ashhurst said: "The legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind;" and Buller, J., said, "The ingredients of this offense are the obtaining money by false pretenses, and with an intent to defraud." In *Queen v. Wickham*, 10 Ad. & El. 34, Denman, Ch. J., said to counsel arguing that the fraud must be such as to impose on a man of ordinary caution: "I never could see why that should be. Suppose a man has just art enough to impose upon a very simple person, and defraud him, how is it to be determined whether the degree of fraud is such as shall amount to a misdemeanor? Who is to give the measure?" In *Reg. v. Woolley*, 1 Den. C. C. 559, 4 Cox, C. C. 191, 3 Car. & K. 98, the pretense was by a secretary of an Odd Fellows' lodge that a member owed it a certain sum, greater than the real debt, and thus got the excess for himself. Held a legal false pretense. Alderson, B., said: "If a man represents as an 45 L. R. A.

existing fact that which is not an existing fact, and so gets your money, that is a false pretense; for instance, that a certain church had been built, and that there was a debt still due for the building, when there was no debt due, that would be a false pretense; yet the matter might easily be inquired into and ascertained. Or take the common case, the prisoner says, 'I am sent by Mrs. T. for a pair of shoes,' is not that a false pretense? Yet inquiry can be made, and, after the thing has happened, usually is made, and the falsehood detected." Lord Campbell said: "It seems that the legislature meant to prevent such gross frauds as may easily be perpetrated, though an inquiry might easily be made." "I entirely agree with the observation of Lord Denman in *Queen v. Wickham*." Erle, J., said: "It was once thought that the law was only for the protection of the strong and prudent. That notion has ceased to prevail." So, in *Reg. v. Giles*, 10 Cox, C. C. 44, Leigh & C. C. C. 502, where the defendant pretended to have power to bring back the prosecutrix's husband over hedges and ditches, Erle, Ch. J., said: "The pretense of power, whether moral, physical, or supernatural, made with the intent to obtain money, is within the mischief of the law." The great weight of the authorities and the better reason sustain the rule that it is not necessary that the pretense be such as will impose upon a man of ordinary caution, or as cannot be guarded against by ordinary care and prudence. The object and purpose of the law is to protect, not only the man of ordinary care and prudence, but also the weak and credulous against the strong, the ignorant, inexperienced, and unsuspecting against the experienced and unscrupulous. *McKee v. State*, 111 Ind. 378, 381. In *McKee v. State*, 111 Ind. 378, 381, it was urged by the appellant that the representations were so unreasonable, and of such a character, as that no person exercising reasonable caution would be warranted in believing them; in response to which this court said: "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves. *Smith v. State*, 55 Miss. 413." An inexperienced person, a child, or a feeble old man might be induced to part with his property by false pretenses so flimsy and absurd as not to influence a man of ordinary prudence, and the falsity of which would at once be apparent to a man of experience. Still, if the representations were such as to secure the credit of such a person, and deprive him of the possession of his property, no matter how absurd such representations may appear to a person of more experience and of greater sagacity, they would be such representations as are contemplated by the statute. *McKee v. State*, 111 Ind. 378, 381; *Boven v. State*, 9 Baxt. 45 and note, 40 Am. Rep. 75-80; *People v. Cole*, 48 N. Y. S. R. 351. As was said by Dr. Wharton: "The simple and credulous are as much under the shelter of

the law as are the astute. . . . That gross credulity is no defense is illustrated by the prosecutions sustained against conjurers and fortune tellers. Nothing but gross credulity could be imposed on by such pretenses; yet on behalf of those thus imposed on, prosecutions have been sustained." 2 Whart. Crim. L. 10th ed. §§ 1188, 1192. An indictment has been sustained when money was procured as a loan by a false pretense that the borrower owed a certain debt and required the money to make a payment thereof. 7 Am. & Eng. Enc. Law, p. 753; *State v. Montgomery*, 56 Iowa, 195. When money or property is obtained on the faith of a false representation that the defendant is a single man, it has been held that an indictment will lie. 7 Am. & Eng. Enc. Law, p. 748; 2 Russell, Crimes, 9th Am. ed. pp. 646, 647; 2 Bishop, Crim. L. §§ 422, 445; *Reg. v. Jennison*, 9 Cox, C. C. 158. Leigh & C. C. C. 157, 31 L. J. M. C. N. S. 146, 8 Jur. N. S. 442, 6 L. T. N. S. 256, 10 Week. Rep. 488. So far as *State v. Magee*, 11 Ind. 154; *Leobold v. State*, 33 Ind. 484; *Jones v. State*, 50 Ind. 473; *Bonnell v. State*, 64 Ind. 498; *Miller v. State*, 79 Ind. 198; *Wagoner v. State*, 90 Ind. 504; *Shaffer v. State*, 100 Ind. 365; *State v. Burnett*, 119 Ind. 392,—and any other cases in this state hold that, to come within the statute, the false pretense must be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence, they are overruled.

Judgment affirmed.

INDIANAPOLIS UNION RAILWAY COMPANY, *Appt.*,
v.

Benjamin DOHN.

(.....Ind.....)

1. A grant by a railroad company of the exclusive right to stand hacks on an area owned by it adjacent to a passenger station, for the purpose of soliciting business, is unlawful, as the company, which acquired its grounds through the sovereign right of eminent domain, whether by purchase or by condemnation, cannot grant special privileges and immunities that the state could not: and such action is also against public policy as tending to restrict competition and to enhance prices.
2. The payment by passengers for transportation includes payment for the common use of the station facilities, and entitles them to have the railroad company refrain from coercing them into yielding further tribute by giving an exclusive right to a hackman to solicit their business as they leave the station.

(May 23, 1899.)

NOTE.—For other cases like the above, see note to *Cole v. Rowen* (Mich.) 13 L. R. A. 848, and *State v. Reed* (Miss.) 43 L. R. A. 134, and other cases cited in footnote thereto. 45 L. R. A.

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in a suit brought to enjoin defendant from entering upon appellant's station grounds to solicit customers. *Affirmed.*

The facts are stated in the opinion.

Messrs. Baker & Daniels for appellant.
Mr. Schuyler Haas for appellee.

Baker, J., delivered the opinion of the court:

Suit to enjoin appellee from entering upon the station grounds of appellant to solicit customers for his hack. The question arises upon appellant's exception to the conclusion of law upon the facts specially found. The facts are briefly these: Appellant is a corporation composed of various railway companies, and organized under the act of March 2, 1885 (Acts 1885, p. 30; *Burns's Rev. Stat.* 1894, §§ 5232-5250; *Horner's Rev. Stat.* 1897, §§ 3964a-3964s). Appellee is the driver of a public conveyance, commonly called a "hack" engaged in the business of transporting persons, without discrimination, from place to place, in and about Indianapolis. Appellant owns the Union passenger station at Indianapolis. It acquired the ground partly by condemnation and partly by purchase. The station building faces north. The tracks are south of the building, under a train shed. At the north of the building is an open area, bounded on the north by Jackson Place street, on the east by McCrea street, on the south by the station building, and on the west by Illinois street. The distance from Jackson Place street to the station building is 67 feet. Along the north line of the building is a sidewalk 16 feet wide. The residue of the area is paved, and used as a driveway to and from the entrance, which is at the center of the north front. This condition has continued ten years. Appellant, by contract, undertook to give the Frank Bird Transfer Company the exclusive right to stand hacks on the area, and solicit business of persons leaving the station. Employees of the transfer company were accustomed to stand their hacks upon the area at all hours of day and night, and for such length of time as they pleased. Intending passengers were allowed to alight at the entrance of the station building from their private conveyances, or from public ones that had been employed to bring them there. Arriving passengers were permitted to be met at the entrance by their private conveyances, or by public ones previously engaged to meet them. All other vehicles except the transfer company's were excluded from the area. Appellant has had rules in force to this effect for many years. The city, by ordinance, permitted hacks to stand along the west side of McCrea street. An ordinance forbade hackmen to approach the station building nearer than 15 feet to solicit business. Appellee, within three weeks before the commencement of this suit, at least a dozen times, drove his hack upon

the area outside of the sidewalk, when he had no passenger to be discharged or to be received, and stayed from half an hour to an hour at a time, soliciting business from arriving passengers. Appellant several times told him that he should leave; that he was violating appellant's rules and regulations; and that he was trespassing on private property. Appellee each time refused to leave, stating that he had the right to stand his hack on the area so long as the transfer company was permitted to stand its hacks there, and that he intended to continue to come upon the area so long as the transfer company was given that privilege. From this finding it does not appear that appellee's conduct was boisterous or that he was interfering with appellant in the discharge of its duties to the passengers of the proprietary and associate railway companies, or that he was annoying or interfering with the passengers, or that he was refusing to comply with any rule or regulation of appellant that applied to all hackmen.

Appellant has the undoubted right to make rules and regulations concerning the use of its station and grounds. *Lucas v. Herbert*, 148 Ind. 64, 37 L. R. A. 376. The term "rules and regulations," however, implies uniformity in operation, not discrimination, for the pecuniary advantage of the promulgator. The question is not what rules, uniform in application and promulgated by appellant impartially in the interests of the traveling public, and without a money consideration to itself, might be held reasonable, and what unreasonable, but whether appellant may, under the guise of rules, exclude from its station grounds all hackmen but one, and thus protect a contract from which it derives a revenue. A collection of authorities is made in *Lucas v. Herbert*, 148 Ind. 64, 37 L. R. A. 376. To them may be added *Re Palmer*, L. R. 6 C. P. 194; *Parkinson v. Great Western R. Co.* L. R. 6 C. P. 554; *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 42 L. R. A. 157; *State v. Reed* (Miss.) 43 L. R. A. 134. The majority of the English cases appear to sustain, and the majority of the American to deny, the right of a railway company to grant such an exclusive privilege. See the note of Mr. Freeman in *Kalamazoo Hack & Bus Co. v. Sootsma* (Mich.) 22 Am. St. Rep. on pages 699-702 (84 Mich. 194, 10 L. R. A. 819), and the note of Mr. Lewis in *McConnell v. Pedigo* (Ky.) 5 Am. R. & Corp. Rep. on pages 715-724 (92 Ky. 465). In some of the cases constitutional and statutory provisions enter into the determination, but, in the main, the question is decided from the

points of view of the powers of the corporation and of public policy. By the governing act appellant is authorized "to regulate the use of its depots, stations, structures, appliances, and facilities." Appellant has only the powers that are expressly granted, and those that are necessary to the exercise of express grants. The act is searched in vain for appellant's authority to discriminate. If, under regulations that are uniform and impartial, equality fails by reason of limited facilities, appellant would not be at fault. Appellant acquired its grounds through the sovereign right of eminent domain, whether by purchase or by condemnation; for it could not obtain a broader right by grant than by force. Taking the land by the right of the state, for the purposes of public business, appellant should not be permitted to grant special privileges and immunities that the state could not. The city of Indianapolis is given the right to regulate the use of its streets by hacks. The city would hardly undertake to exclude all but one hack from the stand on McCrea street, in order to make good a rental for the exclusive privilege. The state intrusted appellant with the right to regulate the use of its facilities, not to increase its revenues by creating a monopoly. Appellant is chartered to furnish depot and switching facilities to its proprietary and associate companies, in connection with the transportation of persons and property on their railroads, not to engage in the hack business upon the streets of Indianapolis. True, appellant only rented its grounds to the transfer company. But the only use of the grounds, of advantage to the transfer company, is to base thereon the use of the streets for revenue. If appellant has authority to grant that advantage to another, it may take it to itself. The passengers' payment for transportation includes payment for their common use of the station facilities. If they are not entitled to have appellant use those facilities disinterestedly for their advantage, they are at least entitled to have appellant refrain from coercing them into yielding further tribute; for, under threat of having otherwise to leave the grounds, they pay a fare that necessarily includes appellant's rental. Appellant's action tends to restrict competition and to enhance prices, and is therefore against public policy. *Consumers' Oil Co. v. Nunemaker*, 142 Ind. 560. Appellant sought from a court of equity the extraordinary remedy of injunction. It has failed to show any ground for equitable interposition.

Judgment affirmed.

KANSAS SUPREME COURT.

City of KANSAS CITY, *Plff. in Err.*,
v.

Nellie McDONALD.

(.....Kan.....)

- *1. An ordinance making it a misdemeanor for any person intentionally to ride or drive any horse, mule, or other beast faster than an ordinary traveling gait in any of the streets of the city is unreasonable, when sought to be applied to the fire department in driving to a fire, and for that reason will not be enforced.
2. The fact that a city, having a paid fire department, procured an accident policy for one of its firemen, under the provisions of chapter 363, Laws 1895, and that the amount of the policy was paid to the widow of said fireman after his death, is no defense to an action brought by her, under § 422 of the Code (Gen. Stat. 1897, chap. 95), against said city for its negligence in causing said death.
3. In an action against a city for negligently allowing an obstruction, such as a pile of rocks, to remain in a street unguarded and without lights or other warnings to travelers thereon, by reason of which an accident occurred, it is competent to show that other obstructions not alleged in the petition narrowed the roadway, and also the condition of the street, together with all the surroundings at the time and place of the accident.
4. A mere exception to the language of counsel in argument to the jury, not preceded by any ruling of the court, is insufficient to raise a question as to the propriety of the language used.
5. Rules of a fire department requiring its members to drive in the middle of the street when going to a fire are made for the safety of the men, teams, and vehicles; and a driver of a hook and ladder truck is charged with the use of no greater care and precaution for his safety by such rule than he would be if such rule did not exist.
6. Cities are required to keep and maintain their streets in reasonably safe condition for public travel, and are held to as great a degree of care towards a fireman driving over the same in discharge of his duties as they are to any other traveler.
7. Persons constructing buildings abutting on a street have, in the absence of express permission from the city, the right to use temporarily a portion of the same for the deposit of necessary building material. Such use, however, being exceptional and foreign to the purposes for which the thoroughfare was laid out and maintained, the city must exercise vigilance, to the end that no traveler is harmed by such encroachment.

(May 6, 1899.)

ERROR to the Court of Common Pleas for Wyandotte County to review a judg-

*Headnotes by SMITH, J.

NORM.—For injury to driver of a fire truck in going to a fire, see also *Garrity v. Detroit Citizens' Street R. Co.* (Mich.) 37 L. R. A. 529. 45 L. R. A.

ment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. T. A. Pollock and F. D. Hutchings, for plaintiff in error:

The fact that Andrew McDonald was driving a hook and ladder truck belonging to the fire department was no excuse for his driving at a run through the streets.

It is not a question as to what would be a fit and proper regulation for the city to adopt, but, Will the court step in, and, after the legislating power of the city has acted by passing an ordinance, insert therein an exception which said legislating power has not seen fit to make?

Morse v. Sweeney, 15 Ill. App. 486.

It was error to refuse to permit the defendant to prove that there were rules of the fire department requiring the firemen, when going to a fire, to drive in the center of the street.

The fire department had authority to make such reasonable rules and regulations for the government thereof as should seem best for the protection of firemen and others.

Kansas P. R. Co. v. Salmon, 14 Kan. 524; *Hannibal & St. J. R. Co. v. Fow*, 31 Kan. 586; *Reagan v. St. Louis, K. & N. W. R. Co.* 93 Mo. 352; *Abel v. Delaware & H. Canal Co.* 103 N. Y. 586, 57 Am. Rep. 773.

The employer having made reasonable rules and regulations for the guidance of his employees, it is contributory negligence for the employees not to comply with these rules and regulations, and such employees cannot recover damages for injuries sustained when violating such rules.

Francis v. Kansas City, St. J. & O. B. R. Co. 110 Mo. 387; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637; *Lockwood v. Chicago & N. W. R. Co.* 55 Wis. 50; *Lyon v. Detroit, L. & L. M. R. Co.* 31 Mich. 429.

Clark was unquestionably a fellow servant of McDonald. The mere fact that he was a foreman does not make him vice principal, so that the principal would be liable.

Conley v. Portland, 78 Me. 217.

The city would not be liable when the negligence of one fireman occasioned injury to another, be he fellow fireman or vice principal.

Shanewerk v. Fort Worth, 11 Tex. Civ. App. 271; *Gillespie v. Lincoln*, 35 Neb. 34, 16 L. R. A. 349; *Dodge v. Granger*, 17 R. I. 664, 15 L. R. A. 781; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Howard v. San Francisco*, 51 Cal. 52.

Could the injury to McDonald, under the circumstances, as shown by the evidence, reasonably have been foreseen as probable to follow the act of the street department in permitting the rock to remain in the street without lights or barriers?

Deisenrieter v. Kraus-Merkel Malting Co. 97 Wis. 279.

The whole matter should have been sent to the jury.

On petition for rehearing.

The trial court erred in not submitting the question of proximate cause to the jury. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 409, 24 L. ed. 256; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352.

Messrs. Angevine & Cubbison, for defendant in error:

Ordinances against fast driving have no application to members of a fire department when going to a fire, even where no exceptions are made in the ordinance.

Farley v. New York, 152 N. Y. 222; *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305.

By accepting from the insurance companies a gratuity of \$2,000 the widow and children did not release a claim against the city for \$10,000, for the negligent death of the husband and father.

Coots v. Detroit, 75 Mich. 628, 5 L. R. A. 315.

If neither was a servant of the city, they were not fellow servants of the city.

1 Beach, Pub. Corp. §§ 741-744; 2 Dill. Mun. Corp. 977-980; *Lawson v. Seattle*, 6 Wash. 184; *Pettingell v. Chelsea*, 161 Mass. 368, 24 L. R. A. 426; *Alexander v. Viokeburg*, 68 Miss. 564; *Gillespie v. Lincoln*, 35 Neb. 34, 16 L. R. A. 349; *Dodge v. Granger*, 17 R. I. 664, 15 L. R. A. 781; *Hayes v. Oshkosh*, 33 Wis. 314, 13 Am. Rep. 760; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Field v. Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46; *Helier v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196.

The fact that they are officers or servants or fellow servants of someone else is immaterial.

A fireman of a city bears no such relation to it as to prevent his maintaining an action against it to recover for injuries occasioned by defects in the city's streets, whereby such fireman was injured while driving a hook and ladder truck to a fire in response to a fire alarm.

Coots v. Detroit, 75 Mich. 628, 5 L. R. A. 315; *Palmer v. Portsmouth*, 43 N. H. 265; *Farley v. New York*, 152 N. Y. 222; 1 Lawson, Rights, Rem. & Pr. 513; *Kimball v. Boston*, 1 Allen, 417.

The evidence shows that Mr. McDonald was a kind, affectionate husband and father, industrious, frugal, saving his earnings for his family, and by his habits and life giving to his children practical lessons of more value to them than his wages. This was a proper matter for the jury to consider in estimating damages, and under the circumstances the verdict was too small rather than too large.

Tiffany, Death by Wrongful Act, § 162; *Tilley v. Hudson River R. Co.* 24 N. Y. 471; *McIntyre v. New York C. R. Co.* 37 N. Y. 287; *Northern P. R. Co. v. Freeman*, 48 U. S. App. 757, 83 Fed. Rep. 82, 27 C. C. A. 457; *Tilley v. Hudson River R. Co.* 29 N. Y. 252, 86 Am. Dec. 297; *Howard County Comrs. v. Legg*, 93 Ind. 525, 47 Am. Rep. 390; *Stoher* 45 L. R. A.

v. St. Louis, I. M. & S. R. Co. 91 Mo. 509; *St. Louis, I. M. & S. R. Co. v. Maddy*, 57 Ark. 306; *Chicago, R. I. & P. R. Co. v. Austin*, 69 Ill. 426.

McDonald was going at the usual gait and under control, and the wheel was 8 feet from the curb when it struck the rock. He had a right to drive there. He had a right to presume that the city would do its duty. Even if he saw the obstructions in the street in the daytime, of which there is no evidence, he had a right to assume that they would be removed at night, or lights put up.

Maulby v. Leavenworth, 28 Kan. 745; *Emporia v. Schmidling*, 33 Kan. 485; *Langan v. Atchison*, 35 Kan. 318, 57 Am. Rep. 165; *Kinsley v. Morse*, 40 Kan. 578.

It may be true that persons building or repairing houses have a right to a reasonable use of the streets to deposit building material therein, but it can only be done in case of necessity, and after taking due precaution.

Senhenn v. Evansville, 140 Ind. 675.

Usually a permit is required from the city authorities to so use the street, and granting such a permit is notice to the authorities that the street is to be so used.

District of Columbia v. Woodbury, 136 U. S. 450, 34 L. ed. 472; *Indianapolis v. Doherty*, 71 Ind. 5; *Sweeney v. Butte*, 15 Mont. 274; *Elliott, Roads & Streets*, 468.

The city had no right to permit such use of the street, either by issuing a permit, or by a general ordinance, and is liable for so doing.

Smith v. Leavenworth, 15 Kan. 81; *Miksell v. Durkee*, 34 Kan. 509; *Jansen v. Atchison*, 16 Kan. 358; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325.

It is not necessary to show that the city officers had actual notice of the obstructions in the street. If the obstructions had been in the street for such length of time that the city officers should have known it, the city is liable.

Salina v. Trosper, 27 Kan. 544; *Abilene v. Couperthwait*, 52 Kan. 326; *Hunt v. Dubuque*, 96 Iowa, 314; *Russell v. Columbia*, 74 Mo. 480, 41 Am. Rep. 325.

Smith, J., delivered the opinion of the court:

Nellie McDonald recovered a judgment in the court of common pleas against the defendant below, for \$7,500, by reason of the wrongful acts, neglect, and default of the city in causing the death of her husband. Andrew J. McDonald was a member of the fire department of Kansas City, Kansas, and the driver of a hook and ladder wagon. On the night of August 10, 1896, in responding to an alarm of fire in the south part of the city, while driving at a high rate of speed, the truck upon which he was riding ran against and upon an obstruction in the roadway, consisting of a pile of rocks from 18 inches to 2 feet high and 40 feet long, extending into the street about 12 feet from the west curb. The violence of the collision threw McDonald forward upon the rocks, and he was instantly killed. William Clarke, captain of the truck, was riding with McDonald at the time

of the accident. The obstruction mentioned was in front of some houses then building, and the rock was for use in their erection. There was at the time an ordinance of the city in force providing that persons engaged in the construction of any building might occupy so much of the street in front thereof, necessary for the purpose of depositing material for use in its construction, not over one third of the width of the street to be so occupied. It was alleged in the petition that, by the passage of said ordinance, the city wrongfully and negligently authorized persons to obstruct the street, including South Seventh street at the place where the accident occurred, with earth, sand, gravel, stones, etc., without requiring them to place thereon guards, lights, or other danger signals to warn persons passing of the existence of such obstructions. The defendant city, among other things, pleaded in defense an ordinance as follows: "Any person who shall intentionally ride or drive any horse, mule, or other beast faster than an ordinary traveling gait in any of the streets, avenues, or alleys within the city, or so drive as to endanger the safety of others, or who shall so ride or drive as to be likely to cause other teams to be frightened or run away, shall upon conviction thereof be fined in any sum not exceeding \$100."

The court below sustained a demurrer to that paragraph of the answer which pleaded the ordinance as a defense, and this is the first assignment of error. It is contended that the ordinance was proper evidence to show that McDonald, by its violation, was guilty of contributory negligence. We do not think that the ordinance was intended to govern the actions of firemen or regulate the speed of fire engines or trucks. Such an intention is nowhere expressed, and, if it had been, the ordinance would have been unreasonable. Cities do not provide horses of high mettle, trained to propel speedily apparatus for the extinguishment of fires, and then impede them in their progress by a requirement that they shall not be driven faster than an ordinary traveling gait. Various appliances have been devised by which such horses are harnessed with incredible speed, that no time may be lost in reaching the fire with hose and other aids to prevent the destruction of property. It is of first importance that a fire be reached in its incipency. To accomplish this purpose, the utmost haste is necessary. A compliance with this ordinance by the firemen and the enforced delay required by its terms would convert the fire department into a purely ornamental adjunct to the city government,—proficient only on parade. In *Farley v. New York*, 152 N. Y. 222, it is said: "The safety of property and the protection of life may, and often do, depend upon the celerity of movement, and require that the greatest practicable speed should be permitted to the vehicles of the fire department in going to fires. Section 1932 [Laws 1882, chap. 410] was intended to regulate the speed of horses traveling on the streets, and using them for the ordinary purposes of travel, and from the na-

ture of the exigency cannot apply to the speed of vehicles of the fire department on their way to fires." The restriction as to speed, when applied to the fire department, renders the ordinance unreasonable. Unreasonable ordinances will not be upheld by the courts. 1 Dill. Mun. Corp. § 319; *Crawford v. Topeka*, 51 Kan. 758, 20 L. R. A. 692; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110; *State v. Sheppard*, 64 Minn. 287, 36 L. R. A. 305.

A general demurrer was also sustained to the fourth paragraph of the answer of the city, which reads: "The defendant further says that under and by virtue of the provisions of chapter 363 of the Laws of 1895, and out of the funds created and provided for by said law, it purchased, on the 7th day of August, 1896, an accident insurance policy for said Andrew McDonald, in plaintiff's petition named, from the Travelers' Insurance Company, by which contract and policy said company agreed to pay, and did pay, to the plaintiff, on account of the death of said Andrew McDonald, by reason of the causes in plaintiff's petition set forth, the sum of \$2,000, which sum the plaintiff did receive and still retains." There is nothing in the act of 1895 implying that indemnity is furnished to the city against damages to the widow or next of kin of a fireman killed by its negligence. The accident policy cost the city nothing. The premiums were paid by foreign insurance corporations doing business in the state; a tax being laid by the state of \$2 a hundred upon the amount of all premiums on policies written for fire and lightning insurance within the limits of such city for each year. The law authorized the amount of the tax to be invested in the purchase of accident insurance upon the members of the fire department. The tax is collected by the state for the purposes mentioned, and the mayor and council in cities having a paid fire department are constituted its agents, charged with the duty of applying the amount of the tax to further the objects named. The demurrer to said paragraph of the answer was properly sustained. *Coots v. Detroit*, 75 Mich. 628, 5 L. R. A. 315.

Evidence was introduced by the plaintiff below showing that at the time of the accident there was a pile of sand, cinders, and earth on the east side of the street, south of, but near, the place where the first obstruction mentioned was situated. Counsel for the city complain that the admission of this testimony tended to convey to the jury an impression that the city was unmindful of the streets, and permitted any and all persons to block them up. It was competent to show the width of the roadway in condition for travel at and near the place of the accident, as it might properly be shown that one side of the street was higher or lower than the other, and the condition in general of the surroundings. There was proof tending to show that the rocks upon which the wagon struck were of light color, similar to that of the block pavement in the street, and hence not distinguishable from the pavement at

night. Clarke, who was riding with McDonald, saw this pile of cinders and sand, and it was not improper for the jury to know of the existence of this obstruction, and to consider whether McDonald also saw it, and, in order to avoid it, was driving further west than he otherwise would have done. The jury found, in answer to a particular question submitted, that the sand and cinder pile was not one of the causes of the accident, so that the defendant below cannot be said to have suffered from the evidence complained of. Again, we cannot say that the evidence admitted in cross-examination of the witness Edmunds, showing that there was a movement on hand to reorganize the fire department, was prejudicial to the city. It would seem to be harmless in itself. We think, however, the counsel for plaintiff below went to greater lengths in his comments on this evidence before the jury than he should have done, making an application of the testimony not justified by the language of the witness. The defendant below, however, merely excepted to the language of the opposing counsel. No objection preceded this exception, and the court had made no ruling. This was insufficient. "An exception is an objection taken to a decision of a court or judge upon a matter of law." Gen. Stat. 1897, chap. 95, § 309; *Marder v. Leary*, 137 Ill. 319; *Pike v. Chicago*, 155 Ill. 656. In *Marder v. Leary*, 137 Ill. 319, the court says: "The remark 'I except to that statement' meant nothing, in a legal sense, in the connection in which it occurred. The court had made no ruling to which it was applicable; and, if it was intended to be an objection, it was ineffectual, because it was not pressed upon the attention of the judge, and his ruling obtained thereon. *Elgin, J. & E. R. Co. v. Fletcher*, 128 Ill. 619."

The plaintiff in error urges that the court erred in refusing to permit it to show the rules of the fire department requiring that firemen drive in the middle of the street. If there was such a rule, its object was to insure safety to the men, teams, and vehicles when going at a rapid rate of speed in answer to an alarm of fire. A violation of any precaution affecting safety would have been equally negligent on the part of the driver, whether the exercise of such precaution was demanded by the rules or not. The condition of the street would largely determine the course to be taken, and what part of the street to be avoided, whatever the rule might be. To drive a hook and ladder wagon in the middle of those streets upon which cable-car tracks are in use, with rough stone blocks between the rails, would be exceedingly dangerous to the driver and vehicle, and render collisions with street cars probable. The fact of the existence of a rule as claimed, which McDonald violated, would not demand of him greater care. The condition of the street, as it appeared to him, should determine his course in driving, whether there was a rule on the subject or not. There are cases 45 L. R. A.

where a violation of a rule would be a material consideration. If a man were engaged in a dangerous employment, without an experience fitting him to determine the safer of one or two courses which he was called upon to take, then rules for his guidance, fixed by persons skilled in the particular work or business, should be followed. We have examined the instructions tendered by the city and refused by the court, and see no error in their refusal. The court instructed that McDonald was not in any manner responsible for any negligence of Clarke, the captain of the truck. They were not fellow servants. 1 Beach, Pub. Corp. §§ 741-744; 2 Dill. Mun. Corp. 977-980; *Lawson v. Seattle*, 6 Wash. 184; *Peters v. Lindsborg*, 40 Kan. 664. The last case is authority for the statement that McDonald and Clarke were not servants of the city. That they were fellow servants of someone else is immaterial. But if they were fellow servants of the city, and if Clarke failed to notify McDonald of the existence of rocks in the street, and if he was guilty of negligence in not doing so, and if his failure to give such notice contributed to the death of McDonald, yet the negligence of the city was the primary and proximate cause, without which the accident would not have occurred, and the negligence of Clarke the remote cause. The claim that the death of McDonald was caused by the negligence of a fellow servant, and that the city is not therefore liable, is untenable. We do not see how the failure of Clarke to notify McDonald of the danger can affect the city's liability. The negligence or omission of a stranger to notify McDonald could not excuse the municipality from the consequences of its own negligence. The court below held, and so instructed the jury, that McDonald was a lawful traveler upon the streets, and, as such, the city owed the duty towards him to keep and maintain its streets in a reasonably safe condition for public travel,—in fact, that he was entitled to the same protection as an ordinary traveler upon the highway. This ruling was correct. *Coots v. Detroit*, 75 Mich. 628, 5 L. R. A. 315; *Palmer v. Portsmouth*, 43 N. H. 265; *Farley v. New York*, 152 N. Y. 222. In *Coots v. Detroit*, 75 Mich. 628, 5 L. R. A. 315, it is held that a fireman is not held to that degree of care and caution in driving along a public street required of a common traveler proceeding at an ordinary gait.

The defendant below requested the court to submit to the jury 78 particular questions of fact, 35 of which were refused. Many of the questions were immaterial, and some were repetitions of others. While it is the duty of the court to submit to the jury questions pertinent to the issues, we think the court performed that duty in this case.

As to the verdict being excessive, while the jury are restricted to the pecuniary loss suffered by the widow or next of kin, yet they are not confined, in estimating the damages,

to any exact mathematical calculation, but are invested with considerable discretion, with which the courts will not interfere unless it has been abused. Considering the age and capacity for earning wages possessed by the deceased, his relations to his family, and his habits of life, we cannot say that the amount of the verdict was unreasonable. The case was carefully tried by the learned judge of the court below, and all legal rights of the defendant protected.

The ordinance permitting a use of a portion of the street for the deposit of building material thereon was not invalid. Dill. Mun. Corp. 4th ed. § 730. In the absence of such ordinance, a license thus to encroach upon the street might be implied, and a temporary occupation be lawful, from the necessities of the case, when buildings fronting on the street were being erected. Yet such use being exceptional, and foreign to the purposes for which the thoroughfare was laid out and

maintained, the duty devolved upon the city to exercise vigilance with respect to the rights of a traveler who might be harmed by such obstructions in his way.

Several questions raised in the brief of the plaintiff in error are not discussed in this opinion, but we have examined the same and find nothing substantial in the claim of error. The negligence of the city was clearly shown. It suffered one of its principal thoroughfares to be obstructed in a place likely to occasion injury to persons having a right to travel thereon, and permitted this obstruction to remain unguarded and without lights or warnings to prevent accidents in the night-time, in disregard of a lawful duty imposed upon it.

The judgment of the court below will be affirmed.

All the Justices concur.

Rehearing denied.

MARYLAND COURT OF APPEALS.

STATE of Maryland, Appt.,
v.

Henry A. BROADBELT.

(.....Md.....)

1. The registration with the live-stock sanitary board, of all herds or cattle of persons selling milk for consumption in cities, towns, and villages, may be required by the legislature in the exercise of the police power, and such statute will not deprive the milk dealers of property without due process of law.
2. The equal protection of the laws is not denied to persons who supply milk to cities, towns, and villages for consumption, by a statute compelling them to register their herds or cattle with the live-stock sanitary board, where it applies to all persons of that class, though it does not apply to every person who may occasionally sell milk in the country.
3. Prohibiting the sale and shipment of milk to supply cities, towns, or villages, from premises found in an unsanitary condition, until they conform to reasonable sanitary regulations, is a valid exercise of the police power, although it interferes to some extent with property rights.

(June 22, 1899.)

A PPEAL by plaintiff from a judgment of the Criminal Court of Baltimore City

NOTE.—For ordinances to protect milk supply, see also *State v. Dupaquier* (La.) 26 L. R. A. 162, and *Deems v. Baltimore* (Md.) 26 L. R. A. 541.
45 L. R. A.

sustaining a demurrer to an indictment charging defendant with a violation of the act of 1898 requiring registration and inspection of herds of cattle used for supplying milk to cities. *Reversed.*

The facts are stated in the opinion.

Messrs. Harry M. Olabough, Attorney General, and *Richard M. Venable* for appellant.

Mr. William Pinkney Whyte, for appellee:

The discrimination is unlawful. The object of the law is for the benefit of a privileged class, and there is no reasonable ground for such provisions.

Soon Hing v. Crowley, 113 U. S. 709, 28 L. ed. 1147.

Class legislation discriminating against some and favoring others is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike persons similarly situated, is not within the amendments.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923; *Shaffer v. Union Min. Co.* 55 Md. 74; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389.

The classification made in the act of 1898, chapter 306, is not a valid classification, and the traverser is subjected to expensive, unjust, and oppressive regulations from which

others occupying a precisely similar position are exempt.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 686; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 245, 41 L. ed. 704; *Re Grice*, 79 Fed. Rep. 627; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725.

Under an exercise of the police power the enactment must have reference to the comfort, the safety, or the welfare of society, and it must not conflict with the Constitution.

People v. Gillson, 109 N. Y. 389; *Long v. State*, 74 Md. 565, 12 L. R. A. 425; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Cooley*, Const. Lim. 6th ed. chap. 16.

It is an unwarrantable delegation of power.

Pick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Minnesota v. Barber*, 136 U. S. 315, 34 L. ed. 455, 3 Inters. Com. Rep. 185.

"Due process of law" does not necessarily require a judicial proceeding, but it is essential that the party whose property is to be taken shall have notice of the proceeding and shall have an opportunity to be heard, and that notice must be such as is provided by law.

Kuntz v. Sumption, 117 Ind. 1, 2 L. R. A. 655; *Vizzard v. Taylor*, 97 Ind. 91; *Jackson v. State, Dyer*, 104 Ind. 516; *King v. Hayes*, 80 Me. 206.

McSherry, Ch. J., delivered the opinion of the court:

The appellee was indicted under the act of 1898 (chap. 306) passed by the general assembly of Maryland, and entitled "An Act to Add Certain New Sections to Article Fifty-eight of the Code of Public General Laws, Title 'Live Stock,' under the New Sub-title 'Dairies,' to Follow § 18," etc. He demurred to the indictment upon the ground that the statute was unconstitutional. His demurrer was sustained by the criminal court of Baltimore city, the indictment was quashed, and the state has appealed. The reasons upon which he bases his claim that the statute is void are that it denies the equal protection of the laws guaranteed by § 1 of the 14th Amendment to the Federal Constitution, and deprives the individual of the due process of law secured by that amendment and by article 23 of the Maryland Declaration of Rights. Both of these or similar grounds of attack have of late years been very frequently resorted to in assailing the validity of state legislation enacted in the exercise of the police power, and numerous judgments have been delivered by the Supreme Court of the United States in cases where this method of assault has been relied on. A review of, or even a reference to, all these cases would not be practicable within the limits of this opinion, but brief citations, later on, from some of them, will serve to illustrate the principles

which underlie them all. Those principles must control the final disposition of this prosecution.

By the act of 1888 (chapter 519) a "state live-stock sanitary board" was created. It consists of three members, appointed by the governor, by and with the advice and consent of the senate. It is charged with various duties looking to the prevention and the spread of contagious and infectious diseases among the live stock within the state. Its powers are exercised for the preservation of the public health. The provision of the statute under which the indictment now before us was framed, reads as follows: Sec. 19. It shall be the duty of all dairymen or herdsmen or private individuals supplying milk to cities, towns, or villages, to register their herds or cattle with the live-stock sanitary board; in violation of which the parties offending shall be fined not less than one dollar nor more than twenty for each offense." Section 20, and the rules which it formulates, are in these words:

"Sec. 20. It shall be the duty of the live-stock sanitary board to have inspected at least annually, without notice to the owner or those in charge of any dairy or the parties supplying milk as named in § 19 of this article, the premises wherein cows are kept, and if such premises are found in an unsanitary condition the said board may prohibit the sale and shipment of milk from such premises until such time as such premises shall conform to the following sanitary rules:

"Rule 1. No building or shed shall be used for stabling cows for dairy purposes which is not well lighted and ventilated and which is not provided with sufficient feed troughs or boxes, and suitable floor, laid with proper grades and channels to immediately carry off all drainage; and if a public sewer abuts the premises upon which such building is situated, they shall be connected therewith whenever the inspector considers such sewer connection necessary.

"Rule 2. No water closet, privy, cesspool, or urinal shall be located within any building or shed used for stabling cows for dairy purpose or for the storage of milk or cream; nor shall any fowl, hog, sheep, or goat be kept in any room used for such purposes.

"3. It shall be the duty of each person using any premises for keeping cows for dairy purposes to keep such premises thoroughly clean and in good repairs and well painted or whitewashed at all times.

"4. It shall be the duty of each person using any premises for keeping cows for dairy purposes to cause the building in which cows are kept to be thoroughly cleaned, and to remove all dung from the premises so as to prevent its accumulation in great quantities.

"5. Any person using any premises for keeping cows for dairy purposes shall provide and use a sufficient number of receptacles, made of nonabsorbent materials, for the reception, storage, and delivery of milk, and shall cause them at all times to be cleaned

and purified, and shall cause all milk to be removed without delay from the rooms in which cows are kept.

"6. Every person keeping cows for the production of milk for sale shall cause every such cow to be cleaned every day and to be properly fed and watered with abundance of pure clean water.

"7. Any enclosure where cows are kept shall be graded and drained, so as to keep the surface reasonably dry; no garbage, fecal matter, or similar matter shall be placed or allowed to remain in such enclosure unless sufficient straw or similar good absorbent material be used to keep the enclosure clean at all times, and no open drains shall be allowed to run through it. And any person who shall ship or sell milk contrary to the aforesaid order of said board shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar nor more than twenty dollars for each day during which shipments shall be made after notice of such order."

The indictment charges that the appellee, being a dairyman engaged in supplying milk to cities, towns, and villages within this state, failed, neglected, and refused to register his herd of cattle with the live-stock sanitary board. The demurrer admits these averments to be true.

So far as the 19th section of the act is concerned, it is not perceived that, standing alone, it deprives the appellee of due process of law in any way whatever. This is not a proceeding under the 20th section. The requirement of the 19th section would be of little value if it were not followed by, and did not form a part of, the other provisions of the statute. The entire act is strictly a police regulation, enacted for the purpose of preserving the public health. The strides which our knowledge of bacteriology has made in recent years are generally known, and the ubiquitous microbe has been shown to be a potent agent in the propagation of disease. Tuberculosis, identical, it is said, with consumption in man, is caused by the organism known as "Koch's bacillus," and is readily communicable through milk. Diphtheria is another contagious disease whose specific organism finds in milk favorable conditions of growth, and there is abundant evidence to show that contaminated milk transmits this contagion. Cholera has again and again been traced to the same source, and scarlet fever is generally believed to be communicable by infected milk, and it is said that it may be even caused by an eruption on the udder. Typhoid fever bacilli have been detected in milk supposed to be wholesome. Besides conveying disease, milk occasionally contains certain germs which form poisonous products known as "ptomaines." Milk may carry the bacilli of these, and perhaps other, deadly diseases to infancy, to adolescence, and to age; to the delicate and to the robust alike; and to persons in every class and condition of society. It may receive these germs direct from the cow, if the cow be unhealthy; or it may absorb them from

the dairy, the dairy utensils, or the stable, if these be uncleanly. Thorough inspections of cattle and dairies may reduce the frequency of infection. The preservation of the public health by preventing the sale of infected milk, or of milk that may come from infected sources, when milk, by reason of its almost universal use, in one form or another, as an article of food, is especially likely to spread disease, is one of the most imperative duties of the state, and obviously one most incontestably within the scope of the police power. As a means to that end,—the preservation of the public health,—a requirement that every person selling milk for consumption in cities, towns, and villages shall cause his herd or cattle to be registered with the live-stock sanitary board is a reasonable and an appropriate enactment; and the subsequent provisions are necessary parts of the scheme. The 19th section no more deprives the individual of due process of law than did the ordinance in *Easton Comrs. v. Covey*, 74 Md. 262, which prohibited the erection of any building without a permit from the commissioners of the town; or an ordinance forbidding the keeping of swine without a permit in writing from the board of health (*Quincy v. Kennard*, 161 Mass. 563); or an ordinance requiring the written permission of the mayor of a town before any person was allowed to move a building along the streets (*Wilson v. Eureka City*, decided Feb. 20, 1899, 173 U. S. 32, 43 L. ed. 603), or the ordinance requiring a license for the removal of the contents of privies, and subjecting the holders of such license to the orders of the board of health (*Boehm v. Baltimore*, 61 Md. 259). The constitutional limitations which declare that no person shall be deprived of his property or liberty without due process of law have never been construed as being "incompatible with the principle—equally vital, because essential to the peace and safety of society—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law." *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205.

It was earnestly insisted that the act of 1898 deprives the appellee of the equal protection of the law guaranteed by the 14th Amendment. This amendment was called to the attention of the Supreme Court for the first time in 1872, in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, and since then it has been repeatedly considered and interpreted. The scope of the amendment, in so far as it relates to the branch of the subject now under discussion, has been briefly, but clearly, stated by the late Judge Cooley: "The guaranty of equal protection is not to be understood, however, as requiring that every person in the land shall possess

the same rights and privileges as every other person. The amendment contemplates classes of persons, and the protection given by the law is to be deemed equal if all persons in the same class are treated alike under like circumstances and conditions, both as to privileges conferred and liabilities imposed. The classification must be based on reasonable grounds; it cannot be a mere arbitrary selection." Cooley, Const. Law, 249. This is abundantly supported by the adjudged cases. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611. Thus, in *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, it was held that a statute of a state, which provided that in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the same state the prosecution was only allowed eight such challenges, did not deny to a person tried for murder in a city containing over 100,000 inhabitants the equal protection of the laws enjoined by the 14th Amendment, and that there was no error in refusing to restrict the state's peremptory challenges to eight. And so in the very recent case of *Central Loan & T. Co. v. Campbell Commission Co.* (decided by the Supreme Court on February 20, 1899) 173 U. S. 84, 43 L. ed. 623, it was held that a statute permitting an attachment against a non-resident debtor without a bond, while requiring a bond for an attachment against a resident debtor, does not constitute a denial to the nonresident of the equal protection of the law, because it was within the power of the legislature to divide debtors into two classes,—nonresident and resident,—and, when so classified, to prescribe different methods of proceeding against them. The classification which the legislature is authorized to make may relate to territorial divisions of a state. Thus, in *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989, it was said by Mr. Justice Bradley: "We might go still further, and say with undoubted truth that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the 14th Amendment, be a denial to any person of the 45 L. R. A.

equal protection of the laws." The classification may have reference to occupations (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780,—where it was held that a state statute limiting the period of employment of workmen in underground mines, or in the smelting, reduction, or refining of ores or metals, to eight hours per day, and making its violation a misdemeanor, was a valid exercise of the police power of the state). Or, again, the classification may relate to individuals. *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611. But in every instance the classification, to be valid, must be based on reasonable grounds. It must not depend on distinctions which do not furnish any proper basis for the attempted classification. "That," as declared by the Supreme Court in *Gulf, O. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis." In the case just cited a statute of Texas imposing an attorney's fee, in addition to costs, upon railway companies omitting to pay certain claims within a certain time, which applied to no other corporations or individuals, was declared unconstitutional, as denying to railway companies the equal protection of the laws. In the course of the court's opinion, Mr. Justice Brewer said: "It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other." "It is," said the same court in a very recent case, "the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. . . . Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality. . . . While cases on either side, and far away from the dividing line, are easy of disposition, the difficulty arises as the statute in question comes near the line of separation." *Atchison, T. & S. F. R. Co. v. Mathews* (decided April 17, 1899) 174 U. S. 96, 43 L. ed. 909. Special burdens are often necessary for general benefits, particularly in respect to the preservation of the public health. "Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good.

Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions." *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924. If the legislature of Maryland has, by the statute under consideration, made a class to which the provisions of the act were designed to apply, and if that classification is just and reasonable, and not purely arbitrary, the ruling on the demurrer was wrong. The ultimate object of the statute was, as we have seen, to protect the health of persons living in cities, towns, and villages from the diseases to which impure or contaminated milk might expose them. There is a definite and well-ascertained class of persons described in the statute, and that class comprises dairymen, herdsman, and other individuals who supply milk to cities, towns, and villages. It was not the purpose of the act to include within its purview all persons who sell milk, but it put into a class all dairymen, herdsman, and individuals who supply milk to cities, towns, and villages,—those who are engaged in the business of selling milk in populous communities. These persons are singled out from all others who may own cows, or who may occasionally sell milk in the country to some individual, and are grouped into a class, because they are the persons whose carelessness, whose inattention to their herds, or whose uncleanly surroundings may originate or promote the spread of disease in populous localities. No dairymen, herdsman, or individual who supplies milk to cities, towns, or villages is exempted from the operation of the law, but all who are thus engaged are specifically included. There is no uncertainty as to the persons composing the class, and no dispute that the general assembly intended to make exactly that classification.

Is the classification just and reasonable, and free from the imputation of being merely arbitrary? The act in respect to which the classification is proposed is the act of supplying milk to cities, towns, and villages by dairymen, herdsman, and other individuals. It is founded on the right of the state in the exercise of its police power to classify occupations with relation to their peculiar liability to cause injury to the inhabitants of the designated places from the article of food employed in the business. It is identical in principle with the classification under a Utah statute by which a conclusive presumption of negligence was made to apply to persons driving a herd of cattle over a public highway, while the same presumption did not apply to a person driving less than a herd. *Jones v. Brim*, 165 U. S. 180, 41 L. ed. 677. There is an obvious difference between the occasional sale of milk to an isolated individual and the habitual sale of it to the inhabitants of a city, a town, or a village; and this difference is manifestly sufficient to "furnish a reasonable basis for separate laws and regulations." *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789. The clear purpose of the legislature 45 L. R. A.

was to guard against impurities in milk furnished to residents in populous settlements by requiring persons who supply milk to cities, towns, and villages to keep their cows and premises in a sanitary condition. The danger arising from the nonobservance of the sanitary rules prescribed by the act is increased in proportion to the increased number of the consumers of milk; and a contagious disease introduced by contaminated milk in a thickly settled locality is vastly more serious, because vastly further reaching, than it can possibly be when communicated, by the same means, to an isolated individual. The duty to avoid the introduction of disease in both cases is unquestionably incumbent on the vendor of milk, but there is every reason why a breach of that duty will be far more injurious in the one than in the other instance. Though the statute furnishes no protection to persons not living in cities, towns, or villages, this in no way indicates that its classification is unreasonable, or that it deprives anyone of the equal protection of the laws in the sense that would annul it. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578. It was designed, like many other health laws, to operate in a restricted territory. There are numerous health laws which do not operate on persons living beyond the limits within which they are applicable; but it by no means follows that they are void merely because they were not made to cover a wider range of country, because a classification may be made with reference to the subdivisions of a state. *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989. It would not have been practicable to have made the statute broad enough to include every vendor of milk, whether he sold to cities, towns, and villages, or only to a single individual; nor was it necessary, in order to reach the evil aimed at, that this should have been done. Laws relating to the inspection of milk do not operate outside of the large cities, and yet it has never been held that they are invalid on that account. The act creates a reasonable class, and bears upon all in that class alike; and it cannot be assailed because it may not, perhaps, be efficacious enough to wholly eradicate the evil it was framed to extirpate. Such a test of its constitutionality would make the validity of a measure depend upon the universality of its application, and not upon the fact that the classification was just and reasonable, and was made with reference to some difference which bore a proper relation to the act in respect to which the classification was proposed.

The 20th section of the act does, in a measure, interfere with property rights, but not to such an extent or in such a way as to impair the validity of the enactment. While it is undoubtedly true that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may most certainly be resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion "is necessarily vested

in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385. As observed by Chief Justice Shaw in *Com. v. Alger*, 7 Cush. 84: "Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient." "This power, legitimately exercised, can neither be limited by contract nor bartered away by legislation." *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780. The requirements of the 20th section of the act of 1898 are simply such regulations as the general assembly had, in the exercise of the police power, the undoubted authority to prescribe. A dairyman has no right to sell milk that may be contaminated, or that may be given by diseased cows, or may be kept on uncleanly premises, or in unsterilized utensils; and if he undertakes to sell milk at all to cities, towns, and villages, he must submit to such reasonable sanitary regulations respecting his property used in that business as the legislature may deem necessary to prevent that property from being the source or origin of infectious and contagious diseases. No matter how absolute his title he holds his property subject to this liability: that his use of it may be so regulated as that it shall not be injurious to the community. The statute does not deprive him of his property, but it does impose upon him the duty of so using it, when employed in that business, that no injury shall result to others most likely to be affected by a disregard on his part of the reasonable health regulations which it enacts. Almost every police regulation affects, to a greater or less extent, some property right; but there is no such invasion of a property right by this act as other valid statutes have permitted. For example, in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, a law of the state of Louisiana, vesting in a slaughter-house company the sole and exclusive privilege of conducting a live-stock landing and slaughter-house business, and requiring that all animals should be landed at the stock landings and slaughtered at the slaughter-houses owned by the company, and nowhere else, was upheld as a valid exercise of police power, though it rendered practically valueless other property that had previously been used by its owners for slaughter-houses. See, too, *Northwestern Fertilizing* 45 L. R. A.

Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; *Parker & W., Public Health*, § 251.

For the reasons we have given we are perfectly satisfied the act of 1898 is a valid exercise of the police power, and that it is entirely free from constitutional objections. There was, consequently, error in the ruling which sustained the demurrer. The judgment appealed from will accordingly be reversed, and the case will be remanded for a new trial.

Judgment reversed, and new trial awarded; costs above and below to be paid by the appellees.

J. E. HELLER *et al.*, Appts.

v.

NATIONAL MARINE BANK *et al.*

(.....Md.....)

1. The preferred stock authorized by Code, art. 23, § 294, differs radically from ordinary preferred stock in that it is expressly constituted "a lien on the franchises and property" of the corporation, with priority over subsequent mortgages or other encumbrances.
2. That which is essentially in accord with the statutes does not contravene public policy.
3. The priority over "any subsequent lien, mortgage, or other encumbrance" given to preferred shareholders by Code, art. 23, § 294, extends to unsecured claims over which subsequent mortgages would have preference.
4. A meeting of the stockholders, called for the issue of preferred stock, is properly called under the provisions of Code, art. 23, § 76, providing for meetings to increase or diminish the capital stock to be called by directors on four weeks' published notice, and is not within § 6 of the same article, which applies to meetings generally.
5. Insurance collected by receivers for buildings, machinery, and stock in trade that were burned is not subject to the lien of preferred shareholders given by statute on the franchises and property of the company.
6. Articles produced by a corporation for sale are not subject to the lien on the franchises and property of the company given by Code, art. 23, § 294, to holders of preferred stock.
7. Rents collected by receivers of a corporation are not included in a lien given to preferred shareholders on the company's franchises and property.

(June 22, 1899.)

APPEAL by intervening claimants from a decree of the Circuit Court of Baltimore City distributing the assets of the Chesapeake Guano Company of Baltimore City, to wind up which a bill had been filed by F. Dorsey Grafflin, to the holders of preferred stock in preference to the claims of creditors of the corporation. *Affirmed in part; reversed in part.*

NOTE.—As to preferred, guaranteed, and interest-bearing stock in general, see *note to Field v. Lamson & G. Mfg. Co. (Mass.)* 27 L. R. A. 136.

The facts are stated in the opinion.

Messrs. Gans & Haman, Vernon Cook, and George Whitelock, for appellants:

The construction is to be on the entire statute, and when one part is susceptible of two constructions, and the language of another part is clear and definite, and is consistent with one of such constructions and opposed to the other, that construction must be adopted which will render all the parts harmonious.

Alexander v. Worthington, 5 Md. 471.

If we construe the statute to mean that the lien of preferred stock is only a lien for any preferred dividend that may have been declared, we then by such a construction harmonize the various provisions of the statute.

There are many important differences between the position of a creditor of a corporation and a stockholder.

A preferred stockholder is not a creditor, but a stockholder. The stockholder, and even the preferred stockholder, is, so to speak, a partner in the business of the corporation, and "his chance of gain, by the operations of the corporation, throws on him, as respect creditors, the entire risk of the loss of his share of the capital, which must go to satisfy the creditors in case of misfortune. He cannot be both creditor and debtor, by virtue of his ownership of stock."

Warren v. King, 108 U. S. 389, 27 L. ed. 769; *Hamlin v. Continental Trust Co.* 47 U. S. App. 422; *Hamlin v. Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 671, 24 C. C. A. 271, 36 L. R. A. 826; 2 Beach, Corp. § 505; *Chaffee v. Rutland R. Co.* 55 Vt. 110; *St. John v. Erie R. Co.* 10 Blatchf. 271, 22 Wall. 136, 22 L. ed. 743; *King v. Ohio & M. R. Co.* 2 Fed. Rep. 36; *Branch v. Jesup*, 106 U. S. 468, 27 L. ed. 279; *New York, L. F. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. ed. 363; *Field v. Lamson & G. Mfg. Co.* 162 Mass. 388, 27 L. R. A. 136; 1 Morawetz, Priv. Corp. § 444, p. 417; 2 Beach, Priv. Corp. § 505, p. 815; 1 Cook, Stock & Stockholders & Corp. Law, § 271.

The essential characteristics of preferred stock may be summarized as follows:

(1) It is essentially capital.

1 Morawetz, Priv. Corp. § 444; 2 Beach, Priv. Corp. § 505.

(2) It is entitled to vote and a voice in the management of the company.

1 Cook, Stock & Stockholders & Corp. Law, § 269; 2 Beach, Priv. Corp. § 505.

(3) It is entitled to share in the profits, even in excess of the fixed dividends, if there be so much profit.

1 Cook, Stock & Stockholders & Corp. Law, § 269; 2 Beach, Priv. Corp. § 501.

(4) It is liable for debts to creditors for unpaid subscriptions.

1 Cook, Stock & Stockholders & Corp. Law, § 270.

(5) Even the payment of dividends on preferred stock must be postponed to payment of debts.

St. John v. Erie R. Co. 10 Blatchf. 279; *Warren v. King*, 108 U. S. 395, 27 L. ed. 45 L. R. A.

772; *Hamlin v. Continental Trust Co.* 47 U. S. App. 422; *Hamlin v. Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 664, 24 C. C. A. 271, 36 L. R. A. 826; 2 Beach, Priv. Corp. § 505.

(6) Upon dissolution of the corporation, and upon the division of assets, preferred stock as to capital has no priority even over common stockholders.

1 Cook, Stock & Stockholders & Corp. Law, § 278; 2 Beach, Priv. Corp. § 507; *Birch v. Cropper*, L. R. 14 App. Cas. 525; *Re London India Rubber Co. L. R. 5 Eq. 519*; *McGregor v. Home Ins. Co.* 33 N. J. Eq. 181; *Griffith v. Paget*, L. R. 6 Ch. Div. 511. See also Code, P. G. L. art. 23, § 272; Poe's Supp. to Code, art. 23, § 264a.

No case anywhere has ever held that upon a dissolution and division of assets, the preferred stockholders as to the principal of their stock have any preference over common stockholders, much less over creditors.

It has been frequently laid down as a rule that it would be contrary to public policy, essentially unjust, and inequitable to pay preferred stockholders before creditors.

1 Cook, Stock & Stockholders & Corp. Law, § 271; *St. John v. Erie R. Co.* 22 Wall. 147, 22 L. ed. 746; *Hamlin v. Continental Trust Co.* 47 U. S. App. 422; *Hamlin v. Toledo, St. L. & K. C. R. Co.* 78 Fed. Rep. 671, 24 C. C. A. 271, 36 L. R. A. 826; 2 Beach, Priv. Corp. § 502; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

As to principal of such stock, a stockholder cannot prove against an insolvent corporation in competition with general creditors.

Allen v. Herrick, 15 Gray, 281.

The contract of insurance is a personal one, and a mortgagee or lienor cannot claim the proceeds of an insurance policy collected by the mortgagor or lienor, except perhaps in some cases where there is an agreement by the lienor to insure for the benefit of the lienor, which is not found here.

The City of Norwich, 118 U. S. 468, *Place v. Norwich & N. Y. Transp. Co.* 30 L. ed. 134; 1 Joyce, Ins. §§ 23, 3567; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 512, 9 L. ed. 514.

The alleged lien created in 1889 would only cover property then owned, not property to be acquired in futuro.

First Nat. Bank v. Lindenstruth, 79 Md. 136.

Messrs. T. M. Lanahan and Frank Gosnell, for appellees:

As the meeting was for the benefit of the stockholders only, and the creditors and others were not interested, they cannot be heard now to object to the want of notice as prescribed by law, or to urge upon the court the alleged invalidity of the stock by reason of the fact that notice of the general meeting was not published in two papers.

Morawetz, Priv. Corp. § 635, 2d ed. pp. 635-637; *Beecher v. Marquette & P. Rolling Mill Co.* 45 Mich. 103; *Rochester Sav. Bank v. Averell*, 96 N. Y. 467; *Wood v. Corry Waterworks*, 44 Fed. Rep. 146, 12 L. R. A. 168; *First Nat. Bank v. G. V. B. Min. Co.* 89 Fed. Rep. 447; *Manhattan Hardware Co. v. Phelan*, 128 Pa. 110; *Miller v. Matthews*,

87 Md. 464; *Harrison v. Annapolis & E. Ridge R. Co.* 50 Md. 490.

Even where stockholders have sought to oppose the issue of preferred stock as contrary to the statute, or otherwise, they must act promptly, the lapse of twenty-eight months having been decided by the supreme court to be fatal.

Banigan v. Bard, 134 U. S. 291, 33 L. ed. 932.

The policy of Maryland is to be determined by our Constitution, statutes, and decisions.

Vidal v. Philadelphia, 2 How. 197, 11 L. ed. 233; *Swann v. Swann*, 21 Fed. Rep. 301; *United States v. Trans-Missouri Freight Asso.* 19 U. S. App. 54, 58 Fed. Rep. 58, 7 C. C. A. 15, 24 L. R. A. 73, 4 Inters. Com. Rep. 443; *Potter's Dwarr. Stat.* 214, 215; *Story, Conf. L.* 17.

The statute in controversy is so clear and explicit, and its meaning so obvious, as not to require the aid of authorities in its interpretation.

Gill v. Cacy, 49 Md. 243; *Miller v. Cumberland Cotton Factory*, 26 Md. 475.

Substance, and not form, is to control the construction of statutes prescribing a mode in which acts are to be performed.

Friend v. Hamill, 34 Md. 298; *Young v. State*, 7 Gill & J. 253.

A substantial compliance which meets and subserves the purpose and design of the act is all that the law requires.

Marlow v. McCubbin, 40 Md. 137.

The evidence shows that all of the appellants were creditors of the corporation at a period commencing prior to the issue of the preferred stock in question, and they had actual notice of the existence of such stock, and should it be held by this court that there is any irregularity in its issue, then the same will be held by a court of chancery to be an equitable lien upon the property and assets of the corporation, and good as against the appellant.

Brown v. Deford, 83 Md. 310.

McSherry, Ch. J., delivered the opinion of the court:

The contention in this case is between the holders of what is called "preferred stock" and creditors of an insolvent corporation. The stockholders of the Chesapeake Guano Company, a corporation formed under the general corporation laws of this state, voted some years ago to increase the company's capital by the issue of \$60,000 of preferred stock. Without pausing at this point to examine whether the method pursued was the proper one or not, it suffices for the present to say that the authorized shares were all taken. Subsequently the company contracted the debts due to unsecured creditors, and thereafter became insolvent, and its property and assets were placed in the hands of receivers. The funds now for distribution arose from sources that will be named hereafter. As the discussion requires, and the ultimate decision of the controversy involves, for the first time a judicial interpre-

tation of the statutes under the provisions of which this stock was issued, the enactments, though somewhat lengthy, will be set forth in full. They are contained in § 294, art. 23, of the Code. This section is made up of two acts of assembly, passed at different periods. They are Acts 1868, chap. 471, § 219, and Acts 1880, chap. 474. In transcribing them below, the terms of the later act will be put in italics, so that they may be easily distinguished, and more especially so that the radical changes they made in the substance of the thing with which the legislature had dealt under the earlier may be more readily perceived. The following are the words of the Code: "Every corporation incorporated under the laws of this state, which has the power to issue bonds as evidences of indebtedness, and to secure the same by mortgage of the property of such corporation, or which has the power to obtain such money upon mortgage, may, whenever in the judgment of said corporation it is expedient to do so, in place of issuing such bonds and securing the same by a mortgage of the property of said corporation, or instead of obtaining money upon mortgage, issue a preferred stock for any amount for which said corporation may be authorized to issue its bonds, or for any amount which the said corporation may be authorized to obtain upon mortgage of its property, and may dispose of the said stock by sale, on such terms as it may prescribe, or by permitting the same to be subscribed for, as in the judgment of said corporation may be deemed expedient; and every corporation creating such preferred stock as aforesaid may execute an agreement under seal, *to be acknowledged as conveyances of land are required to be acknowledged and recorded in the office of the clerk of the circuit court for the county where the principal office of such corporation shall be situated, or in the office of the clerk of the superior court of Baltimore city, in case such office shall be situated in said city,* guaranteeing to the purchasers of, or subscribers to, such preferred stock, a perpetual dividend of 6 per centum per annum out of the profits of the said corporation, payable yearly or half-yearly, as said corporation shall determine, before any dividend is distributed to any of the stockholders of the said corporation, other than the holders of said preferred stock so created; and the holders thereof shall have all the incidents, rights, privileges, and immunities, and liabilities, to which the capital stock of said corporation, or the holders thereof, may be entitled or subject; provided, however, that no corporation shall exercise any power under this section, unless the creation of such preferred stock shall be authorized by a general meeting of the stockholders of such corporation; *and the said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage, or other encumbrance.*" The provision requiring an agreement to be executed and to be placed on record was strictly complied

with. The certificates were issued, and the amount subscribed was fully paid. Thereafter the debts which it is claimed ought to be paid out of the fund now in court for distribution were contracted. The fund arose in this way: The improvements on the company's property,—that is, the buildings and machinery,—together with the stock in trade, were insured by the corporation against loss by fire. After the receivers had been appointed, these improvements and the stock, or some of it, were burned. The receivers collected the insurance. This constitutes part of the fund. The rest is made up of book accounts and rents collected by the receivers. No part of the property, real or personal, except, perhaps, stock in trade, appears to have been sold. The holders of the preferred stock (or of what is called preferred stock) issued under the above-quoted section of the Code, claim that they are, as holders of those shares, and in virtue of the terms of the statute, preferred creditors, and entitled, in consequence, to be paid back out of these funds the amount paid in by them on their shares; while the persons who became creditors of the company after the recording of the agreement already alluded to insist that they are entitled to be paid the debts due to them before any distribution is made to the stockholders. Thus this feature of the controversy is sharply defined.

If this stock is preferred stock, pure and simple, the contention of the creditors is right. The law is perfectly well settled that, as between creditors and ordinary preferred stockholders, the latter, as owners of the property of an insolvent corporation, are, upon a distribution of its assets, entitled to nothing until its creditors are first fully paid. There is a palpable difference between the relation of a stockholder and a creditor to the corporate property. Stock, whether preferred or common, is capital; and, generally speaking, a certificate of stock merely evidences the amount which the holder has contributed to or ventured in the enterprise. Such a certificate, representing nothing more than the extent of his ownership in the capital, cannot well be treated as indicating that he is, by virtue of it alone, also to the same extent a creditor, who may compete with other creditors in the distribution of the fund arising from a conversion of the corporation's assets into money. He cannot, if he is simply an ordinary preferred stockholder, in the nature of things, so far as third persons are concerned, be at one and the same time, and by force of the same certificate, both part owner of the property and creditor of the company for that portion of its capital which stands in his name. His certificate, therefore, in such circumstances, merely measures the *quantum* of his ownership. As his chance of gain throws on the stockholder, as respects creditors, the entire risk of the loss of his contribution to the capital, it is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of repaying the principal of the capital until the debts of the corporation

are satisfied. *Warren v. King*, 108 U. S. 389, 27 L. ed. 769; *Cook, Stock & Stockholders & Corp. Law*, § 271; *Hamlin v. Continental Trust Co.* 47 U. S. App. 422; *Hamlin v. Toledo, St. L. & K. O. R. Co.* 78 Fed. Rep. 664, 24 C. C. A. 271, 36 L. R. A. 826. Whether this characteristic may be modified by statute will be considered later on. To be strictly accurate, we ought to say there is a sense in which a shareholder is a creditor. In that sense every corporation includes its capital stock among its liabilities, but it is a liability which is postponed to every other liability. And as to the matured and unpaid guaranteed dividends due on preferred stock the relation of creditor undoubtedly exists. *Baltimore & O. R. Co. v. State*, 36 Md. 541. But, after all, is this particular stock, technically speaking, ordinary preferred stock, and subject, consequently, to the legal incidents and characteristics of that species of property? If you call it preferred stock, and it is what you call it, then the law is perfectly clear that it has no priority over the contesting creditors. If you call it preferred stock, and it is not preferred stock, then, obviously, it is not governed by the principles applicable to preferred stock, but by those relating to the thing that it really is. The mere naming of it does not make it that which it is named, if, in fact, it is something else. Its properties and qualities determine what it is. If the statute calls it what its properties and qualities show that it is not, surely it does not thereby become what it is misnamed, and cease to be what it essentially is. Calling stock preferred stock does not *per se* define the rights in such stock, but these depend on the statute or contract under which it was issued. *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 233. As said by the supreme court of Ohio: "To call a thing by a wrong name does not change its nature. A mortgage creditor, although denominated a 'preferred stockholder,' is a mortgage creditor nevertheless; and interest is not changed into a 'dividend' by calling it a dividend. Nothing is more common, in the construction of statutes and contracts, than for the court to correct such self-evident misnomers by supplying the proper words. To use the language of the court in *Corcoran v. Powers*, 6 Ohio St. 19: 'The question in such cases is not, What did the parties call it? but, What do the facts and circumstances require the court to call it?' " *Burt v. Ratlle*, 31 Ohio St. 116. Courts are not influenced by mere names. They look beyond these and give to the subject dealt with the character—the status—which its properties denote it possesses. The qualities and properties of a thing are its essentials. They define and mark what it is. The name is purely accidental. It is no part of the thing named. If, then, the thing which the statute contemplates possesses the characteristics and qualities of preferred stock, and possesses none other, it is preferred stock; but if, on the other hand, it possesses characteristics and qualities that are entirely foreign to preferred stock, as strictly defined, and that

are descriptive of something else, then the thing is obviously either not ordinary preferred stock, or not preferred stock at all, even though it be called preferred stock, and have, in addition to its own qualities, some of the characteristics that do pertain to preferred stock. Precisely because preferred stock has no lien on the company's property, and cannot be repaid in advance of general creditors, it is necessarily true that a security which is, by express and emphatic legislative enactment, entitled to just such a lien and just such a priority, is not preferred stock, technically speaking, though called by that name, and though having many features incident to preferred stock. The whole ingenious and exceedingly able argument for the appellants proceeded upon the assumption that this is ordinary preferred stock because called preferred stock, and because it possesses the incidents of such stock (but it ignored the fact that it has a quality which preferred stock has not); and the conclusion thence adduced was that, being that kind of stock, it has no preferential lien. Now, the converse is exactly true. If the statute plainly gives a lien and a preference, then this so-called preferred stock is not ordinary preferred stock at all, no matter what it is called, and no matter what incidents it may have in common with preferred stock; and therefore it has not that particular characteristic which, if it were ordinary preferred stock, would defer it to the claims of unsecured creditors. Brushing aside the name, let us see what are the essential qualities of this statutory creation. The act of 1868 (chap. 471, § 219) authorized corporations to issue preferred stock. It was an alternative method of obtaining money. Any corporation which, under its charter, had authority to borrow money, and issue bonds therefor, and secure the payment of the bonds by mortgage, might, instead of resorting to that method, issue preferred stock. In issuing it the companies were empowered to execute an agreement guaranteeing to the purchasers of or subscribers to such preferred stock a perpetual dividend of 6 per cent out of the profits of the corporation before any dividend could be paid to the holders of the common stock. The holders of such preferred stock were given all the incidents, rights, privileges, and immunities, and made subject to all the liabilities, to which the holders of common stock were entitled or subject. This was strictly and technically ordinary preferred stock. It had no priority over creditors or over subsequent mortgages or encumbrances, and it had no lien on the franchises or the property of the corporation. It merely guaranteed a dividend of 6 per cent out of the profits,—that is, the net profits,—and, if there were no profits, there would be no dividend. Its priority was simply a priority over the usual rights and interests of another, but subordinate, class of stockholders. That is the kind of preferred stock authorized by the act of 1868, as a mere glance at its provisions—quoted in the beginning of this opinion, omit-

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ting the lines in italics—will demonstrate. In the language of the Supreme Court (*Warren v. King*, 108 U. S. 389, 27 L. ed. 769), "It would be difficult to say that these statutory provisions allowed any preference in shares of capital stock except a preference amongst classes of shares, or any preference of any class of shareholders over creditors. . . . There is nothing in the certificate which clothes them with a single attribute of a creditor." The stock authorized by the act of 1868 was not only called preferred stock, but it had every incident of stock, and none that was not. For twelve years the statute remained unchanged. Shares issued under it were, as we have said, essentially shares of capital, with none of the qualities of an evidence of debt, and shareholders were simply owners of the capital, with none of the rights of creditors of the company. But in 1880 the statute was amended by the addition of the words in italics. By the provision requiring the agreement to be recorded no change was effected in the relation of the preferred to the common shareholder. The former was given no greater right over the latter than he had before the agreement was required to be recorded, and the relation of the preferred shareholder to the company's subsequent creditors was not disturbed, unless the last clause, giving the shareholder a lien, and declaring a preference in his favor, altered the nature of the preferred stock, and made it something that it had not been under the act of 1868. If the clause giving the shareholder a lien and a priority did not create a new species of preferred stock, or a security differing radically from ordinary preferred stock, it is difficult, if not impossible, to assign any reason for the adoption of the act of 1880. The clause specifically declaring that "the said preferred stock shall be and constitute a lien on the franchises and property of such corporation, and have priority over any subsequently created mortgage or other encumbrance," essentially changed the whole nature of the thing antecedently described as preferred stock, and the statutory lien converted it into something wholly different. The statute says "said preferred stock"—not the guaranteed dividend thereon—shall be and constitute a lien on the property and franchises of the company. If you say the lien only extends to the dividend, then you say the stock shall not be a lien, though the legislature said it should be. Preferred stock, under the act of 1868, had no lien whatever. This statutory preferred stock, under the act of 1880 ("the said preferred stock"), has a lien on franchises and on property. Preferred stock, under the act of 1868, had no priority over creditors. This statutory preferred stock, under the act of 1880, has priority over subsequent mortgages and encumbrances. The two are therefore intrinsically different, and the argument that gives to the latter no greater effect or wider range than the former possessed, simply because of the identity in the name applied to both, must totally ignore, and in fact ex-

punge, the clause of the statute expressly creating the lien. If this statutory preferred stock has a lien, then it differs from ordinary preferred stock in that it has the lien. If, because it is called preferred stock, it has no lien, though the statute says it shall have, then the name controls the substance, and the lien expressly given is simultaneously taken away by the name conferred. Either the name or the substance must yield, and certainly the latter cannot be made subordinate to the former.

Giving to the holder of what the act of 1880 designates preferred stock a lien is not without precedent. It can be done, and the ultimate question always is, Has it been done? That it can be done, a few citations will show. In *1 Elliott, Railroads*, § 85, the general rule is thus stated: "Unless a preference in repayment of capital invested has been specially contracted for (*Re Bangor & P. Slate & Slab Co.* L. R. 20 Eq. 59; *Re Bridgewater Nav. Co.* L. R. 39 Ch. Div. 1), or is given by statute (*McGregor v. Home Ins. Co.* 33 N. J. Eq. 181), the holder of the preferred stock shares equally with common shareholders in a distribution of assets upon dissolution. . . . This results from the rule that he is a stockholder and not a creditor." "But much," the same author proceeds to observe in § 86, "will necessarily depend upon the language used; and where the interest is guaranteed absolutely, and the corporation also agrees to liquidate the principal at a specified time, or the like, so that the so-called stock is in reality an interest-bearing debenture, the relation created thereby will be that of debtor and creditor, and the holder will not be merely a shareholder, as he would be if it were preferred or interest-bearing stock, payable only out of the profits. *Burt v. Rattle*, 31 Ohio St. 116; *West Chester & P. R. Co. v. Jackson*, 77 Pa. 321; *Totten v. Tison*, 54 Ga. 139. Its validity, therefore, would depend upon some other power than the power to issue preferred stock." And in *1 Cook, Stock & Stockholders & Corp. Law*, § 271, it is said: "A mortgage to secure preferred stock and dividends thereon has been upheld in a few cases. In other cases that which was called preferred stock was nothing more than income bonds with a voting power." In the case of *Garrett v. May*, 19 Md. 191, the late Mr. Reverdy Johnson in his argument spoke of the "income bonds," which were there the subject of controversy, as equivalent to preferred stock. As the interest and principal of the bonds were payable out of income, it meant net income. "The holder," he said, "is thus made only a preferred stockholder." "Occasionally, however," remarks Mr. Cook (*1 Cook, Stock & Stockholders & Corp. Law*, § 271), "a mortgage is given by the corporation to secure the payment of dividends on preferred stock, and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal except when it is issued under

express statutory authority." In *West Chester & P. R. Co. v. Jackson*, 77 Pa. 321, it was said by Judge Woodward, speaking for the court: "A corporation may issue new shares, and give them a preference, as a mode of borrowing money, where it has power to borrow on bond and mortgage, as preferred stock is only a form of mortgage." In *Skiddy v. Atlantic, M. & O. R. Co.* 3 Hughes, 355, it was held that, where preferred stock had been issued reciting that the stipulated interest was a lien on all the property of the corporation after the first mortgage, the lien would be upheld by the court as against subsequent mortgages and general creditors, though such lien had not been secured by any mortgage. There ought, then, to be no doubt that this method of creating a lien in favor of a stockholder can be resorted to if the legislature sees fit to authorize it. That it has authorized it by the terms of the act of 1880, hereinbefore transcribed and put in italics, is, it seems to us, perfectly clear. The general assembly has, in plain and unmistakable words, declared that this particular kind of stock—the "said preferred stock"—shall be and constitute a lien on the company's property. No language could be more explicit, and most certainly courts have no authority to reject or to disregard it. Stock issued under this act is, consequently, a lien on the property of the company issuing it, and entitled to the preference which the statute gives it. It is no answer to say that the giving of such a lien is nugatory by reason of a lien being inconsistent with the properties and qualities of stock, because it is quite obvious that after a lapse of twelve years the legislature, by adopting the act of 1880, intended to do just what it did do, even though in doing it the nature of the thing dealt with was changed, and a new and entirely different statutory preferred stock was created. That it had the power to do this cannot be disputed. There was neither physical nor legal impossibility in the way, and no principle of sound and enlightened public policy was invaded. The substance of the thing was changed; the name was retained.

Much was said in the argument, and something is to be found in the books, about such liens in favor of stockholders being void because against public policy; but Sir George Jessel, M. R., in dealing with that indefinite and variable quantity called "public policy," said, in *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider,—that you are not lightly to interfere with this free-

dom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offense, or to give money or reward to another to commit an immoral offense, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further." In the case of *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, the Supreme Court had under review the act of Congress of July 2, 1890, enacted "to protect trade and commerce against unlawful restraints and monopolies." It was argued that the impolicy of giving to the act the construction which its language plainly conveyed was so clear that it could not be supposed Congress intended the natural import of the words it had used; but a majority of the court, speaking through Mr. Justice Peckham, said: "The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts, and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy, in such a case, is what the statute enacts." It is impossible to see how the lien given to this peculiar preferred stock can be treated as invalid on the ground that it contravenes public policy, since the explicit words of the statute declare a policy with which the lien that is given is essentially in accord. It must be, said this court in *Re Woods*, 52 Md. 520, a very plain case to justify a court in holding a contract to be against public policy. We are dealing now, not with a contract, but with a statute. None of the cases cited by the appellants' counsel arose upon statutes containing such a provision as is set forth in the act of 1880. They are for that reason distinguishable from this case. They all dealt with ordinary preferred stock, and not with stock issued under a special legislative enactment declaring that stock created thereunder shall be and constitute a lien on the company's property, and shall have priority over subsequent mortgages and encumbrances. If this statutory preferred stock has priority over any subsequently created mortgage or encumbrance, it must have priority over the claims which such subsequently created mortgage would itself have precedence over. It would be a solecism—an incongruity—to say that the stock shall have priority over subsequently created mortgages, and, of course, therefore, over those claims which would be deferred to such mortgage, where there is one, and yet shall have no priority over the same claims where there is no mortgage. Obviously, the statute means a priority over subsequent mortgages and over such claims as such subsequent mortgages would have preference over. 45 L. R. A.

Suppose these claims were secured by a mortgage executed after the issue of the stock, would not the mortgage be postponed, by the express terms of the statute, to the prior lien of the stock? Can claims, when unsecured by a mortgage, take precedence of the stock to which they would be subordinate if they were in the form of a mortgage? If they can, it must be solely because, when unsecured, they are given a priority which is denied them when they are secured; thus reversing the ordinary rule, and placing an unsecured claim in advance of a secured one. The statute cannot be interpreted in a way to produce such a result.

We now come to the inquiry as to whether the stock was properly issued. The statute prohibits the issue of this kind of stock "unless the creation of such preferred stock shall be authorized by a general meeting of the stockholders of" the corporation. It is objected that a general meeting of stockholders was not properly called, because: First, the meeting which did assemble was called by the directors, and not by the stockholders; and, secondly, because notice was given in but one, instead of in two, newspapers. This objection is founded on § 6, art. 23, of the Code, and altogether disregards § 76 of the same article. Section 6 permits stockholders to call a general meeting only when the president and directors refuse to call it after being required by the stockholders to do so. The notice prescribed by § 6 is ten days, and, when the corporation is located in Baltimore city, this notice must be published in two newspapers. Upon turning to § 76, it will be found that provision is made for calling a meeting of the stockholders for the purpose of increasing or diminishing the amount of the capital stock. This notice must be given by the directors, or a majority of them. It must be published in one paper, and a copy must be mailed to each stockholder; and the length of the notice must be four weeks. All the provisions of § 76 were strictly complied with. While § 6 provides generally for calling meetings of stockholders, § 76 provides specially for the case of a meeting called for a particular purpose. The general provision must yield to the particular when the thing to be done is that which the latter has relation to. The proviso requiring the general meeting of stockholders to authorize the issue of preferred stock was contained in the act of 1868, before the amendment of 1880. The issue of preferred stock under the act of 1868 was necessarily an increase of the capital, and the proper method to be pursued in calling a meeting of the stockholders to determine whether such preferred stock should be issued was the one pointed out in § 76. The changes made by the act of 1880 in the characteristics of this stock did not change the mode to be followed in securing the sanction of the stockholders to its issue. As that mode—the one designated in § 76—was strictly followed, the objection founded on the failure to comply with § 6 must fall.

This brings us to the only other question

in the case, and that is whether the sums collected by the receivers from the various sources indicated above can be claimed by the holders of this preferred stock, or must be paid to the unsecured creditors. If the fund collected from the insurance companies is payable to the stockholders, rather than to the unsecured creditors, it must be so payable because the lien on the franchises and property of the company is, by reason of its being a lien on the franchises and property, a lien on the money paid by the insurance companies to the receivers under the policies indemnifying the guano company against loss by fire. But since the decision by Lord Chancellor King in the case of *Lynch v. Daltzell*, 4 Bro. P. C. 431, it has never been disputed that a policy of insurance against loss by fire is only a personal contract of indemnity against a possible loss on account of the interest of the insured in the thing mentioned in the policy. Such personal contracts of indemnity do not attach to the realty, or in any manner go with the same as incident, by any conveyance or assignment, unless there is, in addition, some special stipulation to that effect between the insurer and the insured. *Washington F. Ins. Co. v. Kelly*, 32 Md. 441, 3 Am. Rep. 149; *Wheeler v. Factors & Traders' Ins. Co.* 101 U. S. 442, 25 L. ed. 1057; *Royal Ins. Co. v. Stinson*, 103 U. S. 29, 26 L. ed. 477; *Palmer Sav. Bank v. Insurance Co. of N. A.* 166 Mass. 189, 32 L. R. A. 615. Consequently, a mortgage, and for the same reason any other lien, creditor, has no right to claim the benefit of the policy underwritten for the mortgagor or owner of the property, unless there is an express agreement permitting it. The insolvency of the mortgagor or debtor cannot operate to expand the lien held by the mortgagee or creditor, or bring within the scope of that lien a fund which, according to settled principles, is not subject to its operation. If the proceeds of such a policy are not covered by the lien which the creditor holds, the subsequent insolvency of the debtor cannot bring them under the lien, because mere insolvency can, of itself, in no instance, amplify a lien whose existence and extent depend wholly upon the terms of the contract creating the lien. There is no pretense that there was any special stipulation between the guano company and the preferred stockholders appropriating to the latter, in the event of a loss by fire, the funds which might be realized under the policies of insurance; and it of course follows that these stockholders have no lien upon those funds, and, having no lien upon them, they have no claim to them, because these stockholders are not general creditors and have no right to appropriate to the payment of their stock any assets other than those which the statute specifically subjects to their lien until the general and other creditors are first fully paid.

With regard to the book accounts collected by the receivers the record discloses very 45 L. R. A.

little. Presumably these book accounts represent sums due to the company for merchandise sold by it. It does not appear at what time this merchandise was acquired, but it was probably long after the creation of the preferred stock. However this may be, it cannot be held that the money, when collected, was covered by the lien given by the statute, unless the merchandise sold for that money was itself subject to that lien when sold. It cannot be successfully contended that the lien attached to merchandise which the company was engaged in making for sale without at the same time conceding that every article sold went into the possession of the purchaser charged with the lien. In a manufacturing concern, engaged, as the name implies, in the sale of fertilizers, it could never have been the purpose of the statute to attach the lien to the articles produced for sale, as such a lien would effectually prevent any sale, and would at once, as a consequence, stop the very business which the company was organized to conduct.

Lastly, with respect to the rents. The lien given by the statute attaches to the franchises and property. Were the lien that of a mortgage on land, the specific thing pledged would be land. Rents, unless specifically included, would not be conveyed by a pledge of the land. "They belong to the tenant in possession, whether a mortgagor or a third person claiming under him." *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609. In *Freedman's Sav. & T. Co. v. Shepherd*, 127 U. S. 494, 32 L. ed. 163, it appeared that one Bradley executed a deed of trust pledging to the savings and trust company certain real estate. The rent accruing from this property was claimed by the trust company and by other creditors of Bradley. In denying the claim of the trust company, the supreme court said: "Bradley's deed pledged the property, not the rents accruing therefrom, as security for the payment of his notes." See also *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 603, 23 L. ed. 405. It is true that, when possession is taken by a receiver in behalf of the mortgagee, the rents may be appropriated to the payment of the mortgage debt (*Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415), but this lien, given under the statute to a preferred shareholder, is not the lien of a mortgage, and cannot be expanded so as to include anything more than the legislature designated, namely, franchises and property.

From what has been said it results that, in our opinion, the so-called preferred stock is a lien on the company's franchises and property owned at the time the stock was issued, but that it is not a lien on the funds now in the hands of the receivers, and arising from the sources hereinbefore indicated. In so far as the decree below declared the preferred stock a lien on the franchises and property of the Chesapeake Guano Company it is affirmed, but in so far as it awarded the funds collected from the insurance companies, from the book accounts, and from the

rents of the property to the preferred stockholders it will be reversed.

Decree affirmed in part and reversed in part, and cause remanded, that a new decree conforming to this opinion may be signed; the costs to be equally divided between each side.

Sigmund H. WEIHENMAYER, *Appt.*,
v.

J. Irvin BITNER, Secretary, etc., of Windsor Knitting Mills of Washington County.

(.....Md.....)

1. **Mandamus will lie to compel the officers of a corporation to permit a stockholder to inspect the accounts of the president and directors where the statute provides that such accounts shall be open at all times to the inspection of stockholders.**
2. **The statutory right of a stockholder**

NOTE.—Right of stockholder to inspect books of corporation.

- I. *At common law.*
- II. *Under statutes.*
- III. *Extent of the right generally.*
 - a. *At common law.*
 - b. *Under statutes.*
 - c. *Assistance of attorney or expert.*
 - d. *Making memoranda and taking copies.*
 - e. *Time of inspection.*
 - f. *The books and papers inspected.*
 - g. *Effect of business convenience or necessity on.*
 - h. *To what corporations applicable.*
 1. *Domestic corporations.*
 2. *Foreign corporations.*
 3. *Insolvent corporations.*
- IV. *The remedy.*
 - a. *By mandamus.*
 - b. *By imposition of a penalty.*
 - c. *By action for damages.*
 - d. *Other remedies.*
- V. *Sufficiency of demand and refusal to sustain remedy.*
- VI. *Effect of purpose of stockholder on remedy.*
 - a. *Generally.*
 - b. *For hostile purposes.*
 - c. *To obtain grounds for litigation.*
 - d. *To obtain knowledge of condition of company.*
- VII. *Rule that there must be a specific dispute.*
- VIII. *Matters of procedure.*
 - a. *In mandamus.*
 - b. *In other proceedings.*
- I. *At common law.*

A stockholder in a corporation has in the very nature of things and upon principles of equity and good faith and fair dealing the right to know how the affairs of the company are conducted, and whether the capital of which he has contributed a share is being prudently and profitably employed, and to inspect the books of the corporation for the purpose of obtaining such knowledge. *State, Martin, v. Blenville Oil Works Co.* 28 La. Ann. 204; *Cockburn v. Union Bank*, 13 La. Ann. 289.

If not restricted by the charter or rules and by-laws of the corporation, a stockholder had at common law the right, at proper and reasonable times, to inspect all the books and records of the corporation. *Lewis v. Brainerd*, 53 Vt. 510; *Ranger v. Champion Cotton-Press Co.* 51 Fed. 45 L. R. A.

er of a corporation to inspect its books, documents, and records is not forfeited by the fact that he is a business rival of the corporation and seeks information to be used to its injury and loss.

3. **All reasonable times are intended by a statute giving stockholders the right to inspect the corporate books at all times.**
4. **A judgment will not be reversed for a general charge directing a verdict erroneous because not indicating the specific ground of the ruling, if no ground appears on which the adverse party could prevail in the action.**

(October 28, 1898.)

A PPEAL by petitioner from a judgment of the Circuit Court for Washington County in favor of defendant in a mandamus proceeding to compel defendant to permit plaintiff to inspect the books of the Windsor Knitting Mills. *Reversed.*

Plaintiff's prayers were as follows:

1st. The jury are instructed that the

Rep. 611; *Lyon v. American Screw Co.* 16 R. I. 472; *People, Onderdonk, v. Mott*, 1 How. Pr. 247; *Stone v. Kellogg*, 165 Ill. 192. And see *Re STEINWAY*.

Every member of a corporation has the right, as such, to look into the books of the corporation for any matter that concerns himself, though the corporation is not a party to the dispute. *Rex v. Newcastle upon Tyne*, 2 Strange, 1223.

II. Under statutes.

In most of the states, as well as in England, the right of a stockholder to inspect the books of a corporation has also been secured by statute, and in some cases the right has been made the subject of constitutional provision.

Thus, the right of a stockholder in any joint-stock corporation to inspect the books in which transfers of stock are registered and the books containing the names of the stockholders, and to take a copy or memorandum of such names, exists in Pennsylvania, not only at common law without the aid of any statute, but has also been secured by the express language of the Constitution of the state as well as by statute. *Com. v. Philadelphia & R. R. Co.* 3 Pa. Dist. R. 115.

And La. Const. art. 245, declaring that books exhibiting certain enumerated affairs of a corporation shall be kept for public inspection, is self-acting, and needs no legislative enactment to give it effect. *State, Bourdette, v. New Orleans Gaslight Co.* 49 La. Ann. 1556.

These provisions, both constitutional and statutory, however, do not supersede the common-law right, but are in affirmance of it or in addition to it.

The common-law jurisdiction to issue a mandamus to compel the submission of the books of a corporation to a stockholder for inspection, however, is limited to that formerly possessed by the court of King's bench in England. *Re Rappleye*, 43 App. Div. 84.

In the United States the prevailing doctrine seems to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the management. *State, Bourdette, v. New Orleans Gaslight Co.* 49 La. Ann. 1556, *dictum*.

Thus, Mo. Rev. Stat. § 2503, providing that books in which transfers of stock are registered, and books containing the names of the stockholders, shall be kept for their inspection dur-

pleadings in this case show that the defendant admits that the plaintiff is a stockholder in the Windsor Knitting Mills, and that he called upon him at his office, as secretary of the directors of the Windsor Knitting Mills of Washington County, on the 10th and also on the 18th of December, 1897, and asked permission to inspect the books containing the accounts of the transactions of the president and directors of the said Windsor Knitting Mills, and that said defendant refused to permit the plaintiff to inspect the books, records, and papers containing said accounts of their transactions, and under the pleadings in the case the plaintiff is entitled to a verdict.

2d. The jury are instructed that from the evidence in this case it appears the plaintiff called upon the defendant, and asked to see the books of the Windsor Knitting Mills containing the transactions of the president and directors; and, there being no evidence

to the contrary, their verdict should be for the plaintiff, even though the jury believe that the plaintiff at the same time asked to see all the books of the Windsor Knitting Mills.

3d. The jury are instructed that the plaintiff is entitled to inspect, at such times as he may desire, all the books, records, and papers of every kind and description, and all parts of the same, containing accounts of the transactions of the president and directors of the Windsor Knitting Mills of Washington County, without the intervention or assistance of the defendant, in whose custody the said books and records are kept, and the defendant has no right or power to require the plaintiff to inform him what items in or parts of said books and records he desires to see before permitting him to inspect the same, nor has the defendant any right to prevent the plaintiff from inspecting said books and records, because the plaintiff does not inform

ing business hours for twenty days previous to the election of directors, is declaratory of the common law, and is not therefore a limitation on the stockholder's right of inspection, and cannot be construed to prevent such inspection during any time other than such twenty days. *State, Doyle, v. Laughlin*, 53 Mo. App. 542.

The right of a stockholder to examine and inspect all the books and records of a corporation at all reasonable times, and to be thereby informed of the condition of the corporation and its property, is a common-law right, and there is nothing in the Missouri statute in relation to corporations that in any way impairs such right, but, on the contrary, it is expressly declared to exist. *Ibid.*

So, N. Y. Laws 1892, chap. 688, § 29, providing that every stock corporation shall keep a stock book which shall be open daily during business hours for the inspection of its stockholders and judgment creditors who may make extracts therefrom, is not exclusive and does not abridge the common-law right of stockholders with reference to the examination of corporate books. *Re Strinway*.

And 1 N. Y. Rev. Stat. Edm. ed. 558, providing for corporate books containing the names of stockholders, and authorizing an examination of the same within thirty days previous to an election of directors, does not deprive a stockholder of a corporation of the right to examine its transfer books for proper purposes and on proper occasions at other times, and a proceeding by mandamus may be invoked for the purpose of enforcing such right. *Sage v. Lake Shore & M. S. R. Co.* 70 N. Y. 220; *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun, 1; *Brouwer v. Cothel*, 10 Barb. 218.

And a stockholder of a corporation has the right, upon showing a good and sufficient reason, to inspect books of the corporation other than the transfer books, though there is no statutory provision in the state respecting the right of shareholders to examine and inspect the general books of corporations, the only existing enactment on the subject relating to transfer books. *Re Steinway*, 31 App. Div. 70.

So, Ala. Code 1886, § 1877, providing that stockholders of all private corporations have the right of access to inspect and examine all the books, records, and papers of the corporation at reasonable and proper times, was enacted in view of the restrictions and limitations placed by the common law upon the exercise of the right, and the purpose was to protect small and minority stockholders against the power of the

majority, and against the mismanagement and faithlessness of agents and officers. *Foster v. White*, 86 Ala. 467.

It is within the discretion of the court, whenever a case is presented that requires the examination of the books of a corporation by stockholders for the purpose of preserving their rights and interest, to interfere by mandamus to compel the exhibition of the transfer books and books containing the names of its stockholders, though permission to inspect was not asked for within the thirty days previous to an election, during which an absolute right is given to the stockholder to inspect by N. Y. Laws 1882, chap. 409, § 199. *People, Stobo, v. Eadie*, 63 Hun, 320; *Sage v. Lake Shore & M. S. R. Co.* 70 N. Y. 220.

And in determining whether a mandamus shall issue to enforce the right of a stockholder of a domestic corporation to inspect its books at a time other than during the thirty days previous to an election of directors, during which the right is absolute, the power of the court should be exercised with great discrimination and care; and while stockholders should be carefully protected from any abuse on the part of the corporation, or unjust denial of their rights, the court will also guard against all attempts by combinations hostile to the corporation or its existing officers to use the right of mandamus to accomplish personal or speculative ends. *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun, 1.

So, Mo. Rev. Stat. § 7448, providing that no one shall be director in more than one bank at the same time, nor owner of capital stock in a private bank and director in another bank, does not encroach in any way upon the common-law right of a stockholder in a bank to examine its books, though he is also a private banker. *State, Doyle, v. Laughlin*, 53 Mo. App. 542.

And a provision in the by-laws of a corporation that the transfer books of the company shall be closed for not less than thirty days prior to each annual meeting of the stockholders, means the closing of them against the making of further transfers, and not their closing against the inspection of stockholders, as such a closing would be illegal and in contravention of the statute. *State, Wilson, v. St. Louis & S. F. R. Co.* 29 Mo. App. 301.

So, the Illinois statute, Rev. Stat. chap. 32, § 13, giving to every stockholder of a corporation the right at all reasonable times by himself or by his attorney to examine the records and books of account of the corporation, is founded

him of the purpose for which he desires said inspection.

4th. The jury are instructed that the transactions of the president and directors of the Windsor Knitting Mills include the transactions of all persons who, by their authority, appointment, direction, or employment, make contracts of any or every description, whether relating to purchases, sales, rent of property, transportation of goods, prices, employment of labor, or other matter connected with the business of manufacturing and selling hosiery; and also included all the transactions of agents who are allowed by said president and directors to exercise the power of transacting business for the company, and also all the transactions of unauthorized agents accepted by the president and directors. And the jury are further instructed that the books and papers or other records containing the accounts of all said above-mentioned transactions are by

law open to the inspection of the plaintiff; and if the jury believe, from the evidence in the case, that at either or both of the times, when, as admitted, the plaintiff called upon the defendant, he (the plaintiff) requested the defendant to permit him to inspect said books, papers, or records, and said defendant refused to permit the plaintiff to examine the same, then their verdict should be for the plaintiff.

4½. The jury are instructed that the books of the Windsor Knitting Mills are the books containing the accounts of the transactions of the president and directors; and it appearing from the pleadings and evidence in the case that the plaintiff asked the defendant to permit him to see and inspect said books, and that the defendant refused permission to make said inspection, and there being no evidence to the contrary, their verdict should be for the plaintiff.

5th. The jury are instructed that if they

on the principle that the other holders had a right to be fully informed as to the condition of the corporation, the manner in which its affairs are conducted, and how the capital to which they have contributed is employed and managed. *Stone v. Kellogg*, 165 Ill. 192, 62 Ill. App. 444.

And the object of the English company clauses act of 1863, § 28, was to put the stockholders of a corporation in such a position that each might see who were entitled to the stock of which he held a part, and what interest they had. *Mutter v. Eastern & M. R. Co.* L. R. 38 Ch. Div. 92, 36 Week. Rep. 401, 57 L. J. Ch. N. S. 615, 59 L. T. N. S. 117.

III. Extent of the right generally.

a. At common law.

Where no statutory right to inspect the books of a corporation exists, the granting or refusing a writ of mandamus to compel the officers of such corporation to allow a stockholder to make such inspection is discretionary. *People, McDonald, v. United States Mercantile Reporting Co.* 20 Abb. N. C. 192; *Lyon v. American Screw Co.* 16 R. I. 472. And see also *People, Stobo, v. Badie*, 63 Hun, 320; *Sage v. Lake Shore & M. S. R. Co.* 70 N. Y. 220; and *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun, 1, — *supra*, II.

And the exercise of such discretion will be made to depend upon the necessity or propriety of granting it under the circumstances shown. *Lyon v. American Screw Co.* 16 R. I. 472.

A stockholder of a corporation is entitled to inspect the corporate books containing the names of the stockholders in the absence of statutes relating to the matter, at proper times and for proper purposes. But where there is nothing in its charter with reference thereto, he should not be permitted to call upon the court to enforce such right unless the circumstances show that he needs such aid for some reasonable and proper purpose. *Ibid.*

So, an application for a mandamus to compel a foreign corporation to exhibit to the relator the transfer books of preferred stock of the company, or other books containing the names and addresses of the holders of such stock, in the absence of statutory provisions therefor, is addressed to the sound discretion of the court, and should be exercised with great discrimination, and will not be granted where it appears that the relator acquired his stock long after a reso-

lution of the board of directors of the corporation authorizing the execution of a mortgage which he opposed, and for the purpose of which opposition his inspection is sought. *People, Field, v. Northern P. R. Co.* 18 Fed. Rep. 471.

b. Under statutes.

Where the statute confers the right upon a stockholder to examine the books of a corporation in absolute terms, if the right can be refused in any case, and if the court has a discretion in the matter, it is a legal discretion, and the right can be denied only when it is clearly apparent that the purpose of asking it is to gratify an idle whim, or to perplex, annoy, or harass the officers having the books in charge. *Ellsworth v. Dorwart*, 95 Iowa, 108.

Thus, under Ala. Code 1886, § 1677, providing that stockholders of all private corporations have the right of access to, and inspection and examination of, the books, records, and papers of the corporation at reasonable and proper times, the only limitation upon the right of inspection is that it shall be exercised at reasonable and proper times, and not from idle curiosity or for improper or unlawful purposes. *Foster v. White*, 86 Ala. 467.

And under Ill. Rev. Stat. chap. 32, § 13, providing that it shall be the duty of the directors or trustees of every stock corporation to cause to be kept at its proper office or place of business in the state correct books of account of all its business, and every stockholder in such corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records and books of account of the corporation, the only limitation upon the right of inspection is that it shall be exercised at reasonable and proper times, and that it shall not be exercised from idle curiosity or for improper or unlawful purposes; in all other respects the statutory right is absolute. *Stone v. Kellogg*, 165 Ill. 192. See also *Holland v. Dickson*, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320, *infra*, VI. b.

So, statutes giving stockholders the right to inspect certain books of their corporations, and imposing a penalty upon the recording officer for refusal to permit such inspection, although subjecting the offender to a penalty recoverable by the injured party, is not a penal, but a remedial, statute, and should therefore be liberally construed. *Lewis v. Brainerd*, 53 Vt. 510.

Thus, a clause in the charter of a corporation declaring that all the powers of the corporation

believe from the evidence in the case that at one or both of the times, when, as admitted, the plaintiff called upon the defendant in December, 1897, he (the plaintiff) asked said defendant to permit him to see the books of the company, meaning thereby the books or records containing the transactions of the president and directors, if the jury so find, and said defendant refused the plaintiff permission to see any and all books and records in his possession as secretary of the board of directors, then their verdict should be for the plaintiff.

6th. The jury are instructed that if they believe from the evidence in the case that at the time or times in December, 1897, when, as admitted, the plaintiff called upon the defendant, he requested said defendant to permit him to see and examine the books containing the accounts of the transactions of the president and directors of the Windsor Knitting Mills, and said defendant refused

to permit the plaintiff to see and examine said books, then their verdict should be for the plaintiff.

7th. The jury are instructed that if they believe from the evidence that at the time or times in December, 1897, when, as admitted, the plaintiff called upon the defendant, the purpose and desire of the plaintiff was to inspect the books containing the transactions of the president and directors of the Windsor Knitting Mills, and that defendant so understood the plaintiff from the language used, but refused to permit the plaintiff to inspect any and all books in his possession as secretary of said directors, then their verdict should be for the plaintiff; and the jury are instructed that the fact that the plaintiff is conducting a hosiery mill of his own has nothing to do with the case.

8th. The jury are instructed that the plaintiff is entitled to inspect every book containing any transaction directly or indi-

shall be exercised by a board of directors does not deprive a stockholder of his individual right to know from personal inspection of the books and papers of the company the state of its business affairs, and does not warrant an assumption by the board of directors that it has the right of deciding when, by whom, and for what purpose the books shall be inspected, and that a stockholder has no right to make inspection at pleasure. *State, Martin, v. Blenville Oil Works Co.* 28 La. Ann. 204.

So, a by-law of a corporation providing that no stockholder or other person shall have the right to inspect the books thereof without special authority from the board of directors, is subordinate to the provisions of the charter and of the Constitution of the state, authorizing stockholders to inspect the books of the corporation. *State, Burke, v. Citizens' Bank*, 51 La. Ann. 426.

And an offer by a corporation in a mandamus proceeding by a stockholder for the inspection of its books to purchase his stock at the market value or at such sum as the court may order, is impertinent and irrelevant, though it had greatly increased in value since the stockholder purchased it, as he is not bound either to forfeit his legal rights or to sell his shares. *State, Wilson, v. St. Louis & S. F. R. Co.* 29 Mo. App. 301. And see *WEIHENMAYER V. BITNER*.

But the purchaser of stock in a corporation, although entitled to examine its books, is not, as matter of law, under obligation to do so for the purpose of ascertaining whether or not he has been defrauded in his purchase of the stock, when he is not aware of any ground of suspicion. *Gerner v. Mosher* (Neb.) 78 N. W. 384.

c. Assistance of attorney or expert.

A shareholder's right to inspect the books of a corporation includes the right to make the inspection by an agent, solicitor, counsel, or expert. *Blair v. Massey*, 1r. Rep. 5 Eq. 623; *Hyde v. Holmes*, 2 Molloy, 372; *Blymyer v. Blymyer Iron Works Co.* 5 Ohio N. P. 71; *State, Martin, v. Blenville Oil Works Co.* 28 La. Ann. 204; *Deaderick v. Wilson*, 8 Baxt. 108.

While the right of a stockholder to inspect the books of a corporation is personal in the sense that only a stockholder possesses and can exercise it, his inspection and examination may be made by an agent or attorney in fact. *Foster v. White*, 86 Ala. 467.

It is not so strictly personal to him that it cannot be exercised by another for him and in

his stead, as by an agent or executor. *State, Burke, v. Citizens' Bank*, 51 La. Ann. 426.

And the right of a stockholder of a corporation to examine its books at the time he requests it cannot be denied because he is accompanied by his attorney and his stenographer. *Ellsworth v. Dorwart*, 95 Iowa, 108.

And the treasurer of a corporation is not justified in refusing a stockholder permission to examine the records, books of account, and stock-books of the company, demanded under N. Y. Laws 1892, chap. 688, § 29, providing that the stock books of every corporation shall be open daily during business hours for the inspection of its stockholders, because the stockholder is accompanied by his attorney, and an offer to allow the stockholder to examine the stock-book by himself does not justify such refusal. *People, Clason, v. Nassau Ferry Co.* 86 Hun, 128.

So, in *State, Spinney, v. Sportman's Park & Club Asso.* 29 Mo. App. 326, the court said that it was not prepared to say that a stockholder's right of examination is one which must be exercised in all cases without the assistance of such expert aid as in many cases is the only one to render the examination effectual.

The right of inspection of the books of a corporation given by the Stannaries act of 1855, § 22, however, is personal to the shareholder, and does not extend to his solicitor or agents. *Re West Devon Great Consols Mine*, L. R. 27 Ch. Div. 108.

And the court, in a proceeding for a mandamus to compel a corporation to permit a stockholder to examine the books, papers, and affairs of the corporation, which has rendered judgment granting the mandamus but giving no permission for the appointment of experts to aid him, cannot, ten days after the judgment was signed, make an *ex parte* order appointing two experts to aid him, as the case was disposed of finally by the judgment, and there was no suit pending in which the order in question could be granted. *State, Mahan, v. Accommodation Bank*, 28 La. Ann. 874.

d. Making memoranda and taking copies.

A stockholder examining the books of a corporation may take memoranda or a list of the stockholders. *Hyde v. Holmes*, 2 Molloy, 372; *Re Martin*, 62 Hun, 557; *Deaderick v. Wilson*, 8 Baxt. 108.

Where there is a power upon the part of a shareholder to inspect the register of members of the company, that power carries with it, if there is nothing to negative it, the right to

rectly made by the president and directors of the Windsor Knitting Mills, whether contained in the day book, ledger, cash book, journal, order book, minute book, or other book of the company; and if the jury find from the evidence that any one or number of said books, containing transactions (one or more) of said president and directors, and believe that the plaintiff requested defendant to permit him to see and examine said book or books so containing the transaction of the president and directors; and that defendant refused to permit the plaintiff to see and examine the same, then their verdict should be for the plaintiff.

9th. The jury are instructed that the business affairs of the Windsor Knitting Mills are under the entire management and control of the president and directors; and the plaintiff, being a stockholder, is entitled to an inspection of the books and records containing the accounts of all the transac-

tions of said president and directors in the management of the company's affairs; and if the jury believe from the evidence that the plaintiff requested the defendant to permit him to see and examine said books or records, but the defendant refused to allow the plaintiff to inspect said books or records, then their verdict should be for the plaintiff.

10th. The jury are instructed that, if they believe from the evidence that the plaintiff requested defendant to permit him to see and examine the books of the Windsor Knitting Mills, and defendant refused to permit him to examine said books, their verdict should be for the plaintiff.

11th. The jury are instructed that any statement or statements made by the plaintiff of the assets and liabilities of the Windsor Knitting Mills have nothing to do with the right of the plaintiff to inspect the accounts of the transactions of the president and directors, and are not to be considered

make extracts from the register, or to make notes of its contents, and to make copies of its entries. *Boord v. African Consol. Land & Trading Co.* [1898] 1 Ch. 596, 77 L. T. N. S. 553.

The right of a stockholder in a corporation to make copies, abstracts, and memoranda of documents, books and papers of the company is as full and complete as the right of inspection thereof. *Swift v. State, Richardson*, 7 Houst. (Del.) 338.

Thus, a stockholder in a private corporation has the right, under the New York act entitled "Special Provisions Relating to Certain Corporations" at any reasonable time during the usual hours of business within thirty days previous to an election of directors, not only to inspect the books in which the transfers of stock are registered and books containing the names of stockholders, but also to take a copy or memorandum of the names of the stockholders. *Cotheal v. Brouwer*, 5 N. Y. 562, 10 Barb. 216.

And the right of a shareholder in a corporation under the companies act of 1862, § 32, to require a copy of the register on payment, is in addition to, and not in substitution for, the right of the shareholder to take his own notes and copies if he likes, upon making an inspection thereof. *Boord v. African Consol. Land & Trading Co.* [1898] 1 Ch. 596, 77 L. T. N. S. 553.

And the right of a debenture stockholder of a stock company to inspect and peruse the register, conferred by the companies clauses act of 1863, § 28, includes the right to make minutes therefrom and take copies thereof. *Mutter v. Eastern & M. R. Co.* L. R. 38 Ch. Div. 92, 36 Week. Rep. 401, 57 L. J. Ch. N. S. 615, 59 L. T. N. S. 117.

So, a debenture stockholder in a corporation entitled to inspect the register under the companies act of 1862, § 43, providing that every limited company shall keep a register of all mortgages and charges specifically affecting its property, includes the right to take copies of the register, and such right is not affected by the fact that the section does not require the addresses of the encumbrancers to be inserted in their register, and that therefore a stockholder would be unable to communicate with them. *Nelson v. Anglo-American Land Mortg. Agency Co.* [1897] 1 Ch. 130, 66 L. J. Ch. N. S. 112, 75 L. T. N. S. 482.

The right to take copies of the list of stockholders of a corporation, conferred by Constitution or statute, however, can only be exercised 45 L. R. A.

for a reasonable and proper purpose. *Com. v. Empire Pass. R. Co.* 134 Pa. 237.

And permission will not be given a stockholder in a corporation to have an expert accountant make an examination of the books of the corporation in an action in equity which might be maintained as a bill for an accounting, in which case the testimony could be taken in the ordinary way, and a *subpoena duces tecum* would produce all the books and papers which could be examined by the complainant or his expert in the usual course of the proceeding. *Clarke v. Eastern Bldg. & L. Asso.* 89 Fed. Rep. 779.

Pennsylvania Const. 1874, art. 17, § 2, providing that a list shall be kept at the office of the company, and that it shall be open to the inspection of stockholders and creditors, does not confer the right to take copies of the list. *Com. v. Empire Pass. R. Co.* 134 Pa. 237.

As to taking memoranda or copies of books of a corporation in the hands of a receiver, see *Re Tiebout*, 19 N. Y. Week. Dig. 570, *infra*, III. g. 2.

e. Time of inspection.

A stockholder in a corporation has not the right to examine the books of the corporation at such times as he might desire; his right is limited to examination at all reasonable times. *WEIHENMAYER v. BITNER*.

The stockholders in a private corporation have the right to inspect the books of the corporation and take minutes therefrom at all reasonable times only. *Deaderick v. Wilson*, 8 Baxt. 108; *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669; *People, Onderdonk v. Mott*, 1 How. Pr. 247; *Lewis v. Brainerd*, 53 Vt. 510.

And this seems to be the rule under the statutes as well as at common law. See *Stone v. Kellogg*, 165 Ill. 192; *Foster v. White*, 86 Ala. 407, *supra*, III. b; *Holland v. Dickson*, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320, *infra*, VI. b.

And an order for inspection of books of a corporation by a stockholder should be so drawn as not to inconvenience the transaction of the corporate business. *Duffy v. Mutual Brewing Co.* N. Y. L. J. Oct. 3, 1892, p. 18, as reported in *Cook on Stock, Stockholders & Corp. Law*, § 516.

Individual shareholders in a corporation cannot appropriate the books thereof for the purpose of inspecting them to an unreasonable extent and to the detriment of the interest of the corporation and the rights of the other share-

by them; and they are also instructed that the fact that plaintiff is conducting the hosiery business for himself has nothing to do with this case.

Defendant's prayers were as follows:

1st. The jury are instructed that the plaintiff has offered no evidence legally sufficient to find a verdict for the petitioner, and the verdict of the jury must be for the defendant.

2d. If the jury believe from the evidence that some time in the month of December, 1897, the petitioner came to the office of J. Irvin Bitner, secretary of the Windsor Knitting Mills, and then and there stated to the said secretary that he wanted to make an examination or investigation of the affairs of the Windsor Knitting Mills, as he thought the books were not properly kept, and the said secretary did then and there refuse to permit said petitioner to take possession of or inspect any books of the Windsor Knit-

ting Mills, which were then in the possession of the said secretary, that said want on the part of the petitioner was too indefinite and general, that said secretary properly refused the want of the petitioner, and the verdict of the jury must be for the defendant.

3d. The jury are instructed that if they believe from the evidence that some time during the month of December, 1897, the petitioner came to the office of J. Irvin Bitner, secretary of the Windsor Knitting Mills, and demanded an inspection of the books of the Windsor Knitting Mills; and further find from the evidence that the said secretary did not refuse such inspection,—then their verdict must be for the defendant.

4th. The jury are instructed that if they believe from the evidence that the petitioner demanded an inspection of the books of the Windsor Knitting Mills in the possession of its secretary, J. Irvin Bitner, without show-

holders, but the convenience of the corporation and the convenience of the shareholder must to some extent yield to each other, and the rights of the one cannot be exercised unreasonably as against the other. *State, Wilson, v. St. Louis & S. F. R. Co.* 29 Mo. App. 301.

And where a stockholder in a corporation is given the right to inspect its books at a particular time in accordance with his demand, he cannot claim that he had no assurance that at some future time the right would be denied him, and in the absence of proof upon his part that some right would probably be denied him in the future he cannot thereafter maintain a suit in equity to prevent the secreting of the books and the putting of any obstacle in the way of his examining the same and to compel the delivery of the books for inspection. *Boardman v. Marshall-town Grocery Co.* 105 Iowa, 445.

And a judgment in a mandamus proceeding requiring permission to a stockholder to inspect books of a corporation for two hours a day for ten days will not be vacated on the ground that the time granted was unreasonable, where the relator offered evidence tending to show that time would be necessary for the examination, and the respondent introduced no evidence on the subject. *State, Spinney, v. Sportman's Park & Club Asso.* 29 Mo. App. 326.

So, a stockholder in a corporation who demands an inspection of the corporation books, and is given permission and tries to make the examination himself without assistance because the expert whom he had employed was detained by sudden illness in his family, but finds that his examination had not been as thorough as it would have been had he been accompanied by the expert, is entitled to a further examination with an expert. *Blymyer v. Blymyer Iron Works Co.* 5 Ohio N. P. 71.

For instances of statutes held to give an absolute right to inspect at any time, see *Foster v. White*, 86 Ala. 467; and *People, McDonald, v. United States Mercantile Reporting Co.* 20 Abb. N. C. 192,—*infra*, VI. a.

1. The books and papers inspected.

The common-law right to inspect includes all the books and records of the corporation. *Lewis v. Brainerd*, 53 Vt. 510.

And a stockholder in a corporation has the right of access to the proper sources of knowledge as to how the affairs of the corporation are conducted, and in the absence of restriction by statute, charter, or rules and by-laws passed in conformity therewith, a stockholder in a

banking company has the right to inspect the discount book of the bank within proper and reasonable hours. *Cockburn v. Union Bank*, 13 La. Ann. 289.

So, in *State, Immanuel Presby. Church, v. Riedy*, 50 La. Ann. 258, it was said that the books and records of a religious society are subject to inspection by those having an interest, but the case turned upon the question of the right to mandamus to compel the delivery of the books to the proper officers entitled thereto.

And in *Cockburn v. Union Bank*, 13 La. Ann. 289, *supra*, *Hatch v. City Bank*, 1 Rob. (La.) 470, *infra*, VI. a, was limited and criticised, the court saying that it cannot be considered as decisive authority against the view expressed in the case at bar because it was the opinion of two judges, and not of the majority of the court.

The question as to what books and papers may be inspected under the statutes is one of statutory construction depending upon the language of the statute authorizing inspection.

Thus, the intention of the provision of Md. Code, art. 23, § 5, that the books of account of the transactions of a corporation shall be open at all times to the inspection of the stockholders or members, is that the stockholders shall have a full opportunity of informing themselves of the business of the corporation, and that nothing could be concealed from them, and the stockholder is entitled to an inspection of all books, papers, and accounts of every kind and description whatsoever of the corporation. *WEIHENMAYER V. BITNER.*

So, under Iowa Code, § 1078, providing that the stock books of a company showing designated facts, or a correct copy thereof showing such facts, shall be subject to the inspection of any person desiring the same, and Iowa Code, § 1078, requiring the treasurer or assistant treasurer of a railroad company to keep a record of the financial condition of the corporation which may be inspected at all reasonable hours by any stockholder, it is the absolute right of any person to examine the stock and transfer books of a corporation whether he shows himself interested or not; and a stockholder has the right at all reasonable hours to inspect the records showing the financial condition of the corporation. *Ellsworth v. Dorwart*, 95 Iowa, 108.

And the register which a shareholder in a corporation is entitled to inspect under the English companies act of 1862, § 32, includes the entries of names of persons who have been, but have ceased to be, members of the company by reason of the forfeiture of their shares or

ing good and sufficient reasons therefor, when their verdict must be for the defendant; and the jury are further instructed that a belief or speculation on the part of the petitioner that the affairs of said mills were not being properly conducted is not a good and sufficient reason giving the right to the petitioner to make such inspection.

The court refused all the prayers and said: "The jury are instructed that, under the pleadings and evidence in this cause, the plaintiff is not entitled to recover, and their verdict must be for the defendant."

Mr. W. C. Griffith, for appellant:

An instruction to the jury, "that under the pleadings and evidence the plaintiff is not entitled to recover," is entirely too general.

Kent v. Holliday, 17 Md. 395; *Western Maryland R. Co. v. Carter*, 59 Md. 311; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 323; *Reier v. Strauss*, 54 Md. 291; *Cook v. Duvall*, 9 Gill, 461.

otherwise. *Boord v. African Consol. Land & Trading Co.* [1898] 1 Ch. 596, 77 L. T. N. S. 553.

So, the word "accounts" in Wis. Laws 1872, chap. 144, § 15, giving a stockholder the right to an inspection of the stock-books and general accounts of the corporation, is not limited to the stock accounts or to the stock-books containing the accounts of the company with the stockholders in relation to the stock held by them; but extends to cover books containing the general accounts of the business of the corporation, and is not limited by the fact that the section is found under the heading of capital stock. *State, Bergenthal, v. Bergenthal*, 72 Wis. 314.

And under the English companies clauses act of 1845, §§ 43, 63, and the companies clauses act of 1863, § 24, the right given holders of stock of inspecting the registers of the company is not confined to an inspection of the names and addresses only of the holders of stock, but extends also to an inspection of the amounts of stock held by the other stockholders. *Holland v. Dickson*, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320.

But N. J. act, § 50, with relation to corporations authorizing the chancellor or the supreme court or any justice thereof to order that the books of a corporation be brought into the state, does not extend to and include the papers and memoranda of the company. *Huyler v. Cragin Cattle Co.* 42 N. J. Eq. 139, 40 N. J. Eq. 392.

And the right guaranteed to stockholders of a corporation by a provision in its by-laws that the treasurer shall keep or cause to be kept a full and accurate account of all the business of the company in suitable books, which books shall at all times be open to the inspection of any of the stockholders, is the right to inspect the books of account of the business of the company, and does not include the right to inspect the stock ledger, the expression "business of the company" having reference to its manufacturing and commercial transactions. *Lyon v. American Screw Co.* 16 R. I. 472.

And a deed of settlement of a joint-stock company formed under 7 & 8 Vict. chap. 110, and registered under that act, and afterwards under 19 & 20 Vict. chap. 47, containing a clause that "the books wherein the proceedings of the company are recorded shall be kept at the principal office of the company, and shall be open to the inspection of the shareholders every day 45 L. R. A.

The instruction of the court taking the case from the jury was erroneous because an inspection of the record shows there was evidence tending to prove the issue joined in favor of the plaintiff, which should have been submitted to the jury.

Code Pub. Gen. Laws, art. 23, § 5.

When a statute gives to stockholders the right to examine corporate books, mandamus seems to be granted as a matter of right.

Cook, Stock & Stockholders, § 511, note.

If under the rules of law the party is entitled to the writ, it must be issued.

Brooke v. Widdicombe, 39 Md. 388.

A stockholder is not to be denied the right to inspect the books because he is hostile to the corporation and may use the information to its injury, nor because the books are kept in a particular way, nor because they contain, besides the information to which he is entitled, other information which he has no right to demand. It is its duty to permit

of the year except on Sundays and holidays," which provides that separate books shall be kept of the minutes of the proceedings at the general meetings of the shareholders, and of the minutes of the proceedings of the directors, gives shareholders the power to inspect the book of minutes of the proceedings of the general meetings only, and not the book of minutes of the proceedings of the directors. *Queen v. Marikita & N. G. Min. Co.* 1 El. & El. 289.

So, a shareholder in a corporation sued by the company for calls under a provision in the charter empowering the directors to make calls under certain regulations, and directing them to enter their proceedings in the books, and declaring it competent for stockholders at any general or special meeting of the company to call for and inspect all books and documents relating to the company, and to require any information from the directors, is not entitled to inspect the minute book of the company and of the directors' meeting,—particularly with respect to the claim upon which he was sued for the purpose of framing his pleading. *Birmingham, B. & T. Junction R. Co. v. White*, 5 Jur. 800, 4 Perry & D. 649, 1 Q. B. 282, 2 Railway Cas. 863.

And the general turnpike act, 3 Geo. IV., chap. 126, § 73, which re-enacted a local act directing that the trustees of the turnpike company shall keep a book in which they shall enter their accounts, which book shall be open to the inspection of the trustees or any creditor on the tolls, directing that all turnpike roads shall keep a book of their orders and proceedings which shall be open to the inspection of any of the trustees, supersedes the provisions of the original local turnpike act, directing that the trustees shall keep books in which they shall enter their accounts and their orders and proceedings, and that all persons shall have access to such entries, and thereby limits the power of inspection given in the previous act to the whole public, to trustees and creditors in the respective cases of orders and accounts. *King v. Trustees of Northleach & Witney Roads*, 5 Barn. & Ad. 978.

The fact that a stockholder requested and prayed for an inspection of more than he was entitled to inspect, however, does not justify the court in denying him the right to make any inspection. *Ellsworth v. Dorwart*, 95 Iowa, 108.

But Mich. Comp. Laws, § 1915, providing that plank-road companies shall keep a stock-book which shall be open at the office of the corporation during business hours, for the in-

an inspection of such books as it keeps for the purpose of recording the transactions which the statute gives the stockholder a right to know.

1 Beach, *Priv. Corp.* § 77; *Mitchell v. Rubber Reclaiming Co.* (N. J.) 24 Atl. 407; *Cook, Stock & Stockholders*, §§ 511, 519, footnote 3; 4 *Thomp. Corp.* §§ 4406, 4412, 4414.

The directors are deemed to be the mind and soul of the corporate entity. What they do the corporation does, and, conversely, what the corporation does, they do. They are the corporation to all purposes, as in Maryland the trustees of a religious society are the body politic.

Maynard v. Fircmen's Fund Ins. Co. 34 Cal. 48, 91 Am. Dec. 672; *Morse, Banks & Banking*, 90; 17 Am. & Eng. Enc. Law, pp. 57, 58, 97; 1 *Beach, Priv. Corp.* § 227; *Burill v. Nahant Bank*, 2 Met. 163, 35 Am. Dec.

spection of all persons, furnishes no remedy to a stockholder in such a corporation, where he asked for inspection of all the books, records, and papers of the company, as such a demand is not within the statute. *People, Bishop, v. Walker*, 9 Mich. 328.

So, a corporation cannot be permitted to defeat the provisions of the Revised Statutes requiring corporations to keep stock-books open to inspection by stockholders, by omitting to keep the book prescribed, and if it does not keep the book which the statute prescribes, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statute gives the stockholders the right to know. *People, Richmond, v. Pacific Mail S. S. Co.* 50 Barb. 280.

And a stockholder of a corporation cannot be deprived of the right to inspect the stock-books of the corporation because they are kept in a particular way or because they contain, along with the information to which he is entitled, other information which he has no right to know. *Ibid.*

Irrelevant parts of books of a corporation on examination by a stockholder may be sealed up. *Napier v. Staples*, 2 Molloy, 270.

And the books of a foreign corporation organized and doing business in a distant state, and which are probably in daily and frequent use, should not be required to be produced before a referee in the state by an order for inspection, but sworn copies of their contents which relate to the subject-matter mentioned in the order should be produced and delivered within a reasonable time to be designated by the order. *Ervin v. Oregon R. & Nav. Co.* 22 Hun, 566.

The book which a corporation is required to keep at its office for inspection of stockholders, by N. Y. Laws 1848, chap. 40, § 25, is defined by the character of the entries which it must contain which relate to stockholders, the shares owned by them respectively, and the amount of stock actually paid in; and the fact that a stockholder requests to inspect the stockbook and record book of the company when the books containing the store entries were known as the certificate book and stock ledger, does not prevent a recovery of the penalty prescribed by that statute, for its violation. *Kelsey v. Plauder Process Fermentation Co.* 20 N. Y. S. R. 523.

Effect of business convenience or necessity on.

The fact that if many shareholders should de-
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395; 1 *Morawetz, Priv. Corp.* §§ 510, 517, 536; *Genesee County Sav. Bank v. Michigan Barge Co.* 52 Mich. 438; *Hoyt v. Thompson*, 19 N. Y. 207; *Cleveland & M. R. Co. v. Himrod Furnace Co.* 37 Ohio St. 321.

When, therefore, the statute says the president and directors shall keep, etc., it is equivalent to saying the corporation shall keep, because the transactions of the president and directors cover the whole ground of corporate activity.

Cook, Stock & Stockholders, §§ 708, 709, 712.

Whatever language is used, everywhere the purpose is to give the stockholders an inspection of the books of the company. The most liberal interpretation is given to the statutes, because the relation of trustee and *cestui que trust* exists between the directors and stockholders, and courts seek to favor the *cestui que trust* in all cases.

mand the right of inspection separately, there might be some confusion caused in the exercise of it, cannot be considered against the right of a shareholder to an inspection. *Com. v. Philadelphia & R. R. Co.* 3 Pa. Dist. R. 115.

And under 1 *Starr & C. (Ill.) Stat.* 616, providing that every stockholder in a stock corporation shall have the right at all reasonable hours by himself or by his attorney to examine the records and books of account of the corporation, business necessity cannot be regarded as a sufficient excuse for noncompliance with the law. *Crown Coal & Tow Co. v. Thomas*, 60 Ill. App. 234.

So, the duty of the directors and executive officers of a bank under the Missouri statute is to permit the examination of the books of a bank upon proper and reasonable request of the stockholder, and such examination cannot be refused on the ground that the bank occupies such a confidential and trust relation toward its customers and depositors that it would be a breach of duty on the part of the bank to open up its books for inspection. *State, Doyle, v. Laughlin*, 53 Mo. App. 542.

And a corporation not denying that an inspection of its stock ledger would give a stockholder demanding it information to which he had a right cannot justify its refusal to exhibit it on the ground that it is also a book of accounts between the company and its shareholders, showing their dealings in the stock of the company, and that it is always regarded as confidential between the parties concerned, and that the information might be used for improper purposes. *People, Richmond, v. Pacific Mail S. S. Co.* 50 Barb. 280.

And the policy of a corporation or the desire of its officers to prevent a disclosure of the private affairs of the stockholders by furnishing their names and the accounts is no answer to a demand by a stockholder of the right to inspect the corporate books. *Com. v. Philadelphia & R. R. Co.* 3 Pa. Dist. R. 115.

And the shareholders of a corporation are entitled to inspect the books and papers of the company which are their property, though there is a secrecy clause in the articles of association, and though in the course of inspection they will become acquainted with matters which should be kept secret, but it is their duty not to divulge the information so acquired, and the court will restrain them by injunction from so doing, and punish them if they should do so. *Re Birmingham Bkg. Co.* 36 L. J. Ch. N. S. 150, 15 L. T. N. S. 203.

In *Rodger Ballast Car Co. v. Perrin (Ill.)* 17

1 Greenl. Ev. §§ 120, 121, 474, 483, 485; Cook, Stock & Stockholders, § 727; 4 Thomp. Corp. §§ 4406-4414.

Mr. J. A. Mason, for appellee:

The words "accounts of the transactions of the president and directors" certainly must be understood as meaning the ordinary minutes of their proceedings, their resolutions, orders, and records of their actions as a governing body, and not the bank books, day books, ledgers, correspondence, etc., usually kept by any reasonably prudent business person or corporation.

While the appellant is a stockholder in the said mills, he is also at the same place a rival and competitor in a like business as that conducted by the appellee.

Without statutory provision "the stockholder was not entitled, as a matter of right, to a mandamus to allow him to inspect the minutes of the directors' meetings," and

courts required strong cases before the writ would be issued for this purpose.

1 Beach, Priv. Corp. § 75; 1 Cook, Stock & Stockholders, § 517; *Queen v. Mariquita & N. G. Min. Co.* 1 El. & El. 289; *Alabama & F. R. Co. v. Rouley*, 9 Fla. 508; *Lyon v. American Screw Co.* 16 R. I. 472.

If the appellant seeks to rely upon a supposed common-law right, the demand is too broad and general.

1 Beach, Priv. Corp. §§ 75-79; 2 Addison, Torts, § 1496c; *People, Bishop, v. Walker*, 9 Mich. 328; *Queen v. Mariquita & N. G. Min. Co.* 1 El. & El. 289; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Com. v. Empire Pass. R. Co.* 134 Pa. 237; *Queen v. Undertakers of Grand Canal*, 1 Ir. L. Rep. 337; *Rea v. Newcastle upon Tyne*, 2 Strange, 1223; *Statc, Rosenfeld, v. Einstein*. 46 N. J. L. 481; *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun, 1.

Nat. Corp. Rep. 819, however, it was held that an injunction will not lie, under the Illinois act requiring corporations to keep certain books of account and providing that every stockholder shall have the right at all reasonable times by himself or by his attorney to examine the records or books of account of the corporation, to prevent a stockholder from exercising his right to examine such books, or to restrain him from divulging any information obtained therefrom.

And in *Pratt v. Meriden Cutlery Co.* 35 Conn. 36, it was held that a mandamus will not issue on petition of a stockholder of a corporation to compel it to keep its books at the town in the state where the office of its treasurer was located under Conn. Gen. Stat. p. 173, § 407, providing that the account books of every corporation shall be kept and shall be open to the examination of stockholders at the town within the state where the corporation is located, or at the office of its treasurer within the state where the corporation had a factory and its principal office in that town and a store for the sale of its manufactured goods in New York, the books pertaining to the manufacturing being kept at the home office, but the books containing accounts of sales and the bank account being kept in New York, where the keeping of the latter books in New York was indispensable to its business, where every facility for obtaining information was given the stockholder, and a monthly statement of the New York books was entered in the books at the home office.

See also on this subject, *Re Pierson*, 28 Misc. 726, *infra*, VI. a.

h. To what corporations applicable.

1. Domestic corporations.

It has never been denied that the common-law doctrine of the right of a stockholder to inspect the books of a corporation applies to all domestic stock companies, and it is plain that all the statutory provisions on the subject were especially intended to apply to that class of corporations.

2. Foreign corporations.

In *People, Field, v. Northern P. R. Co.* 18 Jones & S. 456, it was intimated, but not decided, that the courts of a state have no power, in the absence of statutory provision, to interfere with a foreign corporation or control it by mandamus or compel it to permit stockholders to inspect its books.

And in *Re Rappleye*, 43 App. Div. 84, it was 45 L. R. A.

held that a stockholder's right to inspect the books of a foreign corporation depends upon the law of that corporation's being, and can only be enforced by the court of its legal existence, such corporation having no legal entity in the state although its officers, property, and books may be found there.

Under N. Y. Laws 1842, chap. 165, however, it is the absolute duty of a transfer agent in this state of any monied or other corporation existing beyond the jurisdiction of the state, to exhibit at all reasonable times during the usual hours of transacting business to any stockholder of a foreign corporation when required by him, the transfer book of such foreign corporation, and also a list of the stockholders thereof, if he has power to do so. *Kennedy v. Chicago, R. I. & P. R. Co.* 14 Abb. N. C. 326; *People, Del Mar, v. St. Louis & S. F. R. Co.* 19 Abb. N. C. 1; *Commerford v. Williams, etc.*, Co. N. Y. L. J. Oct. 7, 1890, cited in 1 Cook, Stock & Stockholders & Corp. Law, p. 680.

And under the New York stock corporation law, as amended by Laws 1897, chap. 384, providing that every foreign stock corporation having an office for the transaction of business in the state, with certain exceptions, shall keep therein a book to be known as a stock-book, open to inspection by stockholders, such book must be kept in the office referred to, and a stockholder has the right to insist upon their making an inspection of the book, and is not required to go elsewhere for that purpose. *Recknagel v. Empire Self-Lighting Oil Lamp Co.* 24 Misc. 193.

And that a law exists in the state in which a foreign corporation was formed, requiring it to keep a stock register or transfer book at the home office in that state, is no answer to an application for mandamus to compel the exhibition of the transfer book of the corporation to a stockholder in the state, where it appears that the company has a book containing entries of transfers of stock in the state, though it may be known by another name. *People, Del Mar, v. St. Louis & S. F. R. Co.* 19 Abb. N. C. 1.

Under 1 Starr & C. (Ill.) Stat. p. 616, requiring that the directors and trustees of a stock corporation shall cause to be kept at its principal office or place of business in the state correct books of account of all its business which shall be open to inspection by stockholders at all reasonable times, copies or duplicates may properly be kept in the state in lieu of the original books; but the fact that extra expense would be entailed by keeping two sets of books

No specific request or demand was made. No proper purpose was shown or stated. Hence no refusal on part of appellant of inspection of accounts of transactions of presidents and directors.

King v. Proprietors of Wilts & B. Canal Navigation, 3 Ad. & El. 477; *Queen v. Undertakers of Grand Canal Co.* 1 Ir. L. Rep. 337; High, Extr. Legal Rem. §§ 13, 310.

Even though there was a proper demand to inspect the accounts of the transactions of the president and directors, and a refusal to permit the inspection if the reasons are purely capricious, curious, suspicious, and speculative, courts will not grant the writ.

Com., Sellers, v. Phoenix Iron Co. 105 Pa. 111, 51 Am. Rep. 184; 1 Cook, Stock & Stockholders, § 514, note; 1 Beach, Priv. Corp. § 766; *People, Bishop, v. Walker*, 9 Mich. 328; *Lyon v. American Screw Co.* 16 R. I. 472; *King v. Merchant Tailors' Co.* 2

Barn. & Ad. 115; *Birmingham, B. & T. Junction R. Co. v. White*, 1 Ad. & El. N. S. 281; *French v. McMillan*, 43 Hun, 188; *State, Rosenfeld v. Einstein*, 46 N. J. L. 482; 4 Thomp. Corp. §§ 4419, 4420, 4428; *Pratt v. Meriden Cutlery Co.* 35 Conn. 36; *Imperial Gas Co. v. Clarke*, 7 Bing. 95.

Bryan, J., delivered the opinion of the court:

Weinhenmayer filed a petition for the writ of mandamus against Bitner, secretary of the Windsor Knitting Mills, a corporation. The petitioner is a stockholder in the said company, owning twenty-five shares of its stock of the par value of \$100 a share. He asserts, in substance, that he has a right to inspect the accounts of the transactions of the president and directors of the corporation, and that Bitner, its secretary, refuses to permit him to make the inspection.

is immaterial. *Crown Coal & Tow Co. v. Thomas*, 60 Ill. App. 234.

And refusal of a request of a stockholder in a corporation for opportunity to inspect the books, which request was not unreasonable, is a proper cause under N. J. Stat. Rev. p. 186, § 50, for ordering the books to be brought into the state in order that the stockholders might have an opportunity of inspecting them there. *Liuylar v. Cragin Cattle Co.* 40 N. J. Eq. 392.

So, a statute of another state under which a corporation is formed, which allows it to keep an office outside of that state and to keep books outside of it, and allows business to be transacted elsewhere than in that state, and requires the officers of the company to furnish the books to stockholders for inspection, is not a local statute but is transitory in its nature, and follows the officers into another state, and prescribes their duties there as to producing such books as well as at home, so that officers having charge of the books of the corporation in the latter state may be compelled to produce them for the inspection of stockholders in that state, and stockholders therein may maintain mandamus to enforce their rights of inspection. *State, Templin, v. Farmer*, 7 Ohio C. C. 429.

And a foreign corporation holding property and doing business within the state is considered and treated as a domestic corporation having the same rights and protection in carrying on its business, and being subject to the same duties and answerable to the same tribunals, as a domestic corporation, and is amenable, therefore, to a state law providing for the right of inspection of the books of a corporation by its stockholders. *State, Richardson, v. Swift*, 7 Houst. (Del.) 137.

And a stockholder in a corporation is entitled to a mandamus to compel the custodian of corporate documents to allow him to inspect and copy them at proper times and on proper occasions, where he clearly shows a right thereto, though he was not a resident of the state, and the corporation was a foreign corporation, when it had property in the state and the custodian who was an officer of the corporation being domiciled within the state having the books therein. *Swift v. State, Richardson*, 7 Houst. (Del.) 338; *State, Richardson, v. Swift*, 7 Houst. (Del.) 137.

And he is entitled to a writ of mandamus for the enforcement of such right against such custodian, he being within the jurisdiction of the court. *State, Richardson, v. Swift*, 7 Houst. (Del.) 137.

And a corporation has no power to prohibit 45 L. R. A.

its officers or agents who are custodians of its books and papers from obeying the mandate of the court to permit inspection and take copies thereof. *Swift v. State, Richardson*, 7 Houst. (Del.) 338.

So, the supreme court of the state of New York has jurisdiction to allow a writ of mandamus on application of a nonresident stockholder in a foreign corporation for a mandamus to enforce his right to inspect such books of a corporation as are within its territorial jurisdiction, and such a proceeding is not subject to an objection that the jurisdiction can be exercised under N. Y. Code, § 1780, in an action only, and not in a special proceeding, as no distinction is made between residents and nonresidents of the state. *Re Crosby*, 28 Misc. 300.

But an application for a writ of mandamus to compel a foreign corporation to exhibit its transfer book to a stockholder when no action is pending between them, if authorized, is addressed to the sound discretion of the court, and should be exercised with discrimination and care; and where the stock owned by the applicant was transferred to him long after the resolution of the board of directors of the corporation authorizing the execution of a mortgage which he opposes, and to aid which opposition the inspection is sought, the application will be denied. *People, Field, v. Northern P. R. Co.* 18 Jones & S. 456.

And a proceeding for mandamus cannot be maintained in the courts of the state of New York to enforce the right of a stockholder to inspect the books and records of a corporation, where the corporation was organized under the laws of another state and the stockholder simply asserts what he deems to be his right as a member of the company, and the application is not made in an action, and has no relation to any cause of action which he has against the corporation. *Re Rappleye*, 59 N. Y. Supp. 338; *Re Crosby*, 59 N. Y. Supp. 340.

In *Re Crosby*, 59 N. Y. Supp. 340, *State, Richardson, v. Swift*, 7 Houst. (Del.) 137, and *State, Templin, v. Farmer*, 7 Ohio C. C. 429, *supra*, were distinguished upon the ground that they seem to have proceeded upon views as to the jurisdiction over foreign corporations peculiar to their respective states, but that no such jurisdiction has been conferred upon the courts by the statutes of this state in which a different view of the common-law jurisdiction has always prevailed.

So, a peremptory writ of mandamus can only issue where the facts are undisputed, and it is within the power of the person to whom the writ

He founds his demand of right on the 5th section of the 23d article of the Code. It is in these words: "The president and directors of every corporation shall keep full, fair, and correct accounts of their transactions, which shall be open at all times to the inspection of the stockholders or members." The right thus given to the stockholder is unconditional and unqualified. The stockholder has a right to the information contained in the accounts of the transactions of the corporation, and he has a right to obtain this information by his own personal inspection of them. He is not required to accept anything else in lieu of, or as a substitute for, this personal examination. If this be denied him, an action for damages would be a very inadequate and imperfect remedy. The relief given to him by the law would not render complete justice, unless it secured to him the precise right which had been unlawfully withheld from him. The

corporation is charged with an imperative duty to the stockholder. It appears to us that the case has every feature which marks the character of the writ of mandamus. In *George's Creek Coal & I. Co. v. Allegany County Comrs.* 59 Md. 255, speaking of this writ, the court said: "Its office, as generally used, is to compel corporations, inferior tribunals, or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature, is imperative, and to the performance of which the party applying for the writ has a clear legal right. The process is extraordinary, and, if the right be doubtful, or the duty discretionary, or of a nature to require the exercise of judgment, or if there be any ordinary adequate legal remedy to which the party applying could have recourse, this writ will not be granted." *Foster v. White*, 86 Ala. 467, was very much like the present. The Code of Alabama provided (§ 1677) that the

would issue to perform the act, and it will not issue to compel the transfer agent of a foreign corporation to exhibit to a stockholder the transfer book and a list of the stockholders, which he declined to do upon the ground that the books had been sent to the home office in another state, and were not, therefore, under his control. *People, Hoffman, v. Tedcastle*, 12 Misc. 469.

In the above case *People, Del Mar, v. St. Louis & S. F. R. Co.* 44 Hun, 552, *infra*, VIII. a, was limited and explained, the court saying that that case did not authorize a reference as to a disputed fact, but one where further information was required.

So, N. Y. Laws 1842, chap. 165, § 3 Edmund's Gen. Stat. 677, to compel transfer agents of foreign corporations to exhibit a list of the stockholders thereof, is applicable only to the transfer agents in the state of foreign corporations, and it is only upon such transfer agent or his clerk or officers that the forfeiture provided for by that act is imposed, and proceedings for a writ of mandamus to compel the exhibition of the transfer books of a foreign corporation and of a list of the stockholders can properly be taken against such transfer agent only. *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun, 1.

A statute providing that the stockholders of all private corporations have the right of access to inspection and examination of the books, records, and papers of the corporation at reasonable and proper times applies to national banks. *Winter v. Baldwin*, 89 Ala. 483.

And U. S. Rev. Stat. §§ 5240, 5241, authorizing the appointment of bank examiners by the comptroller of the currency, and providing that banks shall not be subject to any visitatorial powers other than those authorized by Congress or vested in the courts of justice, is not intended to curtail, or even to regulate, the rights of stockholders or their relations toward the bank, so as to exempt the bank from operation of the state statute giving stockholders the right to inspect their books. *Ibid.*

The provisions of N. Y. Act 1842, p. 165, designed to compel transfer agents of foreign corporations to exhibit lists of their stockholders, have no application to domestic corporations. *Sage v. Lake Shore & M. S. R. Co.* 70 N. Y. 220.

3. Insolvent corporations.

The question whether or not an inspection of books will be accorded to a stockholder when 45 L. R. A.

the corporation is insolvent and has gone into the hands of a receiver is one resting in the discretion of the court unhampered by any decisions touching the right to such an inspection, while the corporation was still a going concern in the hands of its officers and directors. *Chable v. Nicaragua Canal Constr. Co.* 59 Fed. Rep. 846.

The right of an individual stockholder to obtain from the court an inspection of the books of the corporation in the court's custody in the hands of a receiver, in order to inform himself as to past transactions and the present condition, or to enable him to determine what may be most conducive to the protection of his interests as a stockholder in the future, is one entitled to the favorable consideration of a court of equity. *Ibid.*

And a stockholder who in good faith asks for an examination of the books of a corporation in the custody of the court in the hands of a receiver in order to enable him to determine whether or not a proposed plan of reorganization is a desirable one for himself and the other stockholders to enter into, should be accorded such inspection under proper regulations as to time and circumstance, so as not to interfere either with the transaction of the receiver's duties or with such inspection as his fellow members may be entitled to. *Ibid.*

A receiver of a corporation is an officer of the court and a trustee for the stockholders and bondholders; and stockholders are entitled to an inspection of his books, papers, and accounts, relating to the receivership, which should be allowed on all reasonable applications made for that purpose, though he should not be subjected to purely inquisitive or fishing expeditions. *Fowler's Petition*, 9 Abb. N. C. 268.

And an application by a stockholder of a corporation in the hands of a receiver for mandamus to compel the receiver to exhibit his books, accounts, and contracts for the inspection of a stockholder as distinguished from those of the company prior to his appointment, based on charges made against him in regard to the execution of the trust, should be granted unless some good reason is shown to exist why such inspection should not be made. *Ibid.*

And stockholders should be permitted to examine the books of a bank and take abstracts thereon for the purpose of obtaining information with reference to the condition of the bank, its property, assets, and liabilities after it has been judicially dissolved, and its corporate

stockholders of private corporations should "have the right of access to and inspection and examination of the books, records, and papers of the corporations at reasonable and proper times." It was held by the court that a stockholder could enforce his statutory right by mandamus; and that, if his petition alleges an application at a reasonable and proper time, and its refusal, it is not necessary that it should aver a definite legitimate purpose in making the application, or negative an improper purpose; and that, if any good reason existed why the inspection should not be permitted, it ought to be shown as a matter of defense. We may also refer to 1 Redfield on Railways, 467: "No better general rule can be laid down upon this subject than that where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reason-

rights, privileges, and franchises adjudged to be forfeited, and that its property and assets be applied to the payment of its debts, and the balance, if any, distributed among its stockholders, and a receiver appointed. *People v. Cataract Bank*, 5 Misc. 14.

But receivers having nothing to do with the stock and internal management of a corporation need not be made parties defendant in a proceeding for a mandamus to enforce a stockholder's right to inspection of the stock-books of the corporation. *Com. v. Philadelphia & R. R. Co.* 3 Pa. Dist. R. 115.

And an application by a stockholder of a corporation in the hands of a receiver for an inspection of the books of the corporation, the object of which is to obtain material to be used in convincing other stockholders that a plan of reorganization is one which should not be carried out, will be refused where it appears that he did not become a stockholder until nearly six months after the appointment of the receiver, and that therefore he occupies a position of a mere speculator. *Chable v. Nicaragua Canal Constr. Co.* 59 Fed. Rep. 846.

And the provision of the companies act of 1862, § 22, that the register of an incorporated company is to be open to inspection on payment therefor by any member of the company or by any other person during business hours for not less than two hours each day, does not apply to the case of a company in liquidation, where the register has passed into the hands of a liquidator. *Re Kent Coalfields Syndicate*, 67 L. J. Q. B. N. S. 500, [1898] 1 Q. B. 754, 78 L. T. N. S. 443.

And a clause in the articles of association in a company directing that the books of account thereby directed to be kept should be open to the inspection of the shareholders during the hours of business, subject to any reasonable restrictions as to the time and manner of inspecting the same that might be imposed by the company in general meeting, is not applicable after the company has gone into voluntary liquidation. *Re Yorkshire Fibre Co. L. R.* 9 Eq. 650, 18 Week. Rep. 541.

The authority of the court in an application by a stockholder of a corporation in the hands of a receiver for a mandamus to enforce his right to make extracts from the corporation books does not rest upon the technical right of stockholders or creditors as between themselves and the corporation under the statutes relating to corporations, but upon grounds of justice

and equity in administering the trust in the hands of the receiver, and the matter is therefore one for the exercise of the discretion of the court. *Re Tiebout*, 19 N. Y. Week. Dig. 570.

IV. The remedy.

a. By mandamus.

The usual and customary method of enforcing a stockholder's right to inspect the books of the corporation is by mandamus addressed to the custodian of the books.

And that mandamus is the proper remedy of a stockholder who is denied the right to inspect the books of a corporation is held in *State, Wilson, v. St. Louis & S. F. R. Co.* 29 Mo. App. 301; *Cockburn v. Union Bank*, 13 La. Ann. 289; *State, Richardson, v. Swift*, 7 Houst. (Del.) 137; *Stettauer v. New York & S. Constr. Co.* 42 N. J. Eq. 46; *Re Crosby*, 28 Misc. 300; *People, Harri-man, v. Paton*, 20 Abb. N. C. 195; *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun, 1; *People, Richmond, v. Pacific Mail S. S. Co.* 50 Barb. 280; *People, Mulr, v. Throop*, 12 Wend. 183; *State, Bergenthal, v. Bergenthal*, 72 Wis. 314; *Ranger v. Champion Cotton-Press Co.* 51 Fed. Rep. 61; *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669. And see *RE STEINWAY* and *WEIHENMAYER v. BITNER*.

And mandamus to enforce the right of a stockholder to inspect the books of a corporation will not be withheld simply because his interest is small. *RE STEINWAY*.

The remedy of a stockholder in a corporation who has been denied the right to an inspection of its books to compel such inspection under *Ohio Rev. Stat. § 3254*, providing that the books and records of a corporation shall at all reasonable times be open to the inspection of every shareholder, is by mandatory injunction, and not by mandamus. *Blymyer v. Blymyer Iron Works Co.* 5 Ohio N. P. 71.

Attention is called, also, to the fact appearing incidentally in many of the cases in the preceding subdivisions of this note with reference to the right of inspection, that the questions determined arose in mandamus proceedings.

b. By imposition of a penalty.

A penalty is imposed in some of the states, notably in New York, upon corporations and the officers having custody of their books, for violation of statutory provisions requiring them to keep certain specified books open at designated times and places to the inspection of stockhold-

soms for refusing an application,—for instance, if it were made for some evil, improper, or unlawful purpose. And, if such purpose were alleged and proved, the writ would be denied.

At the trial the petitioner submitted twelve prayers to the court, and the defendant submitted four. The court rejected all the prayers on both sides, and gave an instruction of his own. The petitioner took an exception to the refusal of his prayers and to the instruction given by the court. The petitioner's first prayer insists that the pleadings admit that he was a stockholder, and that he made application to Bitner, the secretary, for permission to inspect the books containing the accounts of the transactions of the corporation, and that Bitner refused to permit him to make the inspection, and that on these grounds he was entitled to the

verdict. We think that these facts are admitted in the first, second, and third paragraphs of the answer, and that the prayer ought to have been granted. The third paragraph of the answer states that the petitioner asked for all books, papers, and accounts of every kind and description whatsoever of the corporation, and that he (the respondent) refused to permit the examination. It was the intention of the provision of the Code which has been mentioned (art. 23, § 5) that the stockholders should have a full opportunity of informing themselves of the business of the corporation, and that nothing should be concealed from them. The section meant that all the transactions should be fully, fairly, and correctly stated, and that these statements should at all times be open to the inspection of the stockholders. The statute recognized the fact that

ers. This penalty is recoverable by action, and is payable in some instances to the complaining stockholder, and in some in part to the stockholder and in part into the public treasury.

c. By action for damages.

A stockholder at common law could maintain an action against the recording officer of the corporation having the custody of its books and records for wilfully refusing to allow him to inspect the same at seasonable and proper times, and recover damages therefor, either actual or nominal as the case might be. *Lewis v. Brainerd*, 53 Vt. 510.

A denial by the company of the right of a stockholder of a corporation to inspect its books in a proper case exposes it to an action either of mandamus whereby the custodian of the books is ordered by the court to permit the desired access to them, or to an action for damages against the corporate officers who prevented the examination. *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669.

d. Other remedies.

While the ordinary and nominal mode of asserting the right of a stockholder to inspect the books of a corporation is by mandamus, it is within the discretion of the court, in an action between the stockholder and the corporation, to order the corporate authorities to permit an inspection of the books of the corporation by the shareholder at any stage of the suit; but it will not make such an order upon the filing of the bill or before the parties had appeared and pleaded, except under the most pressing necessity. *Ranger v. Champion Cotton-Press Co.* 51 Fed. Rep. 61.

But while the supreme court might, independently of statute, by virtue of its supervisory powers, have the right to order an inspection of the books of account of a corporation by a stockholder upon a proper showing, particularly in the absence of any statutory restriction of such power, a stockholder will not be permitted to invoke the aid of the court before exhausting the remedy given to him by N. Y. stock corporation law, § 52, making it the duty of the treasurer of the company upon proper demand to furnish him a statement of the affairs of the corporation under oath, embracing a particular account of all its assets and liabilities, where it appears that this would include all the information which he desires. *People, Clason, v. Nassau Ferry Co.* 86 Hun, 128.

So, the right of a stockholder in a stock company to inspect the registers of the company 45 L. R. A.

given by the companies clauses act of 1845, §§ 45, 63, and of the companies clauses act of 1863, § 28, may be enforced by an injunction restraining interference by the company with a stockholder in the exercise at all reasonable times of his statutory right, and he will not be compelled to apply for a mandamus calling upon the directors to allow inspection. *Holland v. Dickson*, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320.

As to relief by injunction, see also *Blymyer v. Blymyer Iron Works Co.* 5 Ohio N. P. 7, *supra*, IV. a.

The mere fact of a petition, however, is not enough to justify an order of inspection of books of a corporation under the Stannaries act of 1855, § 22, but if grounds are shown the petition may properly be ordered to stand over to allow the petitioner to enforce his right, as a shareholder, to inspection. *Re West Devon Great Consols Mine*, L. R. 27 Ch. Div. 106.

And stockholders in a corporation cannot maintain a bill against the corporation for equitable interposition to compel a discovery in aid of an accounting in the absence of a showing that the matters as to which a discovery is asked could not be ascertained by an inspection and examination of the books, papers, and records of the corporation, and that the right to such inspection and examination could not be enforced by proceedings at law. *Wolfe v. Underwood*, 96 Ala. 329.

And equity has no jurisdiction to compel the submission of the books of a corporation to a stockholder and an expert accountant employed by him, where no fraud is alleged and the corporation has ceased to do business, although its term of existence has not expired, and it has not been dissolved, and has paid its debts and divided its remaining assets among its stockholders, mandamus being the proper remedy. *Stettauer v. New York & S. Constr. Co.* 42 N. J. Eq. 46.

V. Sufficiency of demand and refusal to sustain remedy.

While in the absence of any statutory provision a corporator may, at common law, have a mandamus to compel the custodian of corporate records and documents to allow him an inspection of them, to entitle himself to the aid of the court he must show that he has made a proper demand upon the custodian at a proper time and place and for a proper reason, and has been refused, and it cannot be granted to enable him to gratify idle curiosity. *People, Bishop, v. Walker*, 9 Mich. 328.

the stockholders were the owners of the property of the corporation, and not the president and directors. The petitioner's second prayer undertakes to instruct the jury on the evidence. If the case was rested on this footing, the jury ought to have been allowed to find the truth of the facts alleged. Moreover, the jury were not required in this prayer to find that Bitner refused to permit the petitioner to inspect the books containing the transactions. It was properly rejected. The third prayer stated that the petitioner was entitled to inspect the books, etc., at such times as he might desire. He had a right to examine them at all reasonable times; but he might peradventure wish to inspect them at midnight, or on Sunday, or on some other day when business was suspended by reason of its being a public holiday, or at some other unreasonable time. The

other portions of the prayer were correct, and, if the right of inspection had been restricted to all reasonable times, the prayer ought to have been granted. But without this restriction it was properly refused. The other prayers of the plaintiff were correct. But it surely was unnecessary to duplicate and reduplicate the same proposition so many times. If the first prayer had been granted, the other prayers would have been unnecessary.

The defendant's prayers are not strictly before us; but, as the case must be tried again, we will give our opinion on them. The third prayer leaves to the jury a fact which had been admitted in the pleadings, and the pleadings were brought to the attention of the court by the petitioner's first prayer. It was properly refused, as were all the other prayers of the defendant.

A shareholder in a corporation is entitled to mandamus to compel the custodian of corporate documents to allow him an inspection and copies of them at reasonable times for a specific and proper purpose upon showing a refusal on the part of the custodian to allow such inspection, and not otherwise. *Com., Sellers, v. Phoenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184.

And a mandamus to compel the custodian of corporate records to permit a stockholder to inspect them, asked for on the ground that the stockholder wished to ascertain his rights, duties, privileges, and liabilities and for his protection, will be refused where the demand for the inspection was not shown to have been made at the office of the company, and no excuse was given for not making it there. *People, Bishop, v. Walker*, 9 Mich. 328.

And a demand by the attorney for the relator, and not by the relator himself, is not such a demand as will require the issuance of a mandamus requiring the custodian of corporate books to permit the attorney to inspect them. *People, McDonald, v. United States Mercantile Reporting Co.* 20 Abb. N. C. 194.

But an error of an officer in a subordinate position in refusing to permit books to be examined by a stockholder is not *per se* such an error as will expose the company to payment of damages. To fix the liability it must appear that such officer was expressly authorized to do the act, or that it was done bona fide in pursuance of a general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation. *Legendre v. New Orleans Brewing Assn.* 45 La. Ann. 609.

And where a shareholder in a corporation the charter of which provided that it should be managed by a committee and authorized them to appoint a clerk for carrying out the purposes of the act of incorporation, and required them to enter in books of account their disbursements, receipts, and transactions, and keep the books open at all reasonable times for the inspection of proprietors, applied to the clerk appointed under such act for inspection of the books which were in his charge, and he said he would refer the demand to the committee, and the proprietor attended the committee and repeated his request, and the chairman said they would take time to consider it, and ten days afterwards he again applied to the clerk who refused the inspection, there was no sufficient refusal by the committee to warrant the issue of a mandamus to compel it to permit him to inspect them. *Kling v. Proprietors of Wilts & B. Canal Navigation*, 3 Ad. & El. 477, 29 L. T. N. S. 922.

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The respondent in a proceeding by mandamus by a stockholder for the privilege of inspecting the books of a corporation, however, cannot urge that no proper demand was made or that the suit was premature, where the relator made personal application at the office of the company for examination of the books, and was told by the official in charge that the president of the company had given instructions that no inspection of the books by shareholders was to be allowed, and this was followed by a formal demand in writing by counsel for the relator upon the secretary of the company for permission for him to examine the books, which demand was not acceded to. *State, Bourdette, v. New Orleans Gaslight Co.* 49 La. Ann. 1556.

And the fact that the by-laws of a corporation direct that the certificate book, transfer book, and such other books and papers as the board should direct should be in charge of the secretary, and that no application was made to him for examination of these books, will not justify a refusal to issue a writ of mandamus to compel the production of the books for inspection, where request to inspect was made of the treasurer, and in refusing it he made no allusion to his inability, if that existed, to comply with the demand, and no reference to the fact that any other person was the proper officer to receive and act upon the demand, and it does not appear that the books were not under his control. *Re Martin*, 62 Hun. 557.

And an offer by the vice president of a foreign corporation in charge of its office in the state to give a stockholder demanding the right to inspect its stock-book a letter to a person in another city in whose hands the book then was, or to have the stock-book at the principal office on a subsequent day, is not a compliance with the New York stock corporation law as amended by Laws 1897, chap. 384, providing that every foreign stock corporation having an office for the transaction of business in the state, with certain exceptions, shall keep therein a book to be known as a stock-book open to inspection by stockholders, and is not a defense in an action to recover the penalty prescribed for violation thereof. *Recknagel v. Empire Self-Lighting Oil Lamp Co.* 24 Misc. 193.

And where a shareholder in a corporation whose shares were fully paid presents a petition for a compulsory winding-up order, and the managing director of the corporation files an affidavit stating the liabilities and assets of the company as shown by the company's books, and the solicitor of the petitioner gives notice in writing to the solicitor of the company that he

The prayers on which we have not specially commented are all decided by the views which we have expressed on the construction of the 5th section of the 23d article of the Code. We deem it unnecessary to set them out in detail, but all the prayers will be published in full by the reporter.

The instruction given by the court is in these words: "The jury are instructed that under the pleadings and evidence in this cause the plaintiff is not entitled to recover, and their verdict must be for the defendant." It has been held a great many times that an instruction in this form was erroneous, because it was too general. It presents no specific point or question. But, nevertheless, it would have been useless to reverse the judgment for this reason, if we had come to the conclusion that there was no ground on which the petitioner could obtain a judg-

ment on a second trial. In *Newbold v. J. M. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426, the trial court had granted an instruction in terms identical with the one given in this case. The instruction is found in the opinion of this court on page 49. On page 55 the court speaks as follows: "The instruction given by the court at the instance of the defendant was defective, inasmuch as it left the matter uncertain whether the defect or failure of the plaintiffs' case was to be found in the pleadings or in the evidence. There was no case, however, for the jury, and the instruction should have been that, upon the pleadings in the cause, there was no sufficient evidence of any special damage to entitle the plaintiffs to recover." The judgment was affirmed.

Reversed, and new trial.

will attend at the company's office on the following morning to inspect the books referred to, and is refused permission to inspect them on his so attending, the refusal to allow the solicitor to inspect is a refusal to allow the shareholder to inspect within the meaning of the statute. *Re Credit Co. L. R. 11 Ch. Div. 256, 48 L. J. Ch. N. S. 221, 27 Week. Rep. 380.*

So, the complaint in an action by a stockholder against an officer of a corporation having the custody of its books for the recovery of the penalty for refusing to permit their inspection under Vt. Gen. Stat. chap. 86, §§ 7, 8, 13, is fatally defective where it does not allege a request to exhibit the books and records of the corporation at its office. *Lewis v. Brainerd, 53 Vt. 510.*

And a complaint in an action by a stockholder against a corporation for the penalty imposed upon a company failing to keep the books and make the entries required, and to exhibit the same for the inspection of stockholders, creditors, etc., is defective where it does not aver that the officer of whom the demand for inspection was made had notice that the person demanding it was a stockholder. *Williams v. College Corner & R. G. R. Co. 45 Ind. 170.*

But that a relator in a petition for mandamus to enforce the right of a stockholder to inspect the books of a corporation had fruitlessly applied at the office of the company in the state to see its books, and met with reply that an inspection would be permitted at an office in another state, and an allegation that large sums of money had been lost by mismanagement of the corporation affairs, is a sufficient showing by the relator of personal injury to himself, resulting from the keeping of the books in another state, to justify mandamus to compel the keeping of the books in the principal office in the state under the Illinois statute. *Crown Coal & Tow Co. v. Thomas, 60 Ill. App. 234.*

And a complaint in an action by a stockholder to recover a penalty from the general manager of a domestic corporation for refusing an inspection of the company's books as required by N. Y. Laws 1890, chap. 564, § 29, alleging that the plaintiff, by his duly authorized representative, requested the defendant to exhibit to him the books of said company, which request was refused, is sufficiently broad to permit of proof that a demand was made to have the books exhibited to the plaintiff in person, although the same may have been made through his representative, and therefore the scope of the term "personal representative" as used in the 45 L. R. A.

statute need not be passed upon. *Levy v. Cohen, 45 N. Y. S. R. 278.*

In the above case *People, McDonald, v. United States Report. Co. 20 Abb. N. C. 193, supra*, was distinguished upon the ground that that case merely held that a demand made by the attorney of record in an action by a stockholder for an inspection by him (the attorney), in the absence of any specific authorization to make the demand, was insufficient, as a basis for an application for a mandamus.

To incur the penalty provided for by Vt. Gen. Stat. chap. 86, § 8, for the refusal of the custodian of corporate books to permit their inspection by a stockholder, there must have been a wilful neglect or refusal to exhibit and show the records or by-laws of the corporation. *Lewis v. Brainerd, 53 Vt. 510.*

And a corporation and the officer in charge of its office is not subject to the penalty prescribed by the New York statute for failure to keep a stock-book for the inspection of stockholders at its office or principal place of business, where application for inspection was made by a stockholder on Saturday and he was requested to wait until the morning of the next business day to see the book, on the ground that the person who had them in charge and had the key and combination of the safe in which they were locked was temporarily absent. *Kelsey v. Pfaudler Process Fermentation Co. 41 Hun, 20.*

But the penalty imposed by N. Y. Laws 1848, chap. 40, § 25, for violation of the provision thereof that certain books shall be kept at the office of the company during the usual business hours of the day, on every day except Sunday and the Fourth of July, and shall be open to the inspection of the stockholders, is incurred where a stockholder went with his attorney to the office of the company on Saturday and demanded permission to examine the stock-book and record book, and was informed that the books were in the safe and that the secretary who had the combination was out of town and the books could not be shown until his return on the Monday following, where it appears that nearly two months before such person ceased to be secretary and another succeeded him in that position who had the combination of the safe and charge of the books of the company, and was then within reach and might have permitted the inspection demanded. *Kelsey v. Pfaudler Process Fermentation Co. 20 N. Y. S. R. 533.*

So, an officer of a corporation having charge of its stock-books, who refuses to permit a stockholder to take a copy or memorandum of the names of stockholders therefrom, subjects

NEW YORK COURT OF APPEALS.

Re Petition of Henry W. T. STEINWAY, for Inspection of Books and Records of Steinway & Sons.

(159 N. Y. 250.)

1. **The right to a peremptory writ of mandamus depends upon the conceded facts, the same as if the relator had demurred to the allegations of the defendant, when he proceeds to argument upon his petition and the opposing affidavits without the issuance of any alternative writ.**
2. **A stockholder has the right at common law to inspect the books of his corporation at a proper time and place and for a proper purpose.**
3. **The writ of mandamus to enforce the right of a shareholder to inspect the books of his corporation may issue**

himself of the penalty imposed for refusal to permit inspection of stock-books by N. Y. Rev. Stat. pt. 1, title 4, chap. 18, though he submits the books to the inspection of the stockholder. *Cothéal v. Brouwer*, 5 N. Y. 562.

But a demand by a stockholder of a foreign corporation for the right to inspect the stock-book of the company, and not the transfer book, does not bring him within the provisions of N. Y. Laws 1842, chap. 165, making it the duty of a transfer agent in the state of any monied or other corporation existing beyond the jurisdiction to exhibit at all reasonable times during the usual business hours to any stockholder of such corporation, when required by him, the transfer book thereof and a list of the stockholders. *Kennedy v. Chicago, R. I. & P. R. Co.* 14 Abb. N. C. 326.

So, in *King v. Trustees of Northleach & Witney Roads*, 5 Barn. & Ad. 978, it was doubted, though not decided, whether it is sufficient to show that a party entitled to inspect corporate books demanded liberty to do so, and that his claim was disputed, but inspection offered him as a favor, and that he refused to accept it otherwise than as a right.

A failure or refusal on the part of the recording officer of a corporation to permit a stockholder to inspect its books in violation of Vt. Gen. Stat. chap. 86, §§ 7, 8, 13, constitutes but one act, and but one penalty is incurred, and it is not necessary for the stockholder to renew his request for inspection every twenty-four hours under the provision that the stockholder is entitled to recover \$10 for every twenty-four hours during which the officer so refused, as the neglect or refusal to comply with the stockholder's demand is presumed to continue until willingness on the part of the custodian to exhibit them is made known, or until such presumption is rebutted by a change of circumstances. *Lewis v. Brainerd*, 53 Vt. 510.

Whether a request by a corporation to a stockholder demanding the right to inspect its books to wait from Saturday until Monday following for such inspection was a reasonable request, is a question of fact for the jury, and not one of law for the court. *Kelsey v. Pfaudler Process Fermentation Co.* 20 N. Y. S. R. 538.

VI. Effect of purpose of stockholder on remedy.

a. Generally.

Ordinarily a mandamus will be awarded whenever an inspection by a stockholder of the books of a corporation is necessary for any reason to protect the interests of the stockholders 45 L. R. A.

in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned.

4. **The common-law right of a shareholder to inspect the books of his corporation is not affected by the stock corporation law (Laws 1892, chap. 688, §§ 29, 52), providing for the inspection of the stock book and for the furnishing of a statement of assets and liabilities upon the request of stockholders owning a fixed percentage of the capital stock.**

(June 6, 1899.)

A PPEAL by respondent from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of a Special Term for New York County denying petitioner's motion for a writ of

present or prospective, and is not sought from idle curiosity or for any improper or unlawful purpose. *Foster v. White*, 86 Ala. 467, *dictum*.

And a shareholder in a corporation with a laudable object to accomplish, or a real and actual interest upon which to predicate his request for information disclosed by the books of a bank, is entitled by the fundamental law of the state to the right to inspect them. *State, Burke, v. Citizens' Bank*, 51 La. Ann. 426.

At common law, however, the right of a stockholder to inspect the books of a corporation is not so absolute that mandamus will issue without regard to facts and circumstances. The reasonableness of the request should be considered. A refusal is justifiable where curiosity is the motive or where the object is manifestly in opposition to the interests of the company. *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669; *Stone v. Kellogg*, 165 Ill. 192; *People, Bishop, v. Walker*, 9 Mich. 328.

And a shareholder applying for a mandamus to enforce his right to inspect the books of a corporation should show that when he demanded the inspection he stated the object for which he wanted it. *King v. Proprietors of Wilts & B. Canal Navigation*, 3 Ad. & El. 477, 29 L. T. N. S. 922.

While the books of a corporation are evidence of the acts and proceedings of the body, and with respect to the corporators are public, and each individual has the right to inspect them and use them as evidence of his rights, a mandamus will not be issued to compel the keeper of such books to allow an inspection or the taking of copies unless a clear right is shown and some just or useful purpose is to be effected. *Hatch v. City Bank*, 1 Rob. (La.) 470.

And even under the statutes it has been frequently held that there can be no inspection from mere idle curiosity or for improper or unlawful purposes. See *Foster v. White*, 86 Ala. 467; *Ellsworth v. Dorwart*, 95 Iowa, 108; *Stone v. Kellogg*, 165 Ill. 192, *supra*, III. b; *Com. v. Empire Pass. R. Co.* 134 Pa. 237, *supra*, III. d; *Phoenix Iron Co. v. Com., Sellers*, 113 Pa. 563, and *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115,—*supra*, VII.

But a stockholder in a bank need not state in an application for a mandamus under the Missouri statute to secure the right to examine the corporation books, the purposes for which he seeks to exercise the right of inspection. *State, Doyle, v. Laughlin*, 53 Mo. App. 542.

Under that statute (Rev. Stat. § 720), giving the relator a right to the inspection of books

mandamus to compel the officers of the defendant corporation to permit petitioner to inspect the books and records of the corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edward C. James and George W. Cotterill, for appellant:

The allegations of the petition having been fully met and denied by the answering affidavits, and a peremptory writ having been insisted upon (which was denied by the special term, but granted by the appellate division, 31 App. Div. 70), the law of mandamus holds that the answering affidavits must be taken as true and conclusive, and they therefore constitute a bar to this proceeding.

People, Lefever, v. Ulster County Supers. 34 N. Y. 268; *People v. Rome, W. & O. R. Co.*

103 N. Y. 95; *Commercial Bank v. New York Canal Comrs.* 10 Wend. 25; *People, Mott, v. Greene County Supers.* 64 N. Y. 600; 14 Am. & Eng. Enc. Law, pp. 213, 214; *People, Mygatt, v. Chenango County Supers.* 11 N. Y. 563; *People, Lynch, v. New York*, 25 Wend. 680; *People, Yates, v. New York Canal Board*, 13 Barb. 432; *People, Perry, v. Thompson*, 25 Barb. 73; *Haebler v. New York Produce Exchange*, 149 N. Y. 418.

A peremptory writ of mandamus is only authorized in the first instance, where the applicant's right to a mandamus depends only upon questions of law.

People v. Rome, W. & O. R. Co. 103 N. Y. 95; *People, Kelsey, v. New York Post-Graduate Medical School & Hospital*, 29 App. Div. 249; *People, Peck, v. Salina Town Board*, 27

of a corporation of which he is a stockholder, the motive which may prompt him in demanding his right is not a proper subject for judicial investigation. *State, Wilson, v. St. Louis & S. F. R. Co.* 29 Mo. App. 301.

And under the Missouri statute concerning business corporations, § 932, providing that each stockholder may at all proper times have access to the books of the company to examine the same under such regulations as may be prescribed by the by-laws, it is not incumbent upon a relator to disclose the purpose for which he seeks to exercise the right to inspect, and the fact that the information sought might be used for improper purposes is immaterial. *State, Spinney, v. Sportman's Park & Club Asso.* 29 Mo. App. 326.

And the purpose for which a stockholder acquired stock in a corporation is immaterial in a proceeding brought by him for the inspection of the books of the company, where his legal ownership is admitted, and evidence to the effect that he was a mere accountant and not a bona fide transferee, is inadmissible. *Ibid.*

So, the Alabama statutes secure to the stockholder the general right to examine the books of a corporation at any and all reasonable times, and when his right is claimed and refused he is entitled to a mandamus on the averment that he is a stockholder of the corporation, that he has demanded the right of inspection, that the time was reasonable and proper, and that the right was denied him. *Foster v. White*, 86 Ala. 467, *dictum*.

And a shareholder in a corporation wishing to inspect its books is not required, under the Alabama statute, to show any reason or occasion rendering an examination opportune and proper, or a definite or legitimate purpose. The custodian of the books and papers cannot question or inquire into his motives and purpose. *Ibid.*

And the right of a stockholder to examine the books of a corporation under the Illinois act providing that every stockholder in a corporation shall have the right at all reasonable times, by himself or by his attorney, to examine the records or books of account of the corporation, is absolute, and the motive for desiring such examination cannot be inquired into. *Rodger Ballast Car Co. v. Perrin (Ill.)* 17 Nat. Corp. Rep. 819.

So, in New York the method prompting the request for an inspection of the stock-book of a corporation is immaterial in a proceeding by mandamus to compel the secretary of the corporation to produce the stock-book for inspection. *People, Gunst, v. Goldstein*, 37 App. Div. 550.

And under N. Y. Laws 1848, chap. 40, § 45, 45 L. R. A.

providing that the transfer books of a corporation shall during the usual business hours of a day, on every day except Sunday and the Fourth of July, be open for the inspection of stockholders and creditors and their personal representative at the office or principal place of business of such company in the county where its business operations shall be located, stockholders, creditors, and their personal representative have an absolute right during the usual business hours of every day except Sunday and the Fourth of July, to inspect the stock-books, and where a stockholder applies in person to inspect the stock-book, and such application is refused, the court has no discretion in the matter, and upon proper papers a writ of mandamus requiring the officers to allow him to inspect the books will be granted as a matter of absolute right. *People, McDonald, v. United States Mercantile Reporting Co.* 20 Abb. N. C. 192.

And under N. Y. Laws 1842, chap. 165, providing that the transfer agent in this state of any monied or other corporation existing beyond the jurisdiction shall at all reasonable times during the usual hours of transacting business exhibit to any stockholder of such foreign corporation when required by him the transfer books thereof and also a list of the stockholders, the duty is absolute, and the transfer agent has no right to inquire into the motives and purposes of a stockholder in requiring it. *People, Harriman, v. Paton*, 20 Abb. N. C. 195.

It would seem, however, even under such statutes, at least in Alabama and Illinois, that the purpose must be a lawful one. See holding in *Foster v. White*, 86 Ala. 467, and *Stone v. Kellogg*, 165 Ill. 192, *supra*, II. b.

And in New York the former rule, that the statutory right of inspection is absolute, and that the motive with which it is sought is immaterial, seems to have been somewhat modified.

Thus, in *Re Crosby*, 28 Misc. 300, it was held that the purpose with which a mandamus to enforce the right of a stockholder to inspect the books of his corporation is sought, will not be closely scrutinized by the court unless it is very reprehensible.

And in *Re Pierson*, 28 Misc. 726, it was held that a writ of mandamus is an extraordinary remedy to be invoked only upon special occasions, and the courts will not grant it in a proceeding to enforce the right of a stockholder to inspect the books of a corporation until they have taken into careful consideration all the facts and circumstances of the case, and condition and character of the books, the reasons for refusal by the corporation, the specific purpose of the stockholder in demanding inspection, and

App. Div. 476; *People, Sickles, v. Becker*, 3 N. Y. S. R. 202; *People, New York Tenth Nat. Bank, v. Green*, 3 Hun, 208; *Ex parte Rogers*, 7 Cow. 520; *People, Bentley, v. Hudson Highway Comrs.* 7 Wend. 474; *People, Cagger, v. Schuyler Supers.* 2 Abb. Pr. N. S. 78; *People, Bagley, v. Green*, 1 Hun, 1; *People, Hoyt, v. Ballston Spa. Trustees*, 19 App. Div. 569; *People, Buffalo, v. New York O. & H. R. R. Co.* 156 N. Y. 570.

The method prescribed by the statute creating this corporation, and by the general statutes and rules and practice of the courts, for the examination of corporate books by a stockholder, is exclusive, and is inconsistent with the right claimed in this case to examine the books of account.

The particular account delivered fully complied with the statute.

the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted. And that a person is not at liberty to demand an examination of all corporate books and records by an accountant selected by him when and as often as he pleases, and if refused to apply for a writ of mandamus to enforce such right, merely because he shows himself to be a holder of the stock in the corporation.

And see also *Re STEINWAY*, which must be regarded as fixing the existing rule on the subject in New York.

So, under some of these provisions motive has been directly held to be material.

Thus, the public inspection referred to in La. Const. art. 245, providing that certain books of corporations shall be kept for public inspection, applies to inspections by a shareholder or other person with a laudable object to accomplish, or a real and actual interest upon which to predicate his request for information, and not the inspection of the idle, the impertinent, or the curious, who have no interest to subserve, or advance, or protect. *State, Bourdette, v. New Orleans Gaslight Co.* 49 La. Ann. 1556.

So, a stockholder applying for a mandamus to compel the directors of an incorporated company to allow him to inspect their accounts under the companies clauses act, 8 Vict. chap. 16, §§ 115, 119, requiring companies for six weeks to give inspection to their shareholders of their books, must state what his object is, and what the scope of his demand is, that the company and the court may see that his demand is a reasonable one. *Queen v. London & St. K. Docks Co.* 44 L. J. Q. B. N. S. 4.

And under the Stannaries act of 1855, § 22, an application for an order of inspection of the books of a corporation must be made on sufficient ground on affidavit or otherwise, and the vice warden has a judicial discretion as to making or refusing the order. *Re West Devon Great Consols Mine*, L. R. 27 Ch. Div. 106.

And a proprietor in the Grand Canal Company applying for a mandamus to compel directors thereof to allow him to inspect the books and proceedings of the company under 11 & 12 Geo. III., chap. 31, § 15, providing that every person having in his own name and right any share in the stock thereof, or his or her representatives, may have access at all reasonable times to inspect the books of such company, must show that in his application to the directors he stated the object for which he required the information he desired to obtain, and that the application is a reasonable one and its refusal unreasonable. *Queen v. Undertakers of Grand Canal*, 1 Ir. Law Rep. 337.

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French v. McMillan, 43 Hun, 188.

A stockholder has no common-law right to have an inspection of books by mandamus or otherwise.

Merrill, *Mandamus*, 15, 16, § 21; *People, Field, v. Northern P. R. Co.* 18 Jones & S. 459; *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun, 1; *Central Cross-town R. Co. v. Twenty-third Street R. Co.* 53 How. Pr. 45; *Hoyt v. American Each. Bank*, 1 Duer, 652; *Cassard v. Hinman*, 6 Duer, 695; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115.

The law allows no general right to a stockholder to inspect the books of the corporation. Inspection can only be ordered in aid of a suit brought or defended.

People, Olason, v. Nassau Ferry Co. 86 Hun, 128.

The court has no more supervisory power

b. For hostile purposes.

While a stockholder and director in a joint-stock company has the right at any reasonable and proper time to examine and inspect the books and papers of the corporation whenever it is necessary to do so for the protection of his interest as a stockholder, or the performance of his duties as a director, such examination cannot be rightfully had for a purpose hostile to the corporation. *Hemingway v. Hemingway*, 58 Conn. 443; *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669. And see *Ellsworth v. Dorwart*, 95 Iowa, 108, *supra*, III. b.

If the charge upon which a stockholder rests his claim for inspection of the books of the corporation is free from odium, the general rule is that he is entitled to have the right protected, whatever may be his motive in asking the aid of the court for that purpose. *Mitchell v. Rubber Reclaiming Co. (N. J.)* 24 Atl. 407.

But mandamus will not issue to compel permission to inspect corporate books where there is fair reason to believe that the applicant for inspection intends to make an improper use of the information obtained. *State, Rosenfeld, v. Einstein*, 46 N. J. L. 479.

And a stockholder and director in a joint-stock company, who is engaged with others in organizing and active in the management of a rival company, is not entitled to inspect and examine a letter file of the original company for the benefit of the other company, and the secretary of the original company is not liable for an assault in forcibly taking it from him, using no more force than was necessary for that purpose. *Hemingway v. Hemingway*, 58 Conn. 443.

And the insistence of a treasurer of a corporation upon a stipulation by the secretary and stockholder desiring an inspection of books of the corporation in his hands, against use of them for the purpose of entering estimates therein about which they were disputing, is proper where the testimony in the proceeding for a mandamus to compel permission to inspect such books does not show that the relator had any occasion for getting possession of the books unless it was for the purpose of entering such estimates. *State, Rosenfeld, v. Einstein*, 46 N. J. L. 479.

But while a mandamus will not issue to compel permission to a stockholder to examine the books of a corporation where it is clearly established that his purpose was mischievous, the burden of proving that such a purpose existed devolves upon the party asserting it, and the proofs should be clear and convincing before the party asking permission should be denied it, where his interests are alleged and his rights

over a corporation than it has over a partnership.

If any inference could lead to such a doctrine in England it has been exploded, and the true rule is laid down in the case of *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115.

People, Field, v. Northern P. R. Co. 18 Jones & S. 459.

Text writers have endeavored to lay down in general terms a loose doctrine based on cases of discovery in chancery, of common-law suits for damages, and for penalties under the statute and mandamus generally, all intermingled without discrimination, but no authority is cited by them showing a general right to examine the books of a corporation.

High, Extr. Legal Rem. § 308.

In other respects satisfactorily presented. *Mitchell v. Rubber Reclaiming Co.* (N. J.) 24 Atl. 407.

And that stockholders had been misled by designing persons into making an application for an inspection of the books of the corporation, is no answer or defense to such application. *Re Birmingham Bkg. Co.* 36 L. J. Ch. N. S. 150, 15 L. T. N. S. 203.

Under statutes conferring the right upon the stockholder without qualification, however, the rule is different. In such case the doctrine of the principal case applies.

Thus, it is not a sufficient answer to a petition for a mandamus to enforce the right of a stockholder to inspect the books of a corporation to impugn the motives of the petitioner, and state that the object and purpose were to injure the corporation, where allegations in the petition that the purpose of the petitioner was to seek such relief as the law might afford to protect his interests in the company were admitted by demurrer. *Stone v. Kellogg*, 165 Ill. 192.

The allegations of a relator in a proceeding to obtain a mandamus setting forth just and proper reasons for his desire as stockholder to examine the records and accounts of his company is not one upon which an issue of fact can be raised by answers imputing to him base and unworthy motives. *Stone v. Kellogg*, 62 Ill. App. 444, Affirmed in 165 Ill. 192.

In the above case *Com., Sellers, v. Phoenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; and *Com. v. Empire Pass. R. Co.* 134 Pa. 237, *infra*, VI. c, were disapproved so far as they supported the doctrine that a suspicious stockholder is not entitled to mandamus to permit him to examine the books of the corporation.

So, a reason or purpose on the part of a stockholder for inspecting the records of the corporation need not be alleged or proved in an action for the recovery of the penalty imposed upon the custodian of corporate records for refusal to permit an inspection by a stockholder, provided for by Vt. Gen. Stat. chap. 86, §§ 7, 8, 13, as a lawful reason or purpose for examining them will be presumed in the absence of proof to the contrary. *Lewis v. Brainerd*, 53 Vt. 510.

And a corporation must look to the register of stockholders for the purpose of the liabilities imposed upon them, and the fact that a stockholder bought his stock nominally in his own interest, but has really taken it in the interest of some other person, presents no defense to a demand by him for the right to inspect the books of the company under the companies clauses act of 1863, § 28; *Mutter v. Eastern & M. R. Co.* L. R. 38 Ch. Div. 92, 36 Week. Rep. 401, 57 L. J. Ch. N. S. 615, 59 L. T. N. S. 117.

And that a stockholder in a stock company

Assuming that the jurisdiction in cases of this kind is discretionary, that discretion is not arbitrary, but is governed by legal rules, and was not properly exercised by the appellate division in this case.

People, Gaslight Co., v. Syracuse, 78 N. Y. 56; *People, Millard, v. Chapin*, 104 N. Y. 96; *People, Bagley, v. Green*, 1 Hun, 4.

The petition fails to answer the commonplace requirements that pertain to mandamus. It shows no proper demand for inspection.

Beach, Priv. Corp. 154; High, Extr. Legal Rem. 2d ed. 240; *People, McDonald, v. United States Mercantile Reporting Co.* 20 Abb. N. C. 194.

Messrs. Sullivan & Cromwell, Wheel-

took his stock at the instance of a rival company and for the purpose of serving the interests of the rival company does not, under the companies clauses act of 1863, § 28, deprive him of the right to inspect the books of the company. *Ibid.*

So, under companies clauses act 1845, §§ 45, 63, and the companies clauses act of 1863, § 28, providing that the books of a stock company shall be accessible to him without any other qualification than at all reasonable times, the right of inspection may be exercised without assigning any reason for requiring or desiring inspection. *Holland v. Dickinson*, L. R. 37 Ch. Div. 669, 57 L. J. Ch. N. S. 502, 58 L. T. N. S. 845, 36 Week. Rep. 320.

In the above case *King v. Proprietors of Wilts & B. Canal Navigation*, 29 L. T. N. S. 922, 3 Ad. & El. 477, *infra*, was distinguished upon the ground that there the question was one of fact whether or not there had been a refusal, and it was decided that there had been none.

So, the board of directors of a bank has no right to pass a resolution excluding one who was a member of the board and a stockholder of the bank from an inspection of its books, although the members believed him to be hostile to the interests of the institution. *People, Muir, v. Throop*, 12 Wend. 183.

And that a director of a corporation is suspicious that its affairs are not properly or judiciously managed furnishes no ground for the denial of his right to examine its records and books of account. *Stone v. Kellogg*, 62 Ill. App. 444, Affirmed in 165 Ill. 192.

And that the object of a demand by a stockholder for inspection of the books of the corporation is to obtain material to be used in convincing other stockholders that a proposed plan of reorganization which meets the approval of a majority of the stockholders is one that should not be carried out, is not a sufficient answer to an application for an order directing such inspection. *Chable v. Nicaragua Canal Constr. Co.* 59 Fed. Rep. 846.

So, the fact that a stockholder in a corporation did not feel kindly toward the president, and had commenced suits against him, does not warrant a denial of his right to inspect the books of the company. *Ellsworth v. Dorwart*, 95 Iowa, 108.

And that the secretary of a corporation permitted an inspection of books of the corporation other than the stock-book, and that he furnished the relator with an accurate statement of the condition of the company, and that the relator stopped the proper delivery of the company's mail, and collected the company's money without turning it over, are no defense to a proceeding by mandamus to compel the secre-

er H. Peckham, and Edward B. Hill, for respondent:

The court had full power to grant the writ.

People, Hatch, v. Lake Shore & M. S. R. Co. 11 Hun, 1, Affirmed as *Sage v. Lake Shore & M. S. R. Co.* 70 N. Y. 222; *People, Stobo, v. Eadie*, 63 Hun, 320, Affirmed without opinion, 133 N. Y. 573; *People, Del Mar, v. St. Louis & S. F. R. Co.* 44 Hun, 552; *People, Clason, v. Nassau Ferry Co.* 86 Hun, 128.

The text-books and authorities outside this state are unanimous in holding that a corporation has a right to inspect the general books of the corporation, and that mandamus is the proper remedy.

High, Extr. Legal Rem. § 308; Morawetz, Priv. Corp. § 473-476; Beach, Priv. Corp. §

75; *Thomp. Corp.* §§ 4406 et seq.; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Re Burton & S. Co.* 31 L. J. Q. B. N. S. 62; *Cockburn v. Union Bank*, 13 La. Ann. 289; *People, Bishop, v. Walker*, 9 Mich. 328; *State, Rosenfeld, v. Einstein*, 46 N. J. L. 479; *Com., Sellers, v. Phoenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184.

The right of a stockholder to inspect the books of a private corporation is a general right, to be allowed and enforced, unless some sufficient particular reason appears for denying it in the case at hand.

King v. Babb, 3 T. R. 579; *Re v. New-castle upon Tyne*, 2 Strange, 1223; *Thomp. Corp.* § 4432; *Stettauer v. New York & S. Construction Co.* 42 N. J. Eq. 46.

In the United States the prevailing doc-

tary to permit the inspection of the stock-book. *People, Gunst, v. Goldstein*, 37 App. Div. 550.

And the fact that a stockholder in a corporation desiring an inspection of its books is the brother-in-law of the president of a rival corporation, and a statement by one of his attorneys that the only way in which the controversy between him and the corporation could be settled was by the purchase of the stockholder's stock, is not sufficient to constitute a defense in a proceeding to enforce his right of inspection on the ground that he was acting in the interests of the rival corporation, and that his motive was to force a sale of his stock. *Blymyer v. Blymyer Iron Works Co.* 5 Ohio N. P. 71.

In the above case the question whether the motive of a stockholder in asking an inspection of corporate books can be inquired into in a proceeding to enforce his right was suggested, but the court expressly refused to decide it, resting the decision of the case upon other grounds.

So, a rule for a mandamus by a shareholder to obtain an inspection of a waterworks' company's books and documents will not be discharged because the shareholder was the solicitor of another waterworks company, which had obtained a decree against the defendant company, and it was under consideration whether or not the defendant company should appeal, and such shareholder applied for the inspection without stating his object, and it appears that it was stated on affidavit on the application, and not contradicted, that the prosecutor made his application for inspection in the interests of his clients, and not for any purpose or any interest of the defendant, or of any member of its company as such, and that his object was to canvas the shareholders and endeavor to persuade them to oppose the appeal. *King v. Proprietors of Wilts & B. Canal Navigation*, 29 L. T. N. S. 922, 3 Ad. & El. 477.

And an answer in a petition for a mandamus to enforce the right of a stockholder to inspect the stock-book of the corporation to enable him to consult with other shareholders to obtain proxies to use at the election of officers, denying the motives alleged by the petitioner, and alleging that the petitioner desired to aid a third person in proceedings against the receiver of the company, and that there was not time for consultation by the stockholders prior to the next election, and that the petitioner had not exhibited a desire to act with intelligence, is irrelevant and immaterial, and tenders no issue which could be tried by a jury, or which, if tried, and found for the defendants, could militate against the claim of the petitioners to the right of inspection. *Com. v. Philadelphia & R. B. Co.* 3 Pa. Dist. R. 115.
45 L. R. A.

Where the custodian of the books and records of a corporation denies the right of a stockholder to inspect them on the ground that the examination was sought for the purpose of discovering some ground of attack upon the corporation and its management, he assumes the burden of proof of such motive. *Stone v. Kellogg*, 165 Ill. 192.

See further, as to the effect of the purpose of the desired inspection where the statutory right is absolute, *supra*, VI. a.

c. To obtain grounds for litigation.

The general rule would seem to be that a stockholder in any joint-stock company or private corporation incorporated for manufacturing or trading purposes has such an interest in it and its affairs as will entitle him to an inspection and copies of its books, papers, and accounts on reasonable and proper occasions when they become material to him as evidence in a suit with another. *State, Richardson, v. Swift*, 7 Houst. (Del.) 137.

And a mandamus may go against a corporation at the instance of a member to inspect and see whether he can raise a particular case in his favor by examining the books, but it must be a case with reference to some definite, distinct dispute as to which it appears that it might be to his advantage to see the minutes of the corporation. *Re Burton & S. Co.* 31 L. J. Q. B. N. S. 62.

And a shareholder in a corporation alleging that a majority of the stock is held by officers of the corporation who control its business and manage its affairs to advance their private interest and deny him all access to, or opportunity for inspection of, corporate books and papers, and that he is about to file a bill in equity to restrain such illegal management, is entitled to a mandamus to compel the officers to permit him to inspect the books and papers containing information on the subject of such management. *Com., Sellers, v. Phoenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184.

And a stockholder to a considerable amount in what appears to be a prosperous and highly profitable trading corporation, in which for nine years, although large profits had admittedly accrued, no dividends had been declared and the profits in no way accounted for, who was denied all access to the books and papers for information, and the reading of the minutes of a regular stockholders' meeting was suppressed because of his presence, is clearly entitled to a mandamus to compel the delivery of the books for his inspection, to enable him to prepare a stockholder's bill in equity for the redress of such grievances. *Phoenix Iron Co. v. Com., Sellers*, 113 Pa. 563.

trine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books.

Morawetz, Priv. Corp. § 473; Beach, Priv. Corp. § 75; Thomp. Corp. §§ 4406-4435; Cook, Stock & Stockholders, 3d ed. § 511; *Cockburn v. Union Bank*, 13 La. Ann. 289; *State, Martin, v. Bienville Oil Works Co.* 28 La. Ann. 204; *Com., Sellers, v. Phoenix Iron Co.* 105 Pa. 111, 51 Am. Rep. 184; *Phoenix Iron Co. v. Com., Sellers*, 113 Pa. 563; *Huyilar v. Cragin Cattle Co.* 40 N. J. Eq. 392; *People, Onderdonk, v. Mott*, 1 How. Pr. 247; *Williams v. Prince of Wales Life, etc., Assur. Co.* 23 Beav. 338.

Vann, J., delivered the opinion of the court:

Steinway & Sons, once a copartnership, be-

And a mandamus to enforce the right of stockholders to inspect the books of a corporation will not be refused on the ground that the inspection is desired in an effort on the part of some of the stockholders of the company to destroy it, where it appears that there were two companies, a new one and an old one, the new one consisting of a number of the stockholders of the old, and that both claimed title to the same property, and that the object of the inspection was to look into the question of title with a view of knowing whether they should go into the new company to protect what rights they had in the old. *State, Templin, v. Farmer*, 7 Ohio C. C. 429.

So, the court at the instance of a corporation who makes a claim to be elected to an office in the corporation, founded upon a supposed invariable custom to elect the person who at the time of a vacancy fills the position which he then occupied, will grant a mandamus to allow him to inspect the minutes of the corporation as to former elections, to assist him in stating his case, where the company admits the general practice, but says it is not invariable, though the court entertains great doubt whether such alleged custom if proved would control the charter which prescribes that there is to be a free election. *Re Burton & S. Co.* 31 L. J. Q. B. N. S. 62.

And a stockholder bringing an action against the Bank of England for not paying dividends upon certain stock in which the bank admitted that the stock had up to a certain day stood on the bank-books in the plaintiff's name, but alleged that the plaintiff had on that day transferred it, is entitled upon making affidavit that she had never signed or authorized any transfer, and that if such alleged transfer existed it was a forgery, to an absolute rule allowing her to inspect the particular entry in the transfer-book, purporting to transfer her stock. *Poster v. Bank of England*, 15 L. J. Q. B. N. S. 212, 8 Q. B. 689, 10 Jur. 565.

But that a stockholder in a corporation desires to file a bill in equity to set aside a lease by the corporation to another corporation of all its property and franchise for a long term, and wishes to obtain a list of the stockholders so that he may confer with them in order to procure them to join in the litigation and share the expenses, is not a proper purpose which will entitle him to a writ of mandamus to enforce his right to inspect the books of the company. *Com. v. Empire Pass. R. Co.* 134 Pa. 237.

As to design to confer with stockholders generally and for the purpose of the business and conduct of the corporation, see *infra*, VI. d. 45 L. R. A.

came a corporation in 1876, under the general manufacturing act of 1848, and the relator has been a stockholder therein ever since. He now holds 1,440 shares of its stock, of the par value of \$144,000, out of a total of 20,000 shares, of the value of \$2,000,000, but with an actual value much in excess of that sum. He has not been an officer of the corporation since 1881, and he has had no means of knowing much about the management of its affairs since 1892, when he was given an opportunity to examine the books. Since then he has been substantially ignorant as to all the details of the management, and has had no access to the books or records. Learning of certain practices that he considered improper, on April 12, 1894, and March 27, 1895, he made protests in writing to the company, but no attention was paid to them. On the 6th of April, 1896,

So, a shareholder in a joint-stock company is not entitled to an inspection of the company's books for the purpose of proving a plea of justification in an action against him by the company for libel in imputing insolvency to the company. *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 Hurlst. & N. 146, 5 Jur. N. S. 201.

And entries of the proceedings and transactions of a corporation in a book kept by the clerk are not rendered admissible in evidence on behalf of the company against one of the shareholders suing it, by a clause in its charter providing that the clerk should keep in a book provided by the company an account of all acts, proceedings, and transactions of the company, and that every shareholder should have liberty to inspect the same and take copies of the entries. *Hill v. Manchester & S. Waterworks Co.* 5 Barn. & Ad. 866, 2 Nev. & M. 573.

So, the New Jersey Statute, Rev. p. 188, conferring upon the court power to compel the production of the books of a corporation, confers the power in the special case of the corporation of the state unlawfully keeping its books out of the state, and does not confer any power over corporations which the court did not possess before the passage of the act, except that which is specifically given, and does not confer power to compel the production of books for the purpose of obtaining evidence to be used in a cause and ascertain whether there is any ground of complaint in reference to the conduct of the directors against whom no charge is made. *Stettauer v. New York & S. Constr. Co.* 42 N. J. Eq. 46.

And a stockholder who is sued by his corporation upon instruments made by him in its favor for the payment of money, and who sets up that he purchased stock relying upon false financial statements made by the officers of the company, is not entitled to a writ of mandamus to enable him to examine the books and documents of the company for the purpose, if possible, of verifying his allegations of defense, where it does not appear that he purchased the stock from the company or paid for it by means of the obligations in question. *Investment Co. v. Eldridge*, 2 Pa. Dist. R. 394.

In that case it was said that the right of a stockholder to inspect the books of a corporation seems rather to be intended to enable a bona fide and genuine holder of stock to protect his interest, than to furnish the means whereby a dissatisfied stockholder can relieve himself from liability, either to pay for his stock, or to discharge obligations which he has given for money loaned to him.

So, the court will not order the plaintiff in

he made a written request for leave to examine the books, but, receiving no reply, on the 15th of that month he wrote requesting information, proper in character, upon certain subjects; and to this communication he received an answer from the secretary, dated April 23, 1896, written in behalf of the board of trustees, virtually refusing the information asked for, on the ground that the relator intended to use it in "hostility to the interest of the stockholders." On the 5th of April, 1897, he endeavored to ascertain certain material facts at the annual meeting, but without success; and thereupon he requested the officers and directors to afford his accountants and attorneys access to the books of account, vouchers, and records of the company for the years 1892 to 1896, inclusive, for the pur-

pose of examining the same. Receiving no reply, on the 8th of May, 1897, he served a written request upon the treasurer for a statement in writing, under oath, of the affairs of the company, embracing a particular account of all its assets and liabilities for each of the several fiscal years from 1892 to 1896, inclusive; and in response to this he received a general statement placing the assets at more than \$3,000,000, but distributed into only fourteen items, eight of which were over \$100,000 each. The liabilities included but eight items, three of which were the capital stock, the surplus, and the profit of 1896. This was the first information as to the company's affairs which the petitioner had been able to obtain in five years, except that he once saw the balance sheet and inven-

an action by a railroad company against a proprietor for calls on his shares, to permit the defendant to inspect and make extracts from the books of the company where such inspection is not distinctly authorized by the railway act,—especially if it appears to be the defendant's object to discover what defense he may set up. *Birmingham, B. & T. Junction R. Co. v. White*, 5 Jur. 800, 4 Perry & D. 649, 1 Q. B. 282, 2 Railway Cas. 863.

But an order of a judge at chambers giving liberty to a defendant in an action by a company against an alleged shareholder for calls under a winding-up order to inspect the register of shares, the allotment and the agenda book of the company, will be upheld on appeal when made after plea, as the granting of such an order is purely in the discretion of the judge, and the court will not review the exercise of such discretion unless it clearly sees that the order was wrong. *Lancashire Cottonspinning Co. v. Greatorex*, 14 L. T. N. S. 290.

So, a mandamus will not issue to a trade corporation at the instance of one of its members to compel it to produce its accounts for the purpose of declaring a dividend of the profits, as that is a mere private purpose. *King v. Bank of England*, 2 Barn. & Ald. 620.

And a stockholder in a banking company which is in the course of voluntarily winding up for the purpose of reconstruction, who is offered a designated percentage for her holding in the old company, and gives notice to arbitrate as a dissident, cannot claim the right to examine the books of the company in order to see whether it would be better for her to accept the offer or go on with the arbitration. *Re Glamorganshire Bkg. Co.* L. R. 28 Ch. Div. 620, 54 L. J. Ch. N. S. 765, 51 L. T. N. S. 623, 33 Week. Rep. 209.

In the above case *The Birmingham Bkg. Case*, 36 L. J. Ch. N. S. 150, 15 L. T. N. S. 203, *supra*, VI. b, was distinguished on the ground that there the corporation and its business had come to an end, while here the current accounts which the customers had with the old bank were carried on into the new bank, and the applicant desired to look into those accounts and see their condition.

d. To obtain knowledge of condition of company.

The question whether a desire for knowledge as to the condition of the company warrants the enforcement of the stockholder's right to inspect seems to depend upon the purposes for which he wishes to use the knowledge.

Thus, a mandamus to enforce the right of a stockholder to inspect the stock-book of a corporation will not issue where there is nothing 45 L. R. A.

in the charter or in the statutes relating to the matter, on a showing that the stock had of late paid little or no dividends and depreciated very much in market value, in the absence of anything to show that this was due to any mismanagement, or that the books would disclose a value above its market value, and it appears that no question was made of the right of the stockholders to fully inform themselves from the books of the company as to its financial condition. *Lyon v. American Screw Co.* 16 R. I. 472.

So, an application for a mandamus directed to the masters and wardens of a corporation to require them to allow members to inspect and take copies of all records, books, and muniments in their possession belonging to the company or relating to its affairs will be dismissed with costs when based merely upon the ground that the applicants believed the affairs of the company were improperly conducted and the officers unduly chosen, some particular instance of misgovernment being stated which did not affect the parties themselves or any matter then in dispute. *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115.

And an action cannot be maintained by a stockholder against a corporation upon the ground that the secretary upon informal request did not surrender the books to him for inspection whereby he would have ascertained that the affairs of the corporation were not properly conducted so as to foresee the inevitable depreciation of the stock and prevent loss to himself by selling the same. *Legendre v. New Orleans Brewing Asso.* 45 La. Ann. 669.

And the stockholder in a gas company is not entitled to a mandamus to enforce his right to inspect the books of the company because the company reduced the price of gas from \$1.10 to 50 cents per thousand, and no dividend had been declared on the stock for some time, and that he had been paid only a small per cent on the consolidated bonds since its consolidation with another company, upon his allegation that this condition of affairs was caused by the directors involving the company in a gas war, and that he believed it was selling gas below cost, and that without an examination of the books he could not tell from what source it derived its money to pay fixed charges, whether from capital or income, where he does not furnish any proof that gas could not be profitably sold at the reduced price. *Re Pierson*, 28 Misc. 726.

In the above case *Re Steinway* was distinguished upon the ground that in that case the petitioner owned stock at par value to a large amount with an actual value much in excess thereof, and that the dividends had dwindled down from 20 to 5 per cent, and that he had

tory of January, 1893. Since 1891 the dividends declared by the company have dwindled in amount. In 1896 the dividend was only 5 per cent but never before since 1883 had less than 10 per cent, and sometimes as much as 18 and 20 per cent, been divided in dividends. The relator claimed in his petition for a writ of mandamus to permit inspection of the books, that the officers of the corporation were engaged in an attempt to form an English stock company for the control of its business, with the design of selling their shares of the capital stock, or exchanging them for a much greater amount of shares in the English company, and that efforts had been made by the stockholders and officers to induce him to sell his stock at \$250 a share; but, as he insisted, it was impossible

for him to fix upon any price without an opportunity to investigate the condition of the company. He specified various acts which he alleged to be improper on the part of the officers, such as the payment of exorbitant rentals, carrying on a banking business, allowing unusual rates of interest, inventorying the assets too low, and paying the trustees salaries, with no equivalent in services. The opposing affidavits contain a large amount of matter relating to aggravating conduct on the part of the relator in the past, and alleging improper motives and ulterior aims on his part. Many general allegations of the petition were denied *in hæc verba*, without stating the real facts. The president and other officers of the corporation denied the allegations of improper con-

for several years been endeavoring to ascertain certain material facts as to the company's condition and acts, while in this case the petitioner's holdings had not depreciated, but had advanced.

But that a stockholder was seeking information to determine the present value of his holdings and to guide his future action with reference to the stock of the company is a sufficient motive to warrant his seeking inspection of the books of the company within La. Const. art. 245, requiring books of corporations exhibiting certain enumerated affairs to be kept for public inspection. State, Bourdette, v. New Orleans Gaslight Co. 49 La. Ann. 1556.

And the facts that a stockholder had pledged all his holdings to secure a loan, and that the loan would shortly become due, and that he had not the means to pay it, and that he has no means of ascertaining the value of the stock and bonds, except by an examination of the company's books and papers, are sufficient to warrant the issue of a mandamus to enforce his right to inspect the books of the corporation, where it appears that the company had never declared or paid any dividends whatsoever. *Re Crosby*, 28 Misc. 300.

And an inspection of the register of shareholders of a corporation for the purpose of canvassing the proprietors before determining whether a litigation in which the company was concerned should go on or not is a legitimate object, though the canvass is made in the interest of the opponent in the action. *King v. Proprietors of Wilts & B. Canal Navigation*, 29 L. T. N. S. 922, 3 Ad. & El. 477.

And that a stockholder desires to inspect the books of the corporation to enable him to consult with other shareholders and obtain proxies to be used at the election of managers or officers, is a legal purpose warranting the issue of a mandamus to enforce his right of inspection. *Com. v. Philadelphia & R. R. Co.* 3 Pa. Dist. R. 115.

So, where a notice has been given by the directors of a corporation that a vote will be taken at a designated time upon the question of a reduction of the capital stock and upon other matters, it is requisite for stockholders to know the condition of the affairs and business operations of the company so as to be enabled from such knowledge to act for the best interests of themselves and other stockholders; and where in such case the directors conceal from the stockholder the books of the corporation, and refuse him permission to examine them, he is entitled to relief by mandamus. State, Martin, v. Blenville Oil Works Co. 28 La. Ann. 204.

But see *Com. v. Philadelphia & R. R. Co.* 3 Pa. Dist. R. 115, *supra*, VI. b.
45 L. R. A.

But that a stockholder wishes to inspect the stock list for the purpose of conferring with his fellow stockholders will not warrant the issue of a mandamus to enforce the stockholder's right of inspection in the absence of anything in the charter or statutes relating to the matter, where the by-laws provide for annual and special meetings which would afford opportunity for conference, and it does not appear that the stockholder has been deprived of such conference or that there was any considerable dissatisfaction among the other stockholders. *Lyon v. American Screw Co.* 16 R. I. 472.

A stockholder will not be denied permission to inspect the books of a corporation for the purpose of investigating whether a dividend was fairly earned and properly declared on the ground that he was for five months out of the six in which the dividend was declared president and director of the company, and that therefore it was his duty to know its condition, and he must be presumed to know it. *Mitchell v. Rubber Reclaiming Co. (N. J.)* 24 Atl. 407.

And an allegation in a petition for mandamus to compel the giving of permission to a stockholder to inspect the books of the corporation, alleging that a dividend was not fairly earned and that it was declared for the purpose of enabling the recipients to pay for stock which was at the same time ordered to be issued, is sufficient to warrant the issue of the mandamus where it does not appear that the asking was for the purpose of discovering whether the company was prosperous, or otherwise, or its business managed in a skillful and intelligent manner or not, or whether it could be more economically conducted, and there is nothing to indicate that the petitioner was prompted by idle curiosity or that he was seeking to promote some selfish or independent end. *Ibid.*

VII. Rule that there must be a specific dispute.

At common law the stockholders of a corporation had the right to examine at reasonable times the records and books of the corporation. But as the writ of mandamus would not issue as a matter of course, to enforce a mere naked right or to gratify mere idle curiosity, it was necessary for the petitioner to show some specific interest at stake rendering the inspection necessary, or some beneficial purpose for which the examination was desired. *Stone v. Kellogg*, 165 Ill. 192; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115.

A shareholder in a corporation asking a mandamus to compel the custodian of corporate records to permit him to inspect them must have had some interest at stake which rendered the inspection necessary. *People, Bishop, v. Walker*, 9 Mich. 328.

duct on their part, and claimed that the relator wished to force them to buy him out at an extravagant price. As no alternative writ was issued, and the relator proceeded to argument upon his petition and the opposing affidavits, his right to a peremptory writ depends upon the conceded facts, the same as if he had demurred to the allegations of the defendants. *People, Buffalo, v. New York C. & H. R. R. Co.* 156 N. Y. 570; *Haebler v. New York Produce Exchange*, 149 N. Y. 414; *People, Corrigan, v. Brooklyn*, 149 N. Y. 215; *People v. Rome, W. & O. R. Co.* 103 N. Y. 95; Code Civ. Proc. § 2070. While many of the facts alleged in the petition were denied, enough were left undenied to present a case for the exercise of judgment and discretion on the part of the supreme court, provided

it has power, in any case not expressly covered by statute, to authorize the inspection, wholly or in part, of the books of a manufacturing corporation, upon the application of a stockholder. The special term denied the application of the relator for a peremptory writ of mandamus commanding the officers of the corporation to exhibit certain of its books and papers to him, but upon appeal to the appellate division the order of the special term was reversed by a divided vote, and the prayer of the petition granted, with certain regulations as to the time, place, and manner of exhibiting the books and papers. The appellate division allowed an appeal to this court, and certified the following question for decision: "Has the supreme court the power, upon the petition of a stockholder,

The right of a stockholder in a corporation to inspect its books is not to be exercised to gratify curiosity or for speculative purposes, but in good faith and for a specific honest purpose, and where there is a particular matter in dispute involving and affecting his rights as a stockholder. *Phoenix Iron Co. v. Com., Sellers*, 113 Pa. 563.

And a mandamus will be granted in such case only to such extent as may be necessary for the particular occasion. *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115.

In the above case *Rex v. Newcastle-upon-Tyne*, 2 Strange, 1223, *supra*, I., was limited and explained, the court saying that the statement therein, "that every member of the corporation had, as such, a right to look in the books for any matter that concerned himself," must be taken with reference to the cases then before the court.

This rule does not appear to have been applied generally where the right to inspect is statutory, and could not well be where the statutory right is regarded as absolute.

But the theory has been advanced that even the statutory right does not attach unless a controversy existed affecting his interests.

Thus, the Iowa statute does not confer the right on a stockholder to examine the original papers and vouchers of a corporation, and to entitle him to such right he should plead and prove that some property right is involved, or that some controversy exists, or that some specific or valuable interest is in question, to settle which an inspection of such books becomes necessary. *Ellsworth v. Dorwart*, 95 Iowa, 108.

And see also *Lyon v. American Screw Co.* 16 B. I. 472, *supra*, III.

VIII. Matters of procedure.

a. In mandamus.

The rules of procedure with reference to mandamus to enforce a stockholder's right to inspect the books of a corporation would seem to be the same as those applying to that remedy generally, except as modified by the relations of the parties whose rights are in question.

Thus, a mandamus to compel the production of the books of a corporation for inspection by a stockholder is properly directed to the person having the custody, possession, and control thereof, and where a woman is the nominal secretary and her husband does all the business in her name, having the possession and control of the books, and authority to permit an examination and inspection if he sees fit, it is properly directed to him. *State, Bergenthal, v. Bergenthal*, 72 Wis. 314.
45 L. R. A.

And a writ of mandamus to enforce the right of a stockholder to inspect the books of a bank or other corporation must issue against the cashier of the bank or other officer having the custody of the books, and does not run against the corporation as such unless to compel the discharge of some corporate duty, and the bank in its corporate capacity is not a proper party defendant in the proceeding. *Winter v. Baldwin*, 89 Ala. 483.

And a mandamus to compel the submission of the discount book of a bank to a stockholder and director for inspection, which inspection had been refused by the cashier with the approval of the board of directors, is properly directed to the cashier, where he had charge of the book, and need not be directed to the board. *People, Mulr, v. Throop*, 12 Wend. 183.

And a peremptory mandamus requiring the cashier of a bank to submit the discount book of the bank to a stockholder and director for inspection will be granted in the first instance where a rule to show cause had been obtained and cause was shown which was not satisfactory, but in such case the respondent will be permitted to make up a record *pro forma* for the purpose of suing out a writ of error. *Ibid*.

And a foreign corporation need not be made a party to a proceeding by a stockholder against a custodian of its books for an inspection thereof, where the books were within the state and the custodian was domiciled within it. *Swift v. State, Richardson*, 7 Houst. (Del.) 338.

And where it appears in a petition for mandamus to compel permission to inspect the books of a corporation by a stockholder that in compliance with the provisions of the by-laws of the corporation one party was duly appointed as its transfer agent, and that another party was appointed either as transfer agent or registrar of transfers of the stock and was acting as such, the relator is entitled to a peremptory writ directed to both such parties. *People, Harriman, v. Paton*, 20 Abb. N. C. 195.

But in *People, Mulr, v. Throop*, 12 Wend. 123, it was said that while a mandamus to compel the submission of the discount book of a bank to a stockholder and director for inspection is properly directed to the cashier, though his refusal to permit an inspection was approved by the board of directors, it is not thought to be improper to direct it also to the directors.

And the rule that a writ of mandamus to compel the production of books of a corporation for inspection by a stockholder should run against the person having actual charge of the books, and not against the corporation, relates to cases in which the actual custodian of the books has refused to permit another to examine

to compel by mandamus the corporation to exhibit its books for his inspection?" The relator does not claim that the power in question has been conferred upon the court by statute, but he insists that it is a part of its inherent power. This position involves an inquiry into the origin and extent of the authority of the supreme court, and its power of visitation, or of examining into the affairs of corporations according to the common law.

The origin of the supreme court was through a statute passed by the legislature of the colony of New York on the 6th day of May, 1691, whereby, among other things, it was enacted "that there shall be held and kept a Supream Court of Judicature, which shall be Duely and Constantly kept att the City of New Yorke and not Elsewhere, att

the severall & Respective times hereafter mentioned. And that there be five Justices at Least appointed & Commissionated to hold the same court, two whereof together with one Chief Justice to be a Quorum. Which Supream Court are hereby fully Impowered and Authorized to have Cognizance of all pleas, Civill, Criminall, and Mixt, as fully and amply to all Intents & purposes whatsoever, as the Courts of Kings Bench, Comon Pleas, & Exchequer within their Majestyes Kingdome of England, have or ought to have, . . ." This statute was to remain in force for only two years, but it was renewed, recognized, and continued by colonial act or royal ordinance substantially in the words quoted until the adoption of our first Constitution. 1 Col. Laws, pp. 226-229, 303-

them, and not to cases in which the corporation itself by its directors refuses to keep its books at the office in the state in defiance of law. *Crown Coal & Tow Co. v. Thomas*, 60 Ill. App. 234.

One who is a stockholder in two corporations which are to all intents and purposes one and have the same officers may join both in a proceeding by mandamus to enforce his right of inspection of their books. *Re Crosby*, 28 Misc. 300.

And a proceeding by mandamus by a stockholder against the vice president and transfer agent of a corporation in which judgment was rendered in favor of such vice president and agent, is not a bar to a subsequent proceeding brought by the same relator against the corporation itself. *State, Wilson, v. St. Louis & S. F. R. Co.* 29 Mo. App. 301.

Reasons why the right of a stockholder to inspect the books of a corporation should not be granted are matters of defense, where it appears that he is a stockholder and has demanded the right at reasonable and proper times, and that it was denied him. *Foster v. White*, 86 Ala. 467, *dictum*.

And reasons why an inspection of the books of a corporation by a stockholder should not be permitted, and reasons why a company should be made a party to a proceeding for mandamus to compel the production of books for inspection, should be made to appear by the return of the writ, and not by motion to quash. *State, Bergenthal, v. Bergenthal*, 72 Wis. 314.

And a denial by the respondent in a proceeding for a mandamus to enforce the right of a stockholder to inspect the books and records of a corporation that the relator had at any time been refused the right to examine any of the records or accounts of the company which he was entitled to examine either as a stockholder or director, is insufficient as it assumes that he had no right to examine any of the records or accounts which he asked permission to inspect. *Stone v. Kellogg*, 62 Ill. App. 444, Affirmed in 165 Ill. 192.

And a reply by a director of a company to a petition for a mandamus to compel the production of the books of the company for inspection by a stockholder, that he was advised by counsel, and charged the fact to be that the applicant was not the owner or holder of capital stock of the company, but admitting that he held stock, and averring that he was not entitled to possession thereof, is not such a denial of the fact of ownership stated in the petition as to require a trial of the issue. *Re Martin*, 63 Hun, 557.

So, an allegation in an answer to a petition for mandamus to compel permission to a stock-

holder to inspect the books of a corporation, that the respondents had no knowledge or information sufficient to form a belief that the relators are or were or either of them was, at the time, the owner of the shares of stock as alleged, is not a sufficient denial of a positive allegation of ownership in the petition to prevent the issuance of a peremptory writ of mandamus in the first instance. *People, Harriman, v. Paton*, 20 Abb. N. C. 195.

And resisting affidavits in a proceeding for mandamus to compel the allowance of the inspection of the books of a corporation in which the petitioner positively alleges that the relator is the owner of over fifteen shares of capital stock, and shows a proper demand for permission to examine such books, which is refused, alleging that the respondent was advised by his counsel and charges the fact to be that the relator is not the holder or owner of over fifteen shares of such capital stock or the owner of any shares, but admitting that he is the holder of a certificate of twenty shares to the possession of which he is not entitled, is evasive, and does not controvert the positive allegation of the petition as to ownership so as to prevent the issuance of a peremptory mandamus. *Martin v. Johnston*, 25 Abb. N. C. 350.

So, an allegation in an affidavit of the attorney for the relator in a proceeding for mandamus to compel the secretary of a corporation to produce its stock-book for inspection, that he demanded that the respondent allow the relator to inspect the stock-book and make extracts therefrom, is not answered by a denial that the attorney demanded that they be allowed the inspection. *People, Gunst, v. Goldstein*, 37 App. Div. 550.

And an allegation in the affidavits of the attorney for the relator in such a proceeding, that a demand was made for the production of the books, and that the secretary in the presence of a designated person refused to produce them, is not answered by a denial that he refused in the presence of such person. *Ibid*.

And a denial by the respondent in such a proceeding, that on a day mentioned, and daily since that time, the relator had frequently demanded that the respondent produce the stock book for his inspection, is not a denial of an allegation therein that on the day named, and daily since that time, the relator had frequently demanded the production of the book for his inspection. *Ibid*.

And an allegation in such a proceeding that on a designated day the respondent locked up all the other books, and that repeatedly and daily thereafter the respondent demanded to be allowed to look at the same and was refused, is not answered by a denial that the respondent

306, 358, 380; 2 Col. Laws, 462, 639, 948; 3 Col. Laws, 546, 780, 1007; 4 Col. Laws, 1088; 5 Col. Laws, 73. As has been well said by a recent writer: "This act founded the supreme court. . . . Not only did this act erect the tribunal which still continues the great law court of the state, but it vested in it a jurisdiction which change of government and constant reforms and revolutions in procedure have been powerless to abridge in any material respect; for, while its jurisdiction has been enlarged by its union with the court of chancery, its ancient jurisdiction still remains unimpaired. The supreme court of the province was the instrument by which the great body of the jurisprudence of the English common law was applied to New York." Fowler's Organization of the Su-

preme Court, 19 Alb. L. J. 211. The court of chancery was created, or, as some insist, continued, by the same act, and was subsequently kept in force in the same way. Hoffman, Ch. Pr. 14; Graham, Jur. 140. Aside from the colonial statutes, which created and continued such courts only for fixed terms, royal ordinances were resorted to when the legislature failed to act, upon the theory that such action was authorized by the charter of the colony. The most notable were those passed by the governor and council on the 15th of May, 1699, and the 3d of April, 1704; which are referred to by the revisers in a note to 1 Rev. Laws, p. 213, and published in full in appendix No. 5 at the end of the second volume of the Revised Laws. These ordinances, which were questioned but never

locked up all the books of account and stock-books of the corporation, and that he repeatedly and daily thereafter, upon the relator's demand, refused to allow him to look at the same, that being a denial that the respondent locked up the stock-book only. *Ibid.*

And an allegation in such a proceeding, that in reply to a demand for permission to inspect the respondent had stated that he had removed the stock-books from the office of the company, and that between designated dates they had at all times been out of that office, and that the secretary then and there refused to allow the relator to see them, is not answered by a denial that during the times mentioned the respondent refused the relator permission to inspect, as it does not show that he then and there refused it, or that during the interval the stock-book had at all times been out of the office of the company. *Ibid.*

So, it is no answer to an application for a mandamus by a parishioner to compel church wardens to allow him to inspect their accounts under 17 Geo. II. chap. 38, that in a subsequent clause of the statute a penalty is imposed for improperly refusing such inspection, as the penalty is not given by way of compensation to the party aggrieved, but is imposed for the relief of the poor and to punish the offender. *King v. Clear*, 4 Barn. & C. 899.

And a relator in a proceeding for mandamus for the inspection of books of a corporation, who is tendered the inspection he desired with offer of payment of costs up to that time, is rightly taxed with costs of the suit made after that time, unless it be found that some damages should be awarded because of the denial of his right previous to the filing of the tender. *Boardman v. Marshalltown Grocery Co.* 105 Iowa, 445.

The court upon the hearing of a motion for a writ of peremptory mandamus to compel the transfer agents of a foreign corporation to allow stockholders to inspect the transfer books and list of stockholders, may, without regard to the provision of the Code, order a reference to take proofs on matters concerning which fuller information is desired before proceeding. *People, Del Mar, v. St. Louis & S. F. R. Co.* 44 Hun, 552, 19 Abb. N. C. 1.

b. In other proceedings.

The mode of procedure in statutory proceedings is usually prescribed by the statute authorizing them, and in actions for damages for denial of inspection the only questions peculiar to this class of cases seem to be those with reference to the measure of damages.

Thus, the penalty authorized by Vt. Gen. 45 L. R. A.

Stat. chap. 86, §§ 7, 8, 13, for the refusal of the custodian of corporate books and records to permit a stockholder to inspect them, is a satisfaction to the stockholder for the injury caused him by a refusal of his right to inspect the corporate records, and no special injury or damage need be alleged or proved in an action for such penalty. *Lewis v. Brainerd*, 53 Vt. 510.

And the penalty imposed by N. Y. Laws 1848, chap. 40, § 25, for violation of the statute requiring books of a corporation to be kept at the office of the company open for inspection by stockholders, is imposed for violation of a duty, and its recovery is not dependent upon a pecuniary loss as the consequence, and an injury to the stockholder from such violation is not essential to his recovery. *Kelsey v. Pfaudler Process Fermentation Co.* 20 N. Y. S. R. 533.

And evidence of previous efforts on the part of a stockholder to obtain an inspection of the stock-book of a foreign corporation is admissible in an action to recover a penalty for failure or refusal to permit the inspection of such books as provided for by the New York stock corporation law, as tending to show the good faith of the stockholder and as having a bearing upon the validity of the excuse which is given in the explanation of the refusal to permit the inspection. *Recknagel v. Empire Self-Lighting Oil Lamp Co.* 24 Misc. 193.

In the above case *Kelsey v. Pfaudler Process Fermentation Co.* 20 N. Y. S. R. 533, *supra*, V., was distinguished upon the ground that there the person who had the key to the safe where the stock-book was locked was out of town, and that no one else could open the safe, while in the present case the stock-book was not at the proper office when the demand for an inspection was made.

So, the rights of a stockholder who demands the right to inspect the books of a corporation on Saturday and is told to wait until Monday following to recover the penalty prescribed by N. Y. Laws 1848, chap. 40, § 25, for violation of the provision thereof, that certain books should be kept open to the inspection of stockholders, is not waived by his act in going upon Monday and examining the books. *Kelsey v. Pfaudler Process Fermentation Co.* 20 N. Y. S. R. 533.

And the right of a shareholder in a corporation to inspect and take copies of the register of members of the company cannot be objected to by the company upon the ground that he was not a member, and that his shares had been forfeited, and that he had not tendered the shilling necessary under the companies act of 1862, § 32, to entitle a nonmember to inspect, where he was treated by the company as a person who was entitled to inspect and to have a list of the

overthrown, are substantially the same as the original act of 1691. Chalm. Col. Op. 249; 5 Col. Doc. 952; 1 E. D. Smith, introduction, p. 50. The supreme court, as thus continued by Lord Bellamont's ordinance of 1699, and the court of chancery, as continued by ordinance on the 20th of August, 1701, and the 7th of November, 1704, were the same tribunals and possessed the same powers as those organized by the colonial legislature. Appendix No. 7, 2 Rev. Laws, p. 13. They were still in existence and exercising their powers when the convention met to organize a state government. "Such parts of the common law of England and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, 1775," were made and continued the law of this state by its first Constitution. Const. 1777, § 35. While that instrument neither created nor continued the supreme court or the court of chancery, except as stated above, it treated both as existing tribunals; for it alluded to the chancellor and the justices of the supreme court, regulated their terms of office, and conferred upon them the power of appointing clerks for their respective courts. They thus explicitly recognized them as continuing in power under the state government as they had previously existed under the colonial government. Id. §§ 33-37, 41. The second Constitution contained similar provisions as to what constituted the law of the state, except that it omitted "the statute law of England and Great Britain," and abro-

gated such parts of both common and statute law "as are repugnant to this Constitution." Const. 1821, art. 5, §§ 1-7; Id. art. 7, § 13. The third Constitution abolished the court of chancery, and enacted that there should "be a supreme court having general jurisdiction in law and equity." Const. 1846, art. 6, § 3; Id. art. 14, § 8. It repeated the provisions as to what should be the law of the state. Id. art. 1, § 17. The revised Constitution now in force continues the supreme court, "with general jurisdiction in law and equity," and provides that "such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the convention of the state of New York, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same." Const. 1895, art. 1, § 16; Id. art. 6, § 1; *Koch v. New York*, 152 N. Y. 72, 76; *Re Knouack*, 158 N. Y. 482, 487. It is provided by § 217 of the Code of Civil Procedure that "the general jurisdiction in law and equity, which the supreme court of the state possesses, under the provisions of the Constitution, includes all the jurisdiction which was possessed and exercised by the supreme court

present members furnished him. *Boord v. African Consol. Land & Trading Co.* [1898] 1 Ch. 596, 77 L. T. N. S. 553.

Where no actual damages resulting from the denial of a stockholder's statutory right to inspect the books of the corporation are shown, punitive damages cannot be assessed, however malicious the conduct of the corporation or its officers may have been. *Boardman v. Marshalltown Grocery Co.* 105 Iowa, 445.

And while a stockholder who is denied the right to inspect the books of his corporation is entitled to nominal damages by reason of the infraction of the statutory right, a judgment not allowing such nominal damages will not be reversed where he was subsequently tendered the inspection he desired with offer of payment of costs up to that time. *Ibid.*

And time used and expenses incurred in an attempt of a stockholder to secure the right to inspect the books of a corporation cannot be recovered or taxed as items of damage in a case brought to secure that right, where no actual damages resulting from the denial of the stockholder's statutory right are shown, and it does not appear that the denial of the right itself caused damage. *Ibid.*

And a stockholder suing for damages for refusal to permit him to examine the books of the corporation under the New York stock corporation law prescribing that the stock-books shall be open during business hours for the inspection of stockholders and judgment creditors, and providing for a forfeiture or penalty for refusal to permit such inspection, cannot recover the costs and counsel fees of mandamus proceedings by which he compels the corporation and its officers to allow an inspection of the books. 45 L. R. A.

Clason v. Nassau Ferry Co. 20 Misc. 315, 50 N. Y. Supp. 160, 4 N. Y. Anno. Cas. 166.

So, while in a proper case an accountant or expert may be appointed by the court to assist a party in interest in the examination of the books of a corporation, no part of the compensation to be paid to such expert should be assessed against the corporation in the action with reference to which the inspection was made. *State. Burke v. Citizens' Bank*, 51 La. Ann. 426.

And a stockholder who demands of the corporation to see the corporate books, making the demand in such broad terms that the corporation is justified in refusing it, because he is only entitled to a portion of such relief, and who afterwards obtains an order granting him such relief to that extent, is not entitled to recover counsel fees, where it is impossible to separate the services rendered in the proceeding in the attempt to force that part of the relief which was denied from those which were rendered in respect to the relief granted. *Clason v. Nassau Ferry Co.* 50 N. Y. Supp. 160.

An order to inspect books of a corporation will not be granted to a stockholder where he has not given the notice required by the rules of court for that purpose. *Re Credit Co. L. R. 11 Ch. Div. 256*, 48 L. J. Ch. N. S. 221, 27 Week. Rep. 380.

An application by a stockholder of a corporation for a discovery and inspection of books and papers in the possession of the company, though made under the provisions of N. Y. Code Civ. Proc. § 388, and not under the Revised Statutes, will not be denied on the ground that it should have been made by petition instead of by motion. *Johnson v. Consolidated Silver Min. Co.* 2 Abb. Pr. N. S. 413. F. H. B.

of the colony of New York, at any time, and by the court of chancery in England on the 4th day of July, 1776; with the exceptions, additions, and limitations created and imposed by the Constitution and laws of the state. Subject to those exceptions and limitations, the supreme court of the state has all the powers and authority of each of those courts, and exercises the same in like manner." See also 2 Rev. Stat. p. 173, § 36; Id. p. 196, § 1; Laws 1847, chap. 280, § 16. Thus, we have the powers of the court of King's bench and the court of chancery, as they existed when the first Constitution was adopted, blended and continued in the supreme court of the state, except as modified by Constitution or statute.

The right of a corporator, who has an interest, in common with the other corporators, to inspect the books and papers of the corporation, for a proper purpose and under reasonable circumstances, was recognized by the courts of King's bench and chancery from an early day, and enforced by motion or mandamus, but always with caution, so as to prevent abuse. *Rea v. Newcastle-upon-Tyne*, 2 Strange, 1223, and note; *Gery v. Hopkins*, 7 Mod. 129, case 175; *Richards v. Pattinson*, Barnes, N. C. 235; *Young v. Lynch*, 1 W. Bl. 27; *Rea v. Shelley*, 3 T. R. 141; *King v. Babb*, 3 T. R. 579, 580; *King v. Merchant Tailors' Co.* 2 Barn. & Ad. 115; *Re Burton*, 31 L. J. Q. B. N. S. 62; *Re West Devon Great Consols Mine*, L. R. 27 Ch. Div. 106. Lord Kenyon, in rendering judgment in *King v. Babb*, assumed "that in certain cases the members of a corporation may be permitted to inspect all papers relating to the corporation." In *Gery v. Hopkins* the court, on granting the order to produce, said: "There is great reason for it, for they are books of a public company and kept for public transactions, in which the public are concerned, and the books are the title of the buyers of stocks, by act of Parliament." In *Rea v. Newcastle-upon-Tyne* the reporter states that the court said: "Every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others."

The following cases arose in this state, but the most of them are not strictly in point, as they rest mainly upon statutory authority, which does not extend to the case in hand: *People, Hatch, v. Lake Shore & M. S. R. Co.* 11 Hun. 1. Affirmed. *sub nom. Re Sage*, in 70 N. Y. 222; *People, Stobo, v. Eadie*, 63 Hun. 320. 133 N. Y. 573; *Cothel v. Brouwer*, 5 N. Y. 562; *People, Onderdonk, v. Mott*, 1 How. Pr. 247; *People, Harriman, v. Patton*, 20 Abb. N. C. 172 and 195; *People, Richmond, v. Pacific Mail S. S. Co.* 50 Barb. 280; *People, Field, v. Northern P. R. Co.* 18 Jones & S. 456; *People, Olason, v. Nassau Ferry Co.* 86 Hun. 128; *Central Cross-Town R. Co. v. Twenty-Third Street R. Co.* 53 How. Pr. 45; *People, Muir, v. Throop*, 12 Wend. 183.

The courts of other states compel the officers of corporations to allow stockholders to examine the books upon due application for a proper purpose. In *Lewis v. Brainerd*, 53 45 L. R. A.

Vt. 520, the court said: "The shareholders in a corporation hold the franchise and are the owners of the corporate property; and as such owners they have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property." In *Huyilar v. Cragin Cattle Co.* 40 N. J. Eq. 392, 398, it was said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times, . . . and they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way, without the books, that their affairs have been mismanaged or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders." In *Com., Sellers, v. Phœnia Iron Co.* 105 Pa. 111, 116, 51 Am. Rep. 184, the rule was laid down that, "unless the charter provides otherwise, a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them, for a definite and proper purpose, at reasonable times. The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." Upon a second appeal in the same case, *sub nom. Phœnia Iron Co. v. Com., Sellers*, 113 Pa. 563, 572, the court said: "Under the circumstances mentioned and for the purposes stated, we are of opinion that, according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity or for speculative purposes, but in good faith and for a specific honest purpose, and where there is a particular matter in dispute, involving and affecting seriously the rights of the relator as a stockholder. . . . A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers [the relator] was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable personal inspection of them, and, with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he purposed to bring. The relator, we think, has a clear right, under the writ and return, to the relief he asks, and it is plain that he has no specific legal remedy for the enforcement of that right; and the existence of a supposed equitable remedy is not a ground

for refusing the mandamus." In *Cockburn v. Union Bank*, 13 La. Ann. 289, 290, the court, in granting a mandamus requiring the officers of a corporation to allow access by a stockholder to the books, said: "A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by the charter or the law of the land; as long, then, as the charter, or the rules and by-laws passed in conformity thereto, and the law, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of everyone to see that his property is well managed, and to have access to the proper sources of knowledge in this respect." The same court, in a like case, declared that a stockholder in a trading corporation "has, in the very nature of things, and upon principles of equity, good faith, and fair dealing, the right to know how the affairs of the company are conducted,—whether the capital of which he has contributed so large a share is being prudently and profitably employed or otherwise. . . . In order to comply with this call, and to vote understandingly, it was certainly requisite for the relator to know the condition of the affairs and business operations of the company, and be enabled from this knowledge to act for the best interests of the stockholders and of the company." *State, Martin, v. Bienville Oilworks Co.* 28 La. Ann. 204, 208. See also *Stone v. Kellogg*, 165 Ill. 192; *Stettauer v. New York & S. Constr. Co.* 42 N. J. Eq. 46; *People, Bishop, v. Walker*, 9 Mich. 328; *State, Bergenthal, v. Bergenthal*, 72 Wis. 314.

The elementary works unite in holding that a corporator has the right in question, and that mandamus is a proper remedy. Mr. Wait, in his work on Insolvent Corporations, after reviewing the authorities, says: "It will be apparent from an examination of these authorities that the rule in favor of a stockholder's right of inspection and investigation of corporate books and papers is becoming very broad and general." Section 504. But, while the learned author recognizes the rule, he insists—and we agree with him—that an inspection should "not be granted to facilitate speculative schemes or to gratify idle curiosity." He declares that "mandamus is the most complete and effective form of redress available to a stockholder or party in case of a denial of the right of inspection." Section 516. Mr. Cook, in discussing the question, says that "the stockholders of a corporation had, at common law, a right to examine at any reasonable time and for any reasonable purpose, any one or all of the books and records of the corporation. This rule grew out of an analogous rule applicable to public corporations and to ordinary copartnerships, the books of which, by well-established law, are always open to the inspection of members." 2 Cook, Stock & Stockholders, § 511. "The prevailing doctrine in the United States is said to permit an incorporator the same freedom in examining the books of the company as a partner

has with respect to the books of his firm. But the right only extends to such documents as are necessary to the stockholder's particular purpose. . . . Statutes giving the shareholders of corporations the right to inspect the corporate books have been passed in many of the American states and in England. These statutes, however, do not supplant the common-law right." 1 Beach, Priv. Corp. § 75. Judge Thompson, in his work on Corporations, says: "One of the privileges incident to ownership of stock in a corporation is that of an inspection of the books and condition of the company, and this privilege, in general, becomes a right when the inspection is sought at proper times and for proper purposes." Section 4406. He further declares that when the right is guaranteed by statute the motive for its exercise is immaterial, but when it rests upon the common law it will not be allowed for speculative purposes, the gratification of curiosity, or where its exercise would produce great inconvenience. Sections 4412–4420. See also Ang. & A. Corp. 9th ed. § 681; Morawetz, Priv. Corp. § 473; High, Extr. Legal Rem. § 308; 19 Am. & Eng. Enc. Law, p. 231.

We think that, according to the decided weight of authority, a stockholder has the right at common law to inspect the books of his corporation at a proper time and place, and for a proper purpose, and that, if this right is refused by the officers in charge, a writ of mandamus may issue, in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. It should not be issued to aid a blackmailer, nor withheld simply because the interest of the stockholder is small; but the court should proceed cautiously and discreetly, according to the facts of the particular case. To the extent, however, that an absolute right is conferred by statute, nothing is left to the discretion of the court; but the writ should issue as a matter of course although even then, doubtless, due precautions may be taken as to time and place, so as to prevent interruption of business or other serious inconvenience.

The appellants, however, insist that certain statutory provisions relating to the subject are exclusive, and, as they do not extend to the case under consideration, that the appellate division had no right to grant the writ. The history of legislation upon the subject in brief is as follows: By the general manufacturing act of 1848 it was made the duty of the trustees of corporations organized under it to keep a transfer book, which was required to "be opened for the inspection of stockholders and creditors of the company," substantially every business day at the office of the corporation. Laws 1848, chap. 40, § 26. This section was subsequently amended so as to require the treasurer to make a statement of the affairs of the company upon the request of persons owning a specified percentage of the capital stock. Laws 1854, chap. 201, § 1; Laws 1862, chap. 472, § 1. The business corporations law of

1875 required the directors of corporations organized thereunder "to cause to be kept at its principal office or place of business correct books of account of all its business and transactions, and every stockholder in such corporation shall have the right at all reasonable times by himself or his attorney to examine the records and books of account of such corporation." Laws 1875, chap. 611, § 16. These statutes were all repealed in 1892 by the general corporation law. Laws 1892, chap. 687, pp. 1816-1819. During the same year the stock corporation law was passed, which provides that every stock corporation shall keep a stock-book, which "shall be open daily, during business hours, for the inspection of its stockholders and judgment creditors, who may make extracts therefrom." Id. chap. 688, § 29. It also requires the treasurer, upon the request of stockholders owning a fixed percentage of the capital stock, to furnish a statement of all its assets and liabilities. Id. § 52. We do not think that the statute now in force is exclusive, or that it has abridged the common-law right of stockholders with reference to the examination of corporate books. By enabling a stockholder to get some information in a new way, it did not impliedly repeal the common-law rule which enabled him to get other information in another way; for the courts do not hold the common law to be repealed by implication, unless the intention is obvious. By simply providing an additional remedy the existing remedy was not taken away. The statute merely strengthened the common-law rule with reference to one part thereof, and

left the remainder unaffected. It dealt with but a single book, and as to that it amplified the qualified right previously existing by making it absolute, and extending it to judgment creditors. The stock-book has no relation to the business carried on by a corporation; and the change was doubtless made to enable stockholders to promptly learn who are entitled to vote for directors, and judgment creditors to learn who are liable as stockholders for a failure to comply with the provisions of the act. The statute is silent as to the other books, and provides no system of inspection as a substitute for the right of examination at common law. The provision for a report from the treasurer was not designed to take away an old right, but to give a new one, not as a substitute but as an addition.

We think that the common-law right of a stockholder with reference to the inspection of the books of his corporation still exists, unimpaired by legislation; that the supreme court has power, in its sound discretion, upon good cause shown, to enforce the right; and that such power is a part of its general jurisdiction as the successor of the courts of the colony of New York, which had the jurisdiction of the court of King's bench and the court of chancery in England.

It follows that *the order appealed from should be affirmed*, with costs, and that the question certified should be answered in the affirmative.

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts
v.
Albion P. HILTON.

(.....Mass.....)

1. The exclusion of citizens of other states from the right to dig clams for sale on certain flats, by a regulation restricting the right to residents of the town, does not violate the constitutional privileges or immunities of citizens.
2. The common right of the public and the right of regulation are the same in regard to shellfish as in regard to swimming fish.
3. A town regulation prohibiting all persons from digging clams on certain flats without a permit, which will be granted only to residents of the town, is not unconstitutional or in violation of Pub. Stat. chap. 91, § 68, as amended by Stat. 1889, chap. 391, which expressly saves to every inhabitant of the commonwealth a right to take them without permit "for his own family use" and a limited quantity for bait.

(June 30, 1899.)

NOTE.—As to governmental control over right of fishery, see *note to People v. Truckee Lumber Co.* (Cal.) 39 L. R. A. 581.

As to constitutional rights of citizens to take oysters in other states, see cases in *note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. on page 582. 45 L. R. A.

EXCEPTIONS by defendant to rulings of the Superior Court for Essex County made during the trial of an indictment charging defendant with violating the regulations of the town of Salisbury in reference to the taking of shellfish. *Overruled.*

The facts are stated in the opinion.

Messrs. Edmund S. Spalding, Colver J. Stone, and David P. Page, for defendant:

The right of fishery in tide water on a navigable stream is a common public right.

Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764; *Dunham v. Lamphere*, 3 Gray, 268; *Lakeman v. Burnham*, 7 Gray, 437; *Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101; *Predle v. Brown*, 47 Me. 284; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997.

This right applies equally to swimming fish and to shellfish on flats that are covered by tide water on a navigable stream or arm of the ocean.

Wharton v. Wise, 153 U. S. 155, 38 L. ed. 669; *Porter v. Shehan*, 7 Gray, 435; *Com. v. Bailey*, 13 Allen, 541; *Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101; *Peck v. Lockwood*, 5 Day, 22; *Parker v. Cutler Mill-dam Co.* 20 Me. 353, 37 Am. Dec. 56; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

A distinction must be made between cultivated and natural fisheries.

Com. v. Manimon, 136 Mass. 456; *Keene v. Gifford*, 158 Mass. 120; *People v. Hazen*, 121 N. Y. 313; *Clinton v. Buell*, 55 Conn. 263; *Brown v. De Groff*, 50 N. J. L. 409.

The commonwealth is a trustee holding the title for all the inhabitants of the state, who thereby gain a common property right in such fisheries, and the commonwealth as trustee has no power to grant to a single town an exclusive right in the fisheries.

Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; *State v. Higgins*, 51 S. C. 51, 38 L. R. A. 561; *Skinner v. Hettrick*, 73 N. C. 53; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Re Mattson*, 69 Fed. Rep. 535; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432; *Dunham v. Lamphere*, 3 Gray, 273; *West Roxbury v. Stoddard*, 7 Allen, 158; *Rowell v. Doyle*, 131 Mass. 474.

Even if it can be said that the commonwealth in the exercise of its discretion may grant an exclusive right in a particular fishery to the citizens of any one town, such grant must be made by the legislature, and in express terms, and cannot be given by implication or by general law.

Randolph v. Braintree, 4 Mass. 315; *Proctor v. Wells*, 103 Mass. 216; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Paul v. Hazleton*, 37 N. J. L. 106; *Allen v. Allen*, 19 R. I. 114, 30 L. R. A. 497; *Dwelly v. Dwelly*, 46 Me. 377; *Preble v. Brown*, 47 Me. 284.

In considering grants made by the commonwealth, the ordinary rule as to deeds is reversed, and the rights and privileges which are not granted in the most express terms to a particular town will be presumed to have been retained by the commonwealth.

Com. v. Roxbury, 9 Gray, 451.

In the absence of grants the commonwealth stands in the position of trustee to administer the public fisheries within its borders for the benefit of all of its citizens, and the legislature undoubtedly possesses the power to pass such acts as may be necessary for the preservation of the public fisheries, or, in special localities, if for the public welfare, a fishery may be destroyed; but all such acts must be general and for the public interest.

Com. v. Alger, 7 Cush. 53; *Howes v. Grush*, 131 Mass. 207.

There can be no discrimination under pretense of prohibition, and regulation should be capable of general application.

1 Dill, Mun. Corp. 4th ed. §§ 319, 320; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Larion v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 152 U. S. 133, 38 L. ed. 385; *Austin v. Murray*, 16 Pick. 121; *Dill v. Wareham*, 7 Met. 438; *Com. v. Wilkins*, 121 Mass. 356; *Com. v. Allen*, 128 Mass. 308; *Com. v. Roy*, 140 Mass. 432; *Newton v.* 45 L. R. A.

Belger, 143 Mass. 598; *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116; *Com. v. Parks*, 155 Mass. 531; *Swift v. Falmouth*, 167 Mass. 115.

A by-law which under the pretense of regulating the fishery of clams prohibits all persons except the inhabitants of the town from taking shellfish in a navigable river is void as in contravention of common right.

Cooley, Const. Lim. 6th ed. 247; 1 Dill, Mun. Corp. 4th ed. § 325; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Hayden v. Noyes*, 5 Conn. 391.

Mr. W. Scott Peters, for the Commonwealth:

In early English law the right of common is an incorporeal right and includes a common of piscary which is said to be a liberty or right of fishery in the water covering the soil of another, or in a river running through another man's land.

2 Bl. Com. 34, 39.

In England the preservation and regulation of the mode and time of taking fish were of public concern.

Parker v. People, 111 Ill. 581.

The Body of Liberties of 1641 declared that "every inhabitant that is an householder shall have free fishing and fowling in any great ponds and bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the towns where they shall dwell, unless the freemen of the same town or the general court have otherwise appropriated them."

Body of Liberties, art. 16; 28 Mass. Hist. Soc. Coll. 219.

But this article did not confer on the inhabitants of the several towns, as existing in 1641, a right of property in the fisheries within their respective limits.

The qualification "unless the freemen of the same town or the general court have otherwise appropriated them" is not a mere specific exception of privileges previously granted, but a general law, prescribing by what authority this public right may be regulated or granted away.

Coolidge v. Williams, 4 Mass. 144; *Randolph v. Braintree*, 4 Mass. 317; *Dill v. Wareham*, 7 Met. 446.

The public right of fishery throughout Massachusetts, as in other parts of the United States and Great Britain, includes shellfish as well as floating or swimming fish.

Weston v. Sampson, 8 Cush. 347, 54 Am. Dec. 764.

In 1796 a general law was passed for the regulation and preservation of the "common property" in oysters and other shellfish.

By this act so far as it extended and applied, the subject was regulated, and no right of property or control remained in the towns in their corporate capacity.

Dill v. Wareham, 7 Met. 438; *Moulton v. Libbey*, 37 Me. 494, 59 Am. Dec. 57.

Public Statutes, chap. 91, § 68, as amended by chap. 391 of the acts of 1889 empowers the mayor and aldermen of cities and the

selectmen of towns, when so instructed by their cities and towns, to control and regulate or prohibit the taking of eels, clams, quahogs, and scallops within their respective limits.

When the Revolution took place, the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters and the soils under them.

Martin v. Waddell, 16 Pet. 367, 10 L. ed. 997.

The citizens of one state are not invested by the United States Constitution with any interest in the common property of the citizens of another state.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248.

Whatever soil below low-water mark, within the ebb and flow of the tide, is the subject of exclusive property and ownership, belongs to the state within whose territory it lies.

But this soil is held by the state subject to, and in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of fishing.

It is the right of the state to make and enforce laws regulating the exercise of this right, so as to prevent the destruction of the fishery, and to prevent acts which would render the public right less valuable, or destroy it altogether.

Smith v. Maryland, 18 How. 71, 15 L. ed. 269.

Section 2 of art. 4 of the Constitution of the United States, which provides that citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, does not apply to the right of fishing within a state.

McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565.

This common and general right of fishing in the sea and its shores extended to shellfish, as well those which are embedded in the soil as those which lie on the surface.

Weston v. Sampson, 8 Cush. 347; *Proctor v. Wells*, 103 Mass. 216.

The legislature has the power to regulate and control the taking of fish in any of the waters of the commonwealth, and may even grant exclusive rights of fishing at particular places in tide water.

Com. v. Vincent, 108 Mass. 447; *Ooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

No citizen has a right to take shellfish in the waters of the state which is not subject to control or abridgment of the legislature.

Com. v. Manimon, 136 Mass. 456; *Burnham v. Webster*, 5 Mass. 266; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Preble v. Brown*, 47 Me. 284.

Knowlton, J., delivered the opinion of the court:

At a legal meeting of the inhabitants of 45 L. R. A.

the town of Salisbury, it was voted unanimously, under a proper article in the warrant, "that the selectmen be instructed to control or regulate or prohibit the taking of eels, clams, quahogs, and scallops within the town, and make such regulations concerning the taking of eels and said shellfish as they may deem expedient." Subsequently, in accordance with this vote, the selectmen made a regulation "prohibiting all persons from digging clams on Salisbury Flats to sell, except those having a permit from the selectmen, the permit only to be granted to residents of the town." The defendant dug clams in violation of this regulation, and was convicted of the offense in the superior court, under Pub. Stat. chap. 91, § 69. The defendant asked the court to rule as follows: "That the regulation of the town of Salisbury is unconstitutional and void—First, because it is in conflict with § 2, art. 4, of the Constitution of the United States, which provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, and the by-law in question prevents citizens of states other than Massachusetts from availing themselves of the common right of fishery within the said town of Salisbury; second, because the right of fisheries is a public right vested in the commonwealth, and which, as trustee, the commonwealth has no power to grant to the town; third, because it abridges rights and privileges guaranteed under the law of the state, and no express grant of said right has been made by the state to the town; fourth, because no authority, expressed or implied in the charter of said town, gives a right to pass such by-law; fifth, because said by-law, which, under the pretense of regulating the fishery of clams within its limits, prohibits all persons except the inhabitants of the town from taking shellfish from a navigable river, is void, as in contravention of a common right; sixth, because it appears that the defendant and others have acquired a vested right in said fishery, of which they cannot be deprived without compensation and due process of law; seventh, because the said regulation is in conflict with article 14, § 1, of the Amendments of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States, and said by-law abridges a common privilege of all citizens of the country, namely, the common right of fishery within said town of Salisbury; eighth, that the said regulation of the town of Salisbury, so far as it prohibits inhabitants of other towns in the commonwealth from the use of the common fishery within said town of Salisbury, is unconstitutional and void." To the refusal so to rule, and to the ruling that the agreed facts would warrant a verdict of guilty, the defendant excepted.

By the common law of England, all the King's subjects had a common right of fishery in the sea, and in all bays, coves, and

arms of the sea where the tide ebbs and flows. The King, who holds the right of soil under tide water, holds the appurtenant right of fishery in trust for his subjects; and since *Magna Charta* he cannot by grant deprive them of it. These rights in America were granted in the colonial charters, to be held for the benefit of the inhabitants, and when the colonies achieved their independence they remained in the several states, to be exercised for the common good. *Dill v. Wareham*, 7 Met. 446; *Com. v. Alger*, 7 Cush. 53-82; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Martin v. Waddell*, 16 Pet. 367, 410, 432, 10 L. ed. 997, 1012, 1021; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159; *Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356. The rights of the states in the management and regulation of these fisheries are not limited like that of the Crown in England. The states hold them in trust for the public, but they exercise, not only the rights of sovereignty, except in those matters over which it is granted to the general government, but also the right of property, as to everything which remains in common for all the people. In *Martin v. Waddell*, 16 Pet., at page 410, 10 L. ed. 1012, Chief Justice Taney says: "When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British Crown, when the title is held by a single individual in trust for the whole nation." So Chief Justice Shaw, in *Com. v. Alger*, 7 Cush., at page 82, says that "the power of the commonwealth, by the legislature, over the sea, its shores, bays, and coves, and all tide waters, is not limited like that of the Crown at common law." It is now settled that the right of regulation and control of fisheries by the several states in the interest of the public permits, in any state, legislation that secures the benefits of this public right in property to its own inhabitants. The rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several states do not include, in favor of inhabitants of any state, rights in common property of the inhabitants of other states. *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Wharton v. Wise*, 153 U. S. 155, 38 L. ed. 669; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Blake v. McClung*, 172 U. S. 239-249, 43 L. ed. 432-436. The numerous statutes in regard to fisheries which have been enacted from time to time in this commonwealth are founded on this doctrine, and our decisions recognize it. The defendant's contention that the regulation in the

present case is in conflict with the Constitution of the United States, because it gives privileges to the inhabitants of Salisbury which are not given to citizens of other states, is therefore without foundation.

The next question is whether the regulation is unconstitutional, or otherwise invalid, because it gives to inhabitants of Salisbury privileges in the fishery which are not given to inhabitants of other towns and cities in this state. Pub. Stat. chap. 91, § 68, as amended by Stat. 1889, chap. 391, under which the regulation was made, expressly saves to every inhabitant of the commonwealth a right to take, without permit, eels and the shellfish mentioned, "for his own family use," and to take the shellfish for bait, not exceeding 3 bushels in any one day. The language of the statute is broad enough to authorize a regulation which prefers inhabitants of the town in issuing permits to take fish for sale. From the earliest times, in regulating common rights in fisheries, statutes have been passed which authorized a preference of inhabitants of the town in which the fishing place is situated. The *Body of Liberties of 1641* (Mass. Col. Laws, ed. 1672; Whitmore's Reprint. 1887, 90 91), declared that "every inhabitant that is an householder shall have free fishing and fowling in any great ponds and bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the towns where they dwell, unless the freemen of the same town or the general court shall have otherwise appropriated them." See also Stat. 1795, chap. 71; Stat. 1838, chap. 113; Stat. 1841, chap. 64; Stat. 1844, chap. 128; Rev. Stat. chap. 55; Gen. Stat. chap. 83; Pub. Stat. chap. 91; Stat. 1889, chap. 64; Stat. 1892, chaps. 186, 188; Stat. 1893, chaps. 55, 255; Stat. 1897, chap. 289. The power of the legislature to determine the mode of use of fisheries in the public interest, even to the granting of exclusive rights of fishing to individuals, has been broadly stated by the courts, and frequently exercised. In the opinion in *Com. v. Vincent*, 108 Mass. 441, is this language: "The legislature of a state has the power to regulate the time and manner of fishing in the sea within its limits; and, according to the opinions of most respectable judges, may even grant exclusive rights of fishing at particular places in tide water. *Burnham v. Webster*, 5 Mass. 266; *Dunham v. Lamphere*, 3 Gray, 268; *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *Corfield v. Coryell*, 4 Wash. C. C. 371-380; *Bennett v. Boggs*, Baldw. C. C. 60. In those waters, whether within or beyond the ebb and flow of the tide, which are not navigable from the sea for any useful purpose, there can be no restriction upon its authority to regulate the public right of fishing, or to make any grants of exclusive rights which do not impair other private rights already vested. *Nickerson v. Brackett*, 10 Mass. 212; *Cleveland v. Norton*, 6 Cush. 380; *Russell v. Russell*, 15 Gray, 159-161." See also *Arnold v. Mundy*, 6 N. J. L. 1-94, 10 Am. Dec. 356; *Brown v. De Groff*, 50 N.

J. L. 409; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57. It is not to be assumed that a legislature would undertake to grant exclusive rights, except on the ground that the interests of the public would thereby be promoted. The common right of the public and the right of regulation are the same in regard to shellfish as in regard to swimming fish. *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass.

216; *Wharton v. Wise*, 153 U. S. 155, 38 L. ed. 669.

In our opinion there is no doubt of the power of the selectmen, acting under the statute and the vote of the town, to make a regulation forbidding the taking of clams without a permit, except for the purpose and in the quantities authorized by the statute, and providing that permits shall be granted only to inhabitants of the town.

Exceptions overruled.

MICHIGAN SUPREME COURT.

Charles LA DOW, *Plff. in Err.*,
v.

E. BEMENT & SONS.

(.....Mich.....)

A contract to repurchase stock "at the end of two years," if the holder so desires, does not require him to give notice on the first day after the expiration of the two years, that he requires the promisor to repurchase it, but he has a reasonable time to give such notice.

(April 18, 1899.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of defendant in an action brought to recover damages for breach of a contract to repurchase certain stock which had been sold by defendant to plaintiff under a contract to repurchase. *Reversed.*

Statement by Grant, Ch. J.:

On April 27, 1895, the defendant, a corporation, entered into an agreement with the plaintiff, by which it gave to him four promissory notes for \$5,000 each, and also agreed to forward to him certificates for 500 shares of the 6 per cent preferred stock of said corporation of the par value of \$10 per share, and agreed "to repurchase from you, if you so desire, at the end of two years from May 1, 1895, at the par value thereof, and interest or dividends thereon at 6 per cent per annum." The declaration sets forth the above agreement, its fulfillment, and that on May 26, 1897, plaintiff offered said shares of stock to defendant, requesting it to repurchase the same, in accordance with the terms of the agreement; that defendant refused to repurchase; that said stock was, on May 26, worthless; and claims damage by reason of such failure to repurchase. To this declaration the defendant demurred, for the reason it does not appear "by the declaration that the plaintiff notified the defendant on the 1st day of May, 1897, or at any time prior thereto, that he desired the defendant to repurchase the stock." The demurrer was sustained, and plaintiff appeals.

NOTE.—As to rights conferred by a refusal or option, see in general note to *Litz v. Goosling* (Ky.) 21 L. R. A. 127.
45 L. R. A.

Messrs. Barbour & Rexford, for plaintiff in error:

"At," used in reference to time or place, has frequently the sense of "near."

2 Am. & Eng. Enc. Law, 2d ed. pp. 167, 168; Synonyms: "About, Near"; Standard Dictionary of the English Language, see "At."

"At the end of one year" was held to mean at the expiration of "one full and entire year," and "at" to be equivalent in meaning to "after."

Annan v. Baker, 49 N. H. 169; *Rogers v. Burr*, 97 Ga. 10; 1 Am. & Eng. Enc. Law, 1st ed. p. 893, note.

This court has given a like construction to the word "at."

Davidson v. Crump Mfg. Co. 99 Mich. 501.

The term "reasonable time" is a relative one, and its meaning depends entirely upon the attendant circumstances.

19 Am. & Eng. Enc. Law, p. 1089; *Gridley v. Globe Tobacco Co.* 71 Mich. 531; *Clark v. Mowyer*, 5 Mich. 472; *Stange v. Wilson*, 17 Mich. 347; *Grant v. Merchants' & Mfrs. Bank*, 35 Mich. 523.

It was a question of fact for the jury to determine whether plaintiff unreasonably delayed his demand.

Galvin v. Galvin Brass & Iron Works, 81 Mich. 16.

Messrs. Cahill & Wood, for defendants in error:

At law, as a general rule, time is deemed of the essence of a contract, and performance is required at the day, or consequences of default follow.

Beach, Contr. ¶¶ 616, 622; *Pom. Contr.* 2d ed. ¶ 385; *Washington County Bank v. Jerome*, 8 Mich. 490.

If the time is computed from an act done, it includes the day on which the act is done; if from a day specified, it excludes the day.

Bishop, Contr. ¶ 1343; *Chicago Title & T. Co. v. Smyth*, 94 Iowa, 401.

"At the end of two years from May 1, 1895," means the same as "two years from and after May 1, 1895."

In California a statute directed the governor to appoint the successors of certain officers at the expiration of their terms. A successor was appointed on the day of the expiration of the term, and the appointment was held valid.

People v. Blanding, 63 Cal. 333.

Reasonable time is so much as is necessary under the circumstances to do conveniently what the contract or duty requires in the particular case should be done.

Bowen v. Detroit City R. Co. 54 Mich. 501, 52 Am. Rep. 822; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165.

Notice of the dishonor of a bill or note so as to charge a drawer or indorser must be given within a reasonable time.

2 Am. & Eng. Enc. Law, p. 414, title *Bills and Notes*.

A draft payable at sight, or a note payable on demand, must, in order to charge the drawer or indorser, be presented within a reasonable time, but as to whether it was or not is a question of law.

Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756; *Phœnix Ins. Co. v. Gray*, 13 Mich. 191; *Carll v. Brown*, 2 Mich. 401.

The reasons which underlie the doctrine concerning negotiable paper have equal force when applied to contracts for the sale of stocks in railroad, mining, and manufacturing companies the value of which is liable to change from day to day.

Campbell v. London & B. R. Co. 5 Hare, 519; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920; *Hamilton v. Phœnix Ins. Co.* 22 U. S. App. 164, 61 Fed. Rep. 379, 9 C. C. A. 530.

Grant, Ch. J., delivered the opinion of the court:

Plaintiff insists that he had a reasonable time after the expiration of the two years within which to notify defendant that he desired it to repurchase the stock. Defendant insists that the contract fixed a day certain, viz., the first business day after the expiration of the two years, within which such notification must be given. The contract does not, in express terms, fix a day, and make it of the essence of the contract. The preposition "at" is an elastic word. One lexicographer defines it as follows: "A preposition of extremely various use, primarily meaning 'to,' without implication, in itself, of motion. It expresses position attained by motion to, and hence contact, contiguity, or coincidence, actual or approximate, in space or time. Being less restricted as to relative position than other prepositions, it may in different constructions assume their office and so become equivalent, according to the context, to 'in,' 'on,' 'near,' 'by,' 'about,' 'under,' 'over,' 'through,' 'from,' 'to,' 'toward,' etc. See also *Davidson v. Crump Mfg. Co.* 99 Mich. 501. Clearly, plaintiff could not exercise the option until the complete expiration of the two years. He might possibly have given notice before the expira-

tion of the two years that he should demand the repurchase after the time had expired. That question, however, is not before us. The contract did not require him to take any action until the expiration of the time. How much time, then, after the expiration? Shall the court say that it was limited to the first business day after the expiration of the time? But the contract does not say this. This would establish an arbitrary rule, for which no authority is cited. It would result in holding that no excuse whatever can be given for not exercising the option during that day. That is not the rule applicable to giving notice of dishonor in negotiable paper. We are cited to one authority directly in point. *Rogers v. Burr*, 97 Ga. 10. It is true, the declaration does not allege any excuse for delay, as appears to have been done in that case. This might have been better pleading, but we do not think the rule is so technical as to require it in this case. If, when the testimony is concluded, there be no dispute as to the facts, the question as to whether notice was given within a reasonable time will become a question of law for the court. If there be a dispute as to the facts, it may become a question of fact for the jury. This is not one of those commercial transactions the custom in regard to which is so well settled that a reasonable time has been rendered certain by numerous decisions of the courts. This question of reasonable time is very ably and fully discussed in *Hamilton v. Phœnix Ins. Co.* 22 U. S. App. 164, 61 Fed. Rep. 379, 9 C. C. A. 530, and it is there clearly shown when it is a question of law for the court and of fact for the jury. In *Campbell v. London & B. R. Co.* 5 Hare, 519, cited by defendant's counsel, the agreement gave the bondholders of defendant "an option to convert the bonds, at the expiration of not more than three years, into quarter shares of the company at £10 per quarter share." The three years expired February 15, 1845, but no notice was given until the end of June following. The time for the conversion was held to be limited to the three years. That case was heard on pleadings and proofs. It will be observed that the language is stronger than that in this case. Excuses for the delay were alleged and considered, but found to be insufficient. The only question now before us is the sufficiency of the declaration. We are of the opinion that it is sufficient.

Judgment reversed, and case remanded for further proceedings under the rules and practice of the court.

The other Justices concur.

Rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Barth TELEFSEN

v.

Peter P. FEE.

(168 Mass. 188.)

1. The jurisdiction of the consul of Sweden and Norway at Boston over a claim for wages by one of the crew of a Norwegian vessel who has left the ship at that port is exclusive of any jurisdiction in the first instance of the courts of the state under art. 13 of the treaty of 1827 between the United States and Sweden and Norway making the consuls judges and arbitrators "in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge without the interference of the local authorities, unless the conduct of the crews or of the captains should disturb the order or tranquillity of the country."

2. An officer arresting the captain of a foreign vessel in port under process from a state court which has no jurisdiction because a treaty has given exclusive jurisdiction to a consul is not protected by his process when he makes the arrest after being informed of the nationality of the vessel and that the claim will be adjusted at the consulate, since when informed of the facts he is bound to know the law that the court has no jurisdiction.

(Knowlton, J., dissents.)

(March 23, 1897.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action for assault and battery and false imprisonment which resulted in a verdict in favor of defendant. *Sustained.*

NOTE.—Jurisdiction and powers of consuls.

I. Jurisdiction in criminal cases.

- a. Generally.
- b. In non-Christian countries.
- c. Power to send criminals to home country for trial.
- d. In case of deserting seamen.

II. Jurisdiction in civil cases.

- a. In China and Japan.
- b. In other non-Christian countries.
- c. As to controversies between seamen and masters of foreign vessels.
- d. As to discharge of seamen abroad.
- e. As to disabled vessels.
- f. In prize cases.
- g. In suits between French citizens.

III. Powers of consul in other matters.

- a. To assert claims for his citizens and country.
- b. To administer on estates.
- c. To exercise diplomatic functions.
- d. To perform marriage ceremony.
- e. To grant certificates.
- f. To take depositions and affidavits.
- g. To take acknowledgments of deeds and powers of attorney.
- h. To retain ship's papers.
- i. To license illegal acts.
- j. To contract.
- k. To serve process.

I. Jurisdiction in criminal cases.

a. Generally.

The jurisdiction and powers of consuls in criminal cases do not appear to be clearly defined in any of the text-books. They frequently exercise criminal jurisdiction at the suggestion of masters of vessels, but this practice has been condemned by the courts. They have no power whatever to punish seamen for misconduct on board a vessel. It seems that since the act of Congress of 1840 they have the power to confine refractory seamen with the aid of the local authorities, but this is not to punish them, and is only justifiable in extreme cases where it seems necessary for the safety of the ship and for the further purpose of sending the seamen to the home country for trial. In such cases when the consul and the master act in good faith it may exonerate the master from all damages.

In the following cases the power of a consul

to imprison seamen abroad for misconduct is denied: *Re Wildenhus*, 28 Fed. Rep. 924; *The William Harris*, 1 Ware, 367; *Relation of Consuls to Criminals*, 8 Ops. Atty. Gen. 380; *Jordan v. Williams*, 1 Curt. C. C. 69.

So, in the absence of power given by treaty a consul from Belgium in this country cannot try or act as a committing magistrate where a Belgian subject commits the crime of murder in killing a Belgian sailor in New Jersey on a Belgian vessel. *Re Wildenhus*, 28 Fed. Rep. 924.

"A consul has no authority to commit seamen to prison. The laws of the United States invest their consuls and commercial agents with certain powers to be exercised for the benefit and protection of American seamen when in foreign ports; as for the relief of destitute mariners and furnishing them with the means of returning home. But no portion of the judicial power of the United States is conferred on consuls. They cannot take cognizance of the offenses of seamen in foreign ports and sentence them to punishment. When the master of a vessel finds it necessary, for the purpose of preserving discipline on board his ship and maintaining his authority, to treat any of his crew with severity, as a matter of prudence it may be well for him to consult the consul and take his advice. This is usually done on his own representation of the case, but the interposition of the consul has never been supposed to exempt the master from his own responsibility." *The William Harris*, 1 Ware, 367.

In *Relation of Consuls to Criminals*, 8 Ops. Atty. Gen. 380, it was said that if a seaman commits an offense at sea or in port the consul does not possess any criminal jurisdiction; that his powers go no further than to inquire in order to decide what his duty is in the given case, to take evidence of the facts, to collect and see to the preservation of documents and proofs, to draw up a statement of the facts, and, "if in his judgment the facts require it, to see to the further detention of the party, and his transportation in custody to the United States. . . . These particulars of the duty of consuls are not expressly defined by statute. But they belong to the very function of consuls by the law of nations, and by the general practice of Christendom. . . . And in thus detaining criminals, the consul does not usurp any judicial authority. He has no judicial authority." And where seamen were imprisoned on shore

Nils C. Johannessen obtained a writ for the arrest of Telefsen described as master of the steamship Albert in an action to recover for labor performed on the steamship. The writ was placed for service in the hands of Fee, who was a duly qualified constable. The assault for which this action was brought was made during the execution of the writ.

Further facts appear in the opinion.

Messrs. John Lowell and Edward S. Dodge, for plaintiff:

By the treaty between the United States and the Kingdom of Sweden and Norway, the plaintiff, Telefsen, was exempt from arrest at the time the defendant arrested him.

Public Treaties of the United States, in force on the 1st day of December, 1873, ed. 1875, pp. 739, 740; Treaties and Conventions between the United States and Other Powers, 1776-1887, pp. 1062, 1063; 8 U. S. Stat. at L. p. 352.

"This Constitution, and the laws of the

United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

U. S. Const. art. 6; U. S. Rev. Stat. ed. 1878, p. 27.

This treaty is "the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature."

Foster v. Neilson, 2 Pet. 253, 314, 7 L. ed. 415, 435.

The manifest effect of this treaty is to give to the Norwegian consular officers in the ports of this country exclusive jurisdiction of differences arising in such ports between the captains and crews of Norwegian vessels.

The Marie, 49 Fed. Rep. 286; *The Welhaven*, 55 Fed. Rep. 80; *The Elwine Kreplin*,

at the instance of a consul for refusing to obey the master, it was held that the consul's conduct might be justified if he considered it his duty to detain them by the aid of the local authorities that he might send them to the United States for that purpose, but on any other grounds it was grossly improper for he had no right to punish them by imprisonment. *Jordan v. Williams*, 1 Curt. C. C. 69.

In the following cases the practice of consuls in imprisoning seamen abroad is condemned in strong terms: *Wilson v. The Mary, Gilpin*, 31; *Shorey v. Rennell*, 1 Sprague, 407; *Magee v. The Moss, Gilpin*, 219; *Buddington v. Smith*, 13 Conn. 334, 33 Am. Dec. 407; *Johnson v. The Coriolanus, Crabbe*, 241.

So, where a captain consulted a consul and confined a seaman in a common gaol for insubordination, it was held that such punishment was sufficient penalty without a forfeiture of wages, and that the practice of punishing disobedient and refractory seamen in foreign gaols is one of doubtful legality. *Wilson v. The Mary, Gilpin*, 31. In this case it was said that masters "seem to believe that they may do anything, provided they can obtain the assent of the consul to it; which assent consuls are apt to give with very little consideration. . . . If the case were fully and fairly stated to him, and his advice faithfully pursued, it would afford a strong protection on the question of malicious or wrongful intention, but it can give no justification or legal sanction to an illegal act."

And where seamen refused to do duty until they could make a complaint before the consul, and the master had them brought before the consul, who refused to hear them, and by his order they were all sent to jail on shore and confined for thirty-three days, and afterwards, on being released, were badly maltreated on ship-board, heavy damages were awarded for such maltreatment. *Shorey v. Rennell*, 1 Sprague, 407. In this case the court said: "When a controversy has arisen between a master and his seamen, the parties stand upon unequal grounds; the seamen are confined to the ship, the master goes on shore when he chooses, has the ear of the consul, enters a complaint against the men, makes his own statement of the case, and the men are then brought before the consul with the bias of presumed guilt against them; and it too often happens that no other investigation is thought necessary than

merely to take the statement of the complainant."

In *Magee v. The Moss, Gilpin*, 219, the court said: "I have declared that I will not countenance the practice of thrusting our seamen into foreign gaols by the captain, through the influence he may have with our consuls or the officers in a foreign port. . . . The punishments which the law authorizes the master to inflict on board his vessel, by personal correction, by confinement and other privations, are generally sufficient for all the purposes of discipline." Quoted and approved in *Buddington v. Smith*, 13 Conn. 334, 33 Am. Dec. 407.

And where a seaman had a quarrel with the mate, and the second day thereafter a boat was sent to the ship with a police officer and the man carried off to prison without a hearing or any examination of the circumstances of the case, except such as the captain chose to give to the consul, the seaman was allowed his wages for the whole voyage. *Johnson v. The Coriolanus, Crabbe*, 241. In this case the court said: "And here I would again correct an error into which captains are continually falling. They seem to believe that if they can get the consent or co-operation of the consul to their proceedings it will be a full justification for them when they come home. I wish them to understand that I will judge for myself, after hearing both parties and their evidence, of the necessity and propriety of these summary incarcerations; and the part the consul may have taken in it will have very little weight with me. In all my experience I have never known a consul refuse the application of a captain to imprison a seaman, nor to furnish a certificate, duly ornamented with his official seal, of the offense committed, of which he generally knows nothing but from the representations of the captain or officers of the vessel. I never suffer these certificates to be read; they are infinitely weaker than *ex parte* depositions. Our consuls, unfortunately, are merchants also; their profits and their living depend upon the business they can do, especially by the consignments of cargoes to them. It is therefore very important to them to have the good will of the captains of vessels, who may make a good report of them to their owners."

In the following cases the action of a consul in causing seamen to be imprisoned was held to exonerate the captain from damages where the consul acted in good faith: *Chester v. Benner*,

9 Blatchf. 438; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; United States Consular Regulations 1888, § 66, p. 25, § 273, p. 92; *The Salomoni*, 29 Fed. Rep. 534.

There has never been the slightest doubt as to the entire legality of such exclusive jurisdiction.

1 Wharton's Digest of International Law, § 35, p. 129.

It is the clear intention of the treaty to secure to each nation the right to have all disputes between the masters of the vessels of either nation and the members of their respective crews settled by the laws, regulations, and customs of the nation to which the vessel belongs, and to have those laws, regulations, and customs administered and applied by the consular officers of that nation, as being officers particularly acquainted with such laws, regulations, and customs, and familiar with the national language.

The Elvino Kreplin, 9 Blatchf. 438; *The Amalia*, 3 Fed. Rep. 652.

2 Low. Dec. 76; *Jordan v. Williams*, 1 Curt. C. C. 69.

And the same was said to be the rule in *Snow v. Wope*, 2 Curt. C. C. 301, Affirming *Wope v. Hemenway*, 1 Sprague, 300.

So, where seamen were imprisoned in a foreign jail by order of an American consul at that port at the instance of the master for insubordination and drunkenness, and there was no evidence of bad faith on the part of the master, the seamen were required to pay the necessary charges of the imprisonment and the expenses of hiring substitutes, but not the consul's fees. *Chester v. Benner*, 2 Low. Dec. 76. In this case it was said that the act of Congress of 1840 has been construed in the circuit court for that circuit, to give consuls jurisdiction over the imprisonment of our seamen in foreign jails, and in such case to relieve the master from responsibility in the matter if he has acted in good faith. (Citing but doubting the authority of *Jordan v. Williams*, 1 Curt. C. C. 69.)

As to this latter proposition the citation is correct, but the same case holds that consuls have no criminal judicial power.

Under act of Congress July, 1840, providing that it shall be the duty of consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power, and when the local authorities can be usefully employed for that purpose to lend their aid and use their exertions to that end, the action of a consul in imprisoning refractory seamen where he and the master act in good faith is held to exonerate the master. *Ibid.* This case holds that consuls have the power, and it is their duty, where the local authorities can in their judgment, fairly exercised, be usefully employed to restrain a part or the whole of a crew who are in a state of insubordination, to use their exertions to that end in the most effectual manner, and that this restraint may be exercised by confinement on shore in such place as ordinarily used by the local authorities for similar purposes.

But where a seaman requested a discharge, and instead the master caused him to be imprisoned by the local authorities on shore for the space of thirty-four days in a common prison, and the clerk of the consul aided the master, it was said: "If this had been done by the consul, under the powers conferred on him by the act of Congress of July 20, 1840, and there was 45 L. R. A.

And so strictly is this intention respected that even American citizens, serving upon Norwegian vessels, are held to have waived their right to access to the courts of their own country in the matter of disputes arising between them and the master of the vessel upon which they were so serving.

The Marie, 49 Fed. Rep. 286; *The Welhaven*, 55 Fed. Rep. 80; *The Amalia*, 3 Fed. Rep. 652; *Re Ross*, 140 U. S. 453, 472-480, 35 L. ed. 581, 588-591.

The facts that the seaman, Johannessen, had brought the suit against the captain to recover his wages, and that his claim was to have been "adjusted" at the consulate of the Kingdom of Sweden and Norway, show that such a "difference" had arisen between them as is contemplated in the treaty.

The process by virtue of which the defendant, Fee, arrested the plaintiff, Telefsen, was not sufficient to justify the defendant in arresting the plaintiff.

Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec.

no illegality in the conduct of the master in applying to him for his action in the matter, then, as was held by this court in *Jordan v. Williams*, 1 Curt. C. C. 69, the master would not have been liable for such imprisonment. But no one but a duly appointed consul or commercial agent of the United States is intrusted by the act of Congress with power to employ the local authorities to check insubordination. . . .

And if it had been true that the libellant was bound to continue on board and do duty, and that he insisted on his discharge and refused duty, no case existed for confining him in a foreign jail,—especially in such a prison as is described by the testimony in this case." *Snow v. Wope*, 2 Curt. C. C. 301, Affirming *Wope v. Hemenway*, 1 Sprague, 300.

And in *Patch v. Marshall*, 1 Curt. C. C. 452, the imprisonment of an American citizen in a foreign jail by a master of a vessel, through the official intervention of a consul on false allegations, was held not to prevent the investigation of the courts of the United States, although the vessel and commander were British, where the voyage was made on account of merchants in Boston, who hired the master on wages and manned the vessel, and the voyage terminated in Boston.

And where the master on consultation with a consul brought soldiers on board and forcibly removed a sailor and left him in confinement in a foreign port without justifiable cause, it was held that the seaman was entitled to damages. *Gardner v. Bibbins*, Blatchf. & H. 356.

And in *Jay v. Almy*, 1 Woodb. & M. 262, it was said that a master is not excused for imprisonment of a seaman, although ordered by the consul.

In *Cours de Droit Commercial*, Pardessus, it is said that a French consul cannot have criminal jurisdiction in a foreign country unless it is expressly given, and that there is no instance of such power in any Christian country, and that a sovereign cannot invest a consul with judicial power over his own subjects in a foreign country. Authority and Jurisdiction of Consuls, 2 Ops. Atty. Gen. 378.

But in *Ord. du 29 October, 1833*, title III, art. 22,—*De Clercq*, Form tom. II, p. 65, it is said that the "French laws do not hesitate to prescribe that when crimes are committed on board a French vessel in a foreign port, by one of the crew against another of the same

381; *Learnard v. Bailey*, 111 Mass. 160; *Kelly v. Bemis*, 4 Gray, 83, 64 Am. Dec. 50; *Brown v. Webber*, 6 Cush. 560; *Smith v. Shaw*, 12 Johns. 257; *Wise v. Withers*, 3 Cranch, 331, 337, 2 L. ed. 457, 459; *Greene v. Briggs*, 1 Curt. C. C. 311, 333; *The J. W. French*, 13 Fed. Rep. 916.

It is of no importance whether the defendant knew, or did not know, that the court had no jurisdiction.

Nichols v. Thomas, 4 Mass. 232; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Com. v. Kennard*, 8 Pick. 133; *Wilmarth v. Burt*, 7 Met. 257; *Donahoe v. Shed*, 8 Met. 326; *Folger v. Hinckley*, 5 Cush. 263; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Ela v. Smith*, 5 Gray, 121, 66 Am. Dec. 356; *Cheever v. Merritt*, 5 Allen, 563; *Smith v. Keniston*, 100 Mass. 172; *Underwood v. Robinson*, 106 Mass. 296; *Erskine v. Hohnbach*, 14 Wall. 613, 20 L. ed. 745.

Ignorance of such diplomatic immunities, or of the fact that the person arrested

is a foreign minister, does not protect the officer making the arrest or assault.

United States v. Benner, Baldw. 234; *United States v. Liddle*, 2 Wash. C. C. 205; *United States v. Ortega*, 4 Wash. C. C. 531; 1 Wharton's Digest of International Law, § 93, p. 645.

The defendant, however, knew that he was serving a writ issued by a court having no jurisdiction.

He is presumed to know the "supreme law of the land."

He cannot be protected if, after being so informed, he persists in executing the process.

Chase v. Ingalls, 97 Mass. 524; *Pearce v. Atwood*, 13 Mass. 324; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Sprague v. Birchard*, 1 Wis. 457; *Leachman v. Dougherty*, 81 Ill. 324.

Mr. B. Hall with Mr. A. F. Coulter, for defendant.

crew, the French consul is to resist the application of the local authorities to the case." *American Ships in Foreign Ports*, 8 Ops. Atty. Gen. 73.

And the legislation of France confers on her consuls jurisdiction in such matters. *Decret du 24 Mars, 1852, De Clercq*, Formul. tom. II, p. 348; *American Ships in Foreign Ports*, 8 Ops. Atty. Gen. 73.

Consuls' judicial powers are not exclusive under art. 8 of the Convention with France of 1778, giving to consuls the right to exercise police over all vessels in their respective nations confined to the interior of the vessels; but this is not to interfere with the police of the ports where the vessel shall be, and under art. 10, providing that where the respective subjects shall have committed any crime or breach of the peace they shall be amenable to the judges of the country. Authority and Jurisdiction of Consuls, 2 Ops. Atty. Gen. 378.

1 Beawes's *Lex Mercatoria*, 423, says that "another hardship upon British consuls is, that they are often obliged to imprison disorderly seamen upon the complaint of their masters, as an indispensable duty of their office; yet every one of these seamen has it in his power to bring his action against the consul for false imprisonment in the courts of law in England, when it is probable that the master is on some other voyage in some other part of the world. Therefore it is the duty of the consul to be very cautious how he confines or punishes British seamen, or masters of ships, upon their mutual complaints against each other."

This statement *supra* is cited by Chitty on Commercial Law, p. 63, saying that it is the duty of consuls upon complaint of masters to imprison disorderly seamen.

b. In non-Christian countries.

Treaties exist with many non-Christian countries giving consuls in such countries criminal jurisdiction of offenses committed by their countrymen. Where such treaties exist consuls have such jurisdiction.

American consuls in China may try and sentence American citizens for offenses committed in that country. Jurisdiction of United States Consuls in Turkey, 9 Ops. Atty. Gen. 296.

This jurisdiction is exercised under U. S. Rev. Stat. §§ 4083, 4084, providing that under the treaty consuls have jurisdiction to try all citi-

zens of the United States charged with offenses against law, committed in China, Japan, Siam, Egypt, and Madagascar, and to sentence such offenders and to carry their authority into execution.

And the same power, so far as can be executed under the treaties in Tripoli, Tunis, Morocco, and Muscat, is conferred on American consuls of the United States. U. S. Rev. Stat. § 4127.

Under treaty with Japan, June 17, 1857, art. 4, providing that Americans committing offenses in Japan shall be tried by the American consul general or consul, and shall be punished according to the American law, consuls in Japan could try and sentence a seaman of an American vessel for murder committed on board the vessel at a Japanese port, although the seaman was a British subject, and an indictment and trial by jury were denied the prisoner. *Re Ross*, 140 U. S. 453, 35 L. ed. 581, Affirming 44 Fed. Rep. 185.

The provisions of this treaty were superseded by the treaty of 1894, which took effect July 17, 1899, and since then United States consuls in Japan have no judicial jurisdiction.

This jurisdiction was exercised under U. S. Rev. Stat. §§ 4102-4106, providing that consuls have jurisdiction in murder cases in China, Japan, Siam, Egypt, and Madagascar, where the crime is committed by an American citizen, but in such cases he shall summon four citizens of the United States to sit with him at the trial, and all of them must concur in the judgment, and their opinion must be approved by the minister.

And a consul of the United States in Turkey may try and punish American citizens in the Dominion of the Ottoman Porte for offenses committed in that country. *Dainese v. United States*, 15 Ct. Cl. 64, 7 Ops. Atty. Gen. 495.

The place of imprisonment of prisoners sentenced by consuls in China and the Ottoman Porte is regulated by the acting functionary in the absence of any regulation, under act of Congress August 11, 1848, providing for carrying into effect the treaties between the United States and China and the Ottoman Porte. Act of 1848 and Treaty with the Ottoman Porte, 5 Ops. Atty. Gen. 67.

But an American consul in Japan could not try citizens of other countries for offenses committed in Japan. 11 Ops. Atty. Gen. 474.

Lathrop, J., delivered the opinion of the court:

The municipal court of the city of Boston had no jurisdiction of the action brought against the plaintiff in this case for wages alleged to be due one Johannessen, and the writ upon which the plaintiff was arrested on *mesne* process was of no effect. By article 13 of the treaty between the United States and Sweden and Norway of 1827 (8 Stat. at L. 352), it is provided that "the consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country; or the said consuls, vice consuls, or commercial agents should

require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country." There are similar treaties with other countries, including one with Prussia in 1828 (8 Stat. at L. 382). Many of these treaties are referred to in 7 Am. L. Rev. 417. Later treaties have been made with the Netherlands in 1855 (10 Stat. at L. 1150, 1155), with Denmark in 1861 (13 Stat. at L. 605), with Germany in 1871 (17 Stat. at L. 921, 928), and with Italy in 1878 (20 Stat. at L. 725, 729). By article 6 of the Constitution of the United States, it is declared that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary

c. Power to send criminals to home country for trial.

Where consuls have jurisdiction to try and punish they have no power to send the convicts of such courts to this country for imprisonment. In other cases it seems that they cannot compel a merchant vessel to carry to this country offenders for trial; but they may contract for transportation for that purpose.

American consuls at Smyrna and Constantinople have no power to send convicts of such courts to this country for imprisonment. Imprisonment of Convicts, Consular Courts, 14 Ops. Atty. Gen. 522.

And a British consul cannot have the co-operation of the courts of this country to enforce an order made by him sending a prisoner to England for trial. *Re Aubrey*, 26 Fed. Rep. 848. In this case the prisoner was released on *habeas corpus*.

And United States marshals are not required to execute a sentence of a French consul under convention, art. 12, with his most Christian Majesty and the United States. Duties of District Marshals, 1 Ops. Atty. Gen. 43.

"It has been held that a master is not 'obliged' to take on board persons accused of crimes to be transported to the United States for prosecution." United States Consular Regulations 1896, § 276.

And consuls cannot require ship masters to receive and convey to the United States, for prosecution, seamen or other persons accused of crime. Duty of Shipmasters Respecting Criminal Seamen, 7 Ops. Atty. Gen. 722.

In this case the offense was mutiny on the high seas, and the consul in India placed the offenders on board a merchant vessel to send them to this country, and the master allowed them to escape. The conduct of the consul was approved, but the master could not be held liable in the absence of any statute.

In *Re Ross*, 140 U. S. 453, 35 L. ed. 581, it was said that there is no law of Congress compelling the master of a vessel to carry or transport a criminal offender to any foreign port when he can be turned over to the consular court having jurisdiction of criminal offenses committed in a foreign country. (Citing 7 Ops. Atty. Gen. 722.)

But the local authorities in France cannot lawfully interpose to release the crew of an 45 L. R. A.

American vessel confined at the instance of a consul where acts of violence occurred upon the high seas, and the offenders are imprisoned on arrival at a French port, and then placed on the vessel to be sent to this country for trial. American Ships in Foreign Ports, 8 Ops. Atty. Gen. (Cushing) 73.

In case of mutiny the consular officer should, if the laws of the country permit, cause the mutineers to be confined to be sent home for trial, or discharge them. United States Consular Regulations 1896, § 350.

"The new 'Consular Regulations' say that 'if a citizen of the United States be charged with a criminal offense alleged to have been committed at sea, on board of an American vessel (or on such vessel in port, under such circumstances as give jurisdiction to the courts of the United States), it will be the duty of the consular officers to require that the individual so accused be delivered to him to be sent home for trial.' (Nos. 384, 385.) All that is but detention by or at the instance of the consul, for the purpose of trial in the United States." Relation of Consuls to Criminals, 8 Ops. Atty. Gen. (Cushing) 880.

The question arose in this case as to the power of the American consul in Havana.

There is no statute of the United States authorizing consuls to take seamen from a vessel for criminal conduct, and send them home in another vessel for trial. United States v. Lunt, 18 Law Rep. 683. In this case the court said that it is customary for consuls to do so under instructions from the department of state; but they have no jurisdiction, and their certificates are not evidence.

Where the conduct of seamen was reported to the United States consul for mutiny and revolt, and he ordered them to be discharged from the ship and sent to the United States for trial, and placed them in prison at Marseilles, it was held that when on clear *prima facie* proof a consul orders a seaman to be discharged from a vessel for criminal conduct threatening the safety of the vessel or of her officers or company, and transmit him home for trial on the accusation, such discharge is a bar to any continuing claim for wages. *Tingle v. Tucker*, 1 Abb. Adm. 519.

In *Bernhard v. Creene*, 8 Sawy. 230, it was said that a consular court is for the purpose of ascertaining whether certain crimes had been

was sustained. But a treaty as that with Sweden and Norway has been shown uniformly and to take away all right of action for wages in the case of this country by a statute which is within the scope of the treaty without the need to be so viewed as a reservation. *Id.* 3 N. Y. Law. 100, 177. *The Empire*, 9 B. & M. 416, where the question is considered as to whether *The Empress*, 29 Fed. Rep. 554; *The Empress*, 43 Fed. Rep. 655; *The Empress*, 45 Fed. Rep. 501; *The Empress*, 55 Fed. Rep. 501. In *The Empress*, 55 Fed. Rep. 501, the question was considered by Judge Fox of the United States District Court in Boston of a ship against a Swedish vessel, on the ground that there was no consular representative of Sweden in the district of Maine. But the case was so leaning upon the one before us. An examination of the treaty and a comparison above cited makes it plain that the court has no discretion in the

matter, and that the local authorities have no right to interfere. Where jurisdiction is given by a treaty to a consular vice consul or a consular agent, he alone has authority to act in determining in the first instance whether wages are due and the amount.

It is to be remembered that the United States government has the same right by the treaty in regard to its vessels in Norway, and this right is insisted upon by our government. In the United States Consular Regulations of 1896, p. 25, § 46, under the title "Jurisdiction over disputes between Masters, Officers, and Crews," appears the following: "Exclusive jurisdiction over such disputes in the vessels of the United States, including questions of wages, is conferred by treaties or conventions with several governments named, and, among them, Sweden and Norway. And on page 92, § 273, is also the following: "In many instances, by treaty and consular convention,

and the name of the deserter must appear in it before he can be arrested, held in custody, or delivered. Spanish Deserter, 9 Ops. Atty. Gen. 96.

4. In case of deserting seamen.

In the situation of a treaty or convention, a consul or other consular agent has a right from the local authorities the detention or return of a deserter. This right is given to consuls in some countries by treaty.

United States Consular Regulations 1896, § 46, says: "The right to reclaim deserters from the vessels of the United States is conferred by treaties or conventions with Austria-Hungary, Bolivia, Belgium, Columbia, Denmark, Dominican Republic, Ecuador, France, Great Britain, Greece, Germany, Hanseatic Republics, Haiti, Hawaiian Islands, Italy, Kongo Free State, Japan, Madagascar, Netherlands (and colonies), Peru, Portugal, Roumania, Russia, Salvador, Sweden and Norway, and Siam. But if a deserter has committed a crime against local law the surrender will be delayed until after punishment."

A United States consul at the Sandwich Islands had the right to require the Hawaiian authorities to surrender to him a deserting seaman whose name appeared on the ship's roll under the treaty with Hawaii. Judicial Powers of United States Consuls in Sandwich Islands, 11 Ops. Atty. Gen. 508.

The treaty provided that consuls should enjoy the same privileges and powers with those of the most favored nations, and the treaty of France and the Sandwich Islands provides that the respective consuls shall alone take cognizance of crimes and misdemeanors and other matters of differences in relation to the internal order of the vessel.

Where authorized by a treaty consuls may cause the arrest of deserting seamen and imprison them until sent on board the vessel, but this is not to punish, and the consul cannot punish after the discharge of the seamen. In the absence of a treaty a consul cannot claim as a right from the local authorities the detention or return of a deserter. *Jordan v. Williams*, 1 Curt. C. C. 69.

An arrest of a deserter from a Spanish ship cannot be made at the instance of a consul where he produced an extract from a ship's roll certified by himself, but did not exhibit the original roll, under the treaty with Spain requiring that in such a case the Spanish consul in American ports shall exhibit the ship's rolls, 45 L. R. A.

II. Jurisdiction in civil cases.

a. In China and Japan.

Under the treaty between the United States and China, the consular court in China has jurisdiction of all civil cases arising under the treaty, of a demand by a Chinese against an American. An Englishman may sue an American in the United States consular courts of China. But the consular courts of China (and the same was formerly true of those in Japan) have no jurisdiction of claims of foreign citizens against that government.

But an American consul in China has no authority by a treaty or statute to entertain jurisdiction of a suit by the Chinese government for duties, and has no jurisdiction of a suit where the government of China is plaintiff. 7 Ops. Atty. Gen. 495.

This was so held because the treaty mentions explicitly "the subjects of China" and "the subjects of other governments." Besides, the treaty provides for compulsory payment of duties by authorizing the retention of the ship's papers.

The treaty of the United States with Japan, November 22, 1894, taking effect July 17, 1896, provides that the former treaties shall cease, and that the jurisdiction exercised by courts of the United States in Japan shall cease thereafter, and that such jurisdiction shall be exercised by Japanese courts.

British consular courts in China and Japan had no jurisdiction of a "counterclaim" in an action by the Emperor of Japan against a British subject under treaties giving such courts jurisdiction of actions against British subjects exclusively. *Japanese Government v. Peninsular & O. Steam Nav. Co.* [1895] A. C. 644, 64 L. J. P. C. N. S. 107, 11 Reports, 493, 72 L. T. N. S. 881, 8 Asp. Mar. L. Cas. 50.

An appeal to the circuit court of California from a consular decision in a libel suit could be taken where the amount in dispute, exclusive of costs, exceeded \$2,500, under U. S. Rev. Stat. §§ 4092-4109, providing that where the matter in dispute exceeds \$2,500 an appeal from the final judgment of any consular court shall be allowed to the circuit court for the district of California. *The Ping-On*, 7 Sawy. 483; *The Ping-On v. Blethen*, 11 Fed. Rep. 607.

the United States have secured to their consular officers jurisdiction over questions of wages, shipment, and discharge of seamen."

The bill of exceptions is not so full as it should be as to what occurred on the arrival of the ship in Boston. It is merely said that "Johannessen left the ship at Boston because his term of service had expired." It does not appear whether he had been discharged, or had left without the permission of the master, though perhaps the more reasonable interpretation of the exceptions is that the statement of the cause of his leaving precludes our assuming other reasons to exist. However this may be, whether he was discharged or not, there was still the question of wages to be determined; and the defendant had been informed, before he made the arrest, that the claim of Johannessen would be adjusted at the consulate of the Kingdom of Sweden and Norway. It seems to us impossible to say that there was not such a difference between the master and

Johannessen that the consul had not exclusive jurisdiction in the premises. The facts in the case of *The Elucine Kreplin* are not fully set forth in the report in 9 Blatchf. 438. But they are found at length in the report of the case in the district court (4 Ben. 413). It was there considered by Judge Benedict that the connection of the men with the ship was severed by mutual consent, and that they were entitled to their wages. While this view of the facts was not fully assented to by Judge Woodruff, his opinion was that, although the men were entitled to their discharge and to be paid off, and the master was in the wrong, yet this matter of difference "was left by the treaty in the hands of the consul," and the libel of the seamen was dismissed. In *The Burchard*, 42 Fed. Rep. 608, Judge Toulmin dismissed a libel for wages against a German vessel brought by an American seaman who had shipped on board, and who claimed to be entitled to a discharge. He stated, how-

On an appeal in a libel case from a consular court in China and Japan to the United States circuit court for the district of California the record should show an allowance of the appeal. *Taxaymon v. Twombly*, 5 Sawy. 79; *The Spark v. Lee Chol Chum*, 1 Sawy. 713.

In the latter case it was said that a libel before a consul is defective in not stating the facts necessary to give the consular courts jurisdiction under act of Congress in the treaty between the United States and the Empire of China. The jurisdictional facts must all be distinctly averred.

b. In other non-Christian countries.

The consuls of Christian states, in the countries not Christian, exercise the functions of municipal magistrates for their countrymen, their commercial or international capacity being but a part of their general capacity as the delegated administrative and judicial agents of their nation.

So, a British consular court at Constantinople has jurisdiction between British and Russian subjects in an action for collision between British and foreign ships when authorized by a decree of the Russian chancellerie, and the British sultor cannot object to such jurisdiction. *Papayanni v. Russian Steam Nav. & Trading Co.* 2 Moore, P. C. C. N. S. 161, 9 Jur. N. S. 1160.

This was on the ground that the Turkish government has long acquiesced in allowing British consuls to exercise jurisdiction between citizens of Christian powers, under 6 & 7 Vict. chap. 94, providing that whereas by treaty, capitulation, usage, grant, sufferance, and other lawful means Her Majesty hath jurisdiction within divers countries out of her dominion, it shall be lawful to exercise jurisdiction as if acquired by cession or conquest, and Order in Council August 27, 1860, providing that Her Majesty's jurisdiction, civil and criminal, in the dominions of the Ottoman Porte shall be vested exclusively in the supreme consular court.

An order of sale of partnership land in a suit for dissolution before the supreme consular court at Constantinople was not *ultra vires*, although the land was held by British subjects in the name of a Turkish subject, and they had not availed themselves of the protocol of June, 1867, permitting British subjects to hold land in their own names, which had the legal effect to render them directly amenable to the Ottoman civil 45 L. R. A.

court in regard to real property. *Abbott v. Abbott*, L. R. 6 P. C. 220.

The effect of the order was held to be no more than the power to sell the beneficial interests of the partners in the premises, and to compel the partners to carry it into effect.

In *Messina v. Petrococcchino*, L. R. 4 F. C. 144, 41 L. J. P. C. N. S. 27, 26 L. T. N. S. 561, 20 Week. Rep. 451, it was said that Her Majesty has established a supreme consular court at Constantinople and provincial courts with rules for the exercise of civil and criminal jurisdiction.

And a plea of payment of a judgment for the same cause of action in the consular court at Constantinople is a bar to another action in England for the same cause of action, under 7 & 8 Vict. chap. 94, "An Act to Remove Doubts as to the Exercise of Power and . . . within Divers Countries and Places out of Her Majesty's Dominions [in Her Majesty's dominions], and to Render the Same More Effectual." *Barber v. Lamb*, 8 C. B. N. S. 95, 29 L. J. C. P. N. S. 234, 6 Jur. N. S. 981, 8 Week. Rep. 461.

In *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190, it was said that the treaty between the United States and the Ottoman Empire, concluded June 5, 1862 (if not that made in 1830), has the effect of conceding to the United States the same privilege, in respect to consular courts and the civil jurisdiction thereof, which are enjoyed by other Christian nations; and the act of Congress of June 22, 1860, established the necessary regulations for the exercise of such jurisdiction.

In *Mahony v. United States*, 3 Ct. Cl. 152, it was said that in the Mohammedan government, "those consuls were accordingly charged with other duties than those commercial agents who superintend and watch over commerce in European countries, and were invested by treaties with certain diplomatic and even judicial powers."

In *United States Judicial Authority in China*, 7 Ops. Atty. Gen. 496, it was said that "the treaties of the United States with the Barbary powers, and with Muscat, confer judicial functions on our consuls in those countries, and the treaty with Turkey places the same authority in the hands of the minister or consul, as the substitute for the local jurisdiction, which, in each case of controversy, would control it if it arose in Europe or America." These treaties accord with general usage and with the princ-

ever, that he was inclined to take jurisdiction, if the fact had been proved that a discharge had been granted. In the later case of *The Welhaven*, 55 Fed. Rep. 80, a libel was brought against a Norwegian steamship by a citizen of the United States, for damages and for wages, alleging that he shipped on the vessel at Mobile, for a round voyage to Tampico, and that, on his arrival in Mobile bay on the return trip, he was put ashore, manacled, and finally discharged at Mobile, without full pay. On the intervention of the Norwegian consul, claiming jurisdiction, Judge Toulmin sustained the consul's position, and dismissed the libel. The case appears to have been heard on exceptions to the libel, as the judge concludes the opinion thus: "I am therefore constrained to sustain the exceptions to the libel, and to order that the libel be dismissed."

It appears, therefore, that the consul of Sweden and Norway had exclusive jurisdiction of the controversy or difference between

Johannessen and Telefse, and that the municipal court of the city of Boston had no jurisdiction, either of the subject-matter or of the persons of the parties in the action which the seaman saw fit to bring against the master. The officer who arrested the master was therefore acting illegally and without justification, and is liable in this action, unless he is protected by virtue of his writ. This presents a question of some difficulty, and one which is not wholly free from doubt. Before proceeding to consider the principal question, it may be well to state briefly certain principles laid down by the courts in regard to which there is little or no dispute. Where the process is in due form, and comes from a court of general jurisdiction over the subject-matter, the officer is justified in acting according to its tenor, even if irregularities making the process voidable have previously occurred. *Savacool v. Boughton*, 5 Wend. 171, 21 Am. Dec. 181; *Earl v. Camp*, 16 Wend. 563; *Ela v.*

ples of the law of nations in relation to the non-Christian powers.

And the award of a Russian consul of salvage was binding on the insurers, where an English vessel from London was transferred after insurance to Russian owners and was wrecked in Turkish territory. By capitulations of the great powers all matters touching ships and their cargoes are to be decided by the consular courts of the country to which the ship belongs. *Dent v. Smith*, L. R. 4 Q. B. 414, 38 L. J. Q. B. N. S. 144, 20 L. T. N. S. 868, 17 Week. Rep. 646.

A bottomry bond held by a bona fide holder executed under a sentence of a Greek consular court at Constantinople in regard to a disabled Greek ship, and a cargo owned by Greek subjects, was sustained in the absence of any evidence of fraud. *Messina v. Petrocchino*, L. R. 4 P. C. 144, 41 L. J. P. C. N. S. 27, 28 L. T. N. S. 561, 20 Week. Rep. 451.

In *Functions of Consuls*, 7 Ops. Atty. Gen. 346, it was said: "There is one European country, and, so far as my observation goes, but one, where the extraterritoriality, claimed by Christians in all Mohammedan governments, is reciprocated by the Christians. Spain has conceded to the subjects of Turkey, Morocco, and Tripoli the same immunity which these last have conceded to Spaniards, that is, the privilege of being subject, each in the country of the other, only to the authority of their own consuls. *Riquelona, Derecho Internacional*, tom. 1, p. 303."

But a railroad company and partnership complete and existing in a foreign country is not within the purview of the English Joint-stock companies acts 1856, 1857, so as to enable the English consular court in Egypt to issue a sequestration against such members of the company as reside within the jurisdiction of that court for not complying with an order of that court to register the company as one of limited liability under the English acts. *Bulkeley v. Schutz*, L. R. 3 P. C. 764, 8 Moore, P. C. C. N. S. 170.

This is because the English companies act does not apply to a company formed in a foreign dependency of the English Crown.

And where a consul general of Egypt in 1864 issued an attachment against property of citizens of the United States not residents or sojourners in the Turkish dominion, and the consul general was sued for this act and pleaded jurisdiction, the plea was held defective in not 45 L. R. A.

setting forth the law or usages of Turkey upon which the treaty and act of Congress conferring jurisdiction was made to depend. *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190.

And a judgment in a consular court in Egypt for the full amount of freight charges paid under protest on a guaranty required before delivery was held to be no bar to an action in England to recover one half of the same, where the charterer had given his acceptance for such half on shipment which was not due at the time of delivery, and he had suspended payment before the arrival of the ship in Egypt, but which acceptance was paid before suit in the consular court, as the payment of the judgment though a final settlement by the guarantors was not a final settlement by them as agents of the plaintiffs and defendants. *Tamvaco v. Simpson*, 13 L. T. N. S. 160.

Where a Prussian consul made application to the British consular court to appoint a referee to take part in a mixed commission in a case for collision in the Dardanelles brought by the owners of an English ship against a Prussian ship, and the English consul declined to co-operate, the judgment of the Prussian court was held to be no bar to proceedings in admiralty in England. *The Griefswald*, Swabey, Adm. 430. In this case it was not shown that the former judgment was made by a court having jurisdiction by treaty, usage, or voluntary submission.

In *Pitts v. La Fontaine*, L. R. 5 App. Cas. 564, it was said that the consular court in Turkey had no jurisdiction over real property, the title to which was in a Turk. The consular court held that as the Turk had become a British subject by her marriage it could compel a sale by a decree *in personam*, although the court could not transfer the property. The orders made by the consular court were set aside on account of many irregularities.

c. As to controversies between seamen and masters of foreign vessels.

As to whether the jurisdiction of the consul is exclusive in controversies between foreign seamen and the master of foreign ships the courts do not all agree. The English admiralty court asserts a discretion in yielding to the jurisdiction claimed by consuls in controversies between seamen and masters of the vessels belonging to foreign countries. But they usually refuse to retain a case against the protest of

Shepard, 32 N. H. 277; *Dwinells v. Boynton*, 3 Allen, 310; *Chase v. Ingalls*, 97 Mass. 524; *Bergin v. Haycard*, 102 Mass. 414; *Chesebro v. Barme*, 163 Mass. 79, 82; *Howard v. Proctor*, 7 Gray, 128; *Hubbard v. Garfield*, 102 Mass. 72; *Rawson v. Spencer*, 113 Mass. 40; *Hines v. Chambers*, 29 Minn. 7; *Hann v. Lloyd*, 50 N. J. L. 1. Where, however, the process is void on its face, the officer is not protected. *Clark v. Woods*, 2 Exch. 395; *Pearce v. Atwood*, 13 Mass. 324; *Eames v. Johnson*, 4 Allen, 382; *Thurston v. Adams*, 41 Me. 419; *Harwood v. Siphers*, 70 Me. 464; *Brown v. Howard*, 86 Me. 342; *Rosen v. Fischel*, 44 Conn. 371; *Frazier v. Turner*, 76 Wis. 562; *Sheldon v. Hill*, 33 Mich. 171; *Poult v. Slocum*, 3 Blackf. 421. An officer is bound to know the law, and to know the jurisdiction of the court whose officer he is. If, therefore, he does not act in obedience to a precept of the court, and the court has no jurisdiction in the matter, either because the statute under which the

court acted is unconstitutional, or there is a want of jurisdiction for any other reason, it would seem that the officer is not protected. There are many authorities to this effect. *Fisher v. McGirr*, 1 Gray, 45, 61 Am. Dec. 381; *Warren v. Kelley*, 80 Me. 512; *Batchelder v. Currier*, 45 N. H. 460; *Thurston v. Martin*, 5 Mason, 499; *Campbell v. Sherman*, 35 Wis. 103; *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *The Marshalsea*, 10 Coke, 68b; *Crepp v. Durden*, 2 Cowp. 640; *Brown v. Compton*, 8 T. R. 424; *Watson v. Bodell*, 14 Mees. & W. 57. Whether this doctrine applies to a case like the present, where the court had general jurisdiction over the subject-matter, but no jurisdiction over the particular controversy between the parties, and no jurisdiction over their persons, we need not decide, because, on the facts in this case, we are of opinion that the officer may be held liable. He was informed, before making the arrest, that the vessel was a Norwegian vessel, and the cap-

a consul. The Federal courts of this country generally refuse to entertain jurisdiction in such cases if the foreign consul objects, unless the voyage is terminated, or has been unduly prolonged or diverted, or the master has been guilty of extreme cruelty, and it is necessary in the furtherance of justice that the admiralty court should retain jurisdiction. In some cases exclusive jurisdiction is given to the consul by treaty.

In the following cases the admiralty court required that notice be given to the consul of the proceedings: *La Blache v. Rangel*, L. R. 2 P. C. 38; *The Franz et Elise*, 5 L. T. N. S. 290, 2 Maritime Cases, 26, 1 Lush. Adm. Cas. 377; *The Golubchick*, 1 W. Rob. Adm. 143; *The Milford Swabey*, Adm. 862, 4 Jur. N. S. 417.

An admiralty court will not entertain jurisdiction of controversies between foreign seamen and masters of foreign ships when the consul objects. *The Herzogin Marie*, 1 Lush. Adm. Cas. 292, 5 L. T. N. S. 88; *The Octavie*, 33 L. J. Adm. N. S. 115; *The Infanta*, Abb. Adm. 263; *Saunders v. The Victoria*, 11 Legal Int. 70, Fed. Cas. 12,377; *Graham v. Hoskins*, Olcott, 224; *Lynch v. Crowder*, 12 Law Rep. 355; *The Becherdass Ambaldass*, 1 Low. Dec. 569; *The Salomoni*, 29 Fed. Rep. 534; *The Elwin Kreplin*, 4 Ben. 413, Reversing 9 Blackf. 438; *Es parte Newman*, 14 Wall. 152, 20 L. ed. 877; *The Burchard*, 42 Fed. Rep. 608; *Norberg v. Hillgren*, 5 N. Y. Legal Obs. 177; *The Marie*, 49 Fed. Rep. 286; *The Welhaven*, 55 Fed. Rep. 80.

In *TELEFSEN V. FEE* it was held that an officer executing a warrant of arrest in an action for wages against a captain of a Norwegian vessel issued from a state court is liable in damages, as said court has no jurisdiction under treaty with Norway, 1827, art. 13, providing that consuls, vice consuls, or commercial agents shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captain and crews of the vessel belonging to the nations whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of their captain should disturb the order or tranquillity of the country, but that this shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country.

This is in accord with the rule in American 45 L. R. A.

courts yielding to the consular courts exclusive jurisdiction in the absence of special circumstances of extreme cruelty or ending or deviation of voyage. In this case it was said that in *The Amalia*, 3 Fed. Rep. 652, jurisdiction was entertained in the United States district court of Maine, of a libel against a Swedish vessel, on the ground that there was no consular representative of Sweden in the district of Maine. The court said: "But this case has no bearing upon the one before us."

So, where the master of a foreign ship brought suit for his wages in the admiralty court, and the foreign consul protested against the cause proceeding, the case was dismissed. *The Herzogin Marie*, 1 Lush. Adm. Cas. 292, 5 L. T. N. S. 88. In this case the court said that "if the representative of the foreign state expresses his dissent to the suit, this court, though not bound so to do, will incline to hold its hand and remit the plaintiff to remedy under the law of his own country."

In *The La Blache v. Rangel*, L. R. 2 P. C. 38, it was held that the nationality of the vessel, and not that of the seaman, determines the procedure. The court also held that it is discretionary with the court whether it will proceed, but that it will dismiss the case if the seaman contracts in writing to submit such controversies to the consul. In this case the rule is laid down that the court of admiralty will proceed with the action if the foreign consul protests without giving reasons, but that if he gives reasons then the court of admiralty will inquire into their sufficiency and allow the consul's allegations to be contradicted; but that when the court has entered into the facts it will proceed to exercise its discretion.

And the court in its discretion dismissed the case where a Belgian consul protested against the admiralty court hearing a case for wages against a ship of his country. *The Octavie*, 33 L. J. Adm. N. S. 115.

In *The Franz et Elise*, 5 L. T. N. S. 290, 2 Maritime Cases, 26, 1 Lush. Adm. Cas. 377, the court said that it has jurisdiction if it thinks proper to exercise it.

And an action by a British seaman against a Spanish vessel was dismissed where a Spanish consul protested and the seaman served under a Spanish contract restricting him from suing except in Spain or Spanish colonies, or except before Spanish consuls. *The Leon XIII*. L. R. 8

tain of the vessel a Norwegian, and that the claim of Johannessen would be adjusted at the consulate of the Kingdom of Sweden and Norway. Being informed of the facts, he was bound to know the law that the court had no jurisdiction over the person of the captain or the subject-matter of the action. *Sprague v. Birchard*, 1 Wis. 457, 464, 469, 60 Am. Dec. 393; *Grace v. Mitchell*, 31 Wis. 533, 539, 545, 11 Am. Rep. 613; *Leachman v. Dougherty*, 81 Ill. 324, 327, 328.

There are, without doubt, cases which lay down a more stringent rule, and say that the officer need not look beyond his precept, and is not bound to take notice of extrinsic facts; but all of these are cases which are distinguishable from the case at bar. The leading case on this subject is *People v. Warren*, 5 Hill, 440. The defendant was indicted for assaulting an officer. The inspectors of an election issued a warrant to a constable for the arrest of the defendant for interrupting the proceedings at the elec-

tion by disorderly conduct in the presence of the inspectors. The defendant offered to show that he had not been in the presence of the inspectors at any time during the election, and that the constable knew it. This was held to be rightly excluded. The opinion is *per curiam*, and is very brief. While it says that the inspectors had no jurisdiction of the subject-matter, yet the clear meaning is that, if the defendant was not in their presence, they acted in excess of their jurisdiction. Knowledge by an officer that a man was innocent would, of course, be no excuse for assaulting the officer, if he arrested the man upon a warrant from a court of competent jurisdiction. An officer in a criminal case is obliged to obey his warrant, whatever his knowledge may be. This disposes, also, of the case of *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188. Several cases have been called to our attention in which there are *dicta* to the effect that an officer is not bound to look beyond his precept, even

Prob. Div. 121, 52 L. J. Adm. N. S. 58, 48 L. T. N. S. 770, 5 Asp. Mar. L. Cas. 73.

In *The Golubchick*, 1 W. Rob. Adm. 143, all doubt as to jurisdiction was removed by a letter from the Russian consul stating that the vessel was no longer under the Russian flag.

In *Willehdson v. The Försöket*, 1 Pet. Adm. 197, where a foreign seaman asserted a claim in admiralty for wages against a Danish ship, and the vessel had not completed her voyage, the court said: "It has been my general rule not to take cognizance of disputes between the masters and crews of foreign ships." In this case the master claimed that the mariner had deserted, and denied that he had discharged the seaman, and claimed a forfeiture of wages. On the hearing the master agreed to forgive the seaman for past offenses and pay him his wages, and it was stipulated on the part of the captain, by authority from the Danish consul, that the master should bona fide comply with his engagement.

So, where a consul protests against proceedings in admiralty by a British seaman for wages against a British vessel the libel will be dismissed on it appearing that the parties are about to pass within British jurisdiction, and relief may be had from the tribunals of their own country. *Saunders v. The Victoria*, 11 Legal Int. 70 Fed. Cas. No. 12,377.

And if seamen are discharged by a master without being permitted to return with the vessel to her home port their proper course will be to seek redress from their own consul, as courts of this country will take cognizance of their claim for wages against a British vessel only in case of flagrant wrong or suffering on their part, and not upon a breach of contract. *Graham v. Hoskins*, Olcott, 224.

And where a seaman brought a libel for wages in the admiralty court, and the certificate of a British vice consul was indorsed upon shipping articles "that the master has with his sanction discharged and paid off Robert Wood, the first mate," it was held that if this evidence does not conclude Wood in any court it affords satisfactory reasons to this court for declining cognizance of the matter and for remitting him to the tribunals of his country. *The Infanta*, Abb. Adm. 263.

And where seamen requested to be discharged in this country before a termination of the voyage, and the master assented to their leaving the 45 L. R. A.

vessel and going to the British consul's office for their tickets of nationality and service, but the master subsequently refused to consent to their discharge or to pay them their wages, the United States district court refused to entertain jurisdiction of a libel against the protest of a British consul. *Lynch v. Crowder*, 12 Law Rep. 355.

In *The Belgenland*, 114 U. S. 355, 29 L. ed. 152, the court said that if by treaty stipulations the consul has the sole right to adjudge controversies between master and crew such stipulation should be observed.

And a libel in the United States court will not be entertained against a British vessel for wages by British sailors shipped for a voyage ending in a home port where the British consul protests and special circumstances are not shown, such as a clear deviation from the voyage described in the articles, cruelty, or the breaking up of the voyage. *The Becherdass Ambalass*, 1 Low. Dec. 569. In this case the court said that objections to the jurisdiction against the protest of the consul have weight as showing the opinion of the person who is interested in the care of British seamen, and that there is no such hardship in this case as required the libellants to be paid here rather than at home.

In *Morris v. Cornell*, 1 *Sprague*, 62, it was said that the right given to seamen by act of Congress 1840, to lay their complaints before an American consul in a foreign port, is one of great importance which the court of admiralty will carefully guard.

And the Italian consul has exclusive jurisdiction of a demand for wages by an Italian seaman against the master of an Italian vessel under treaty between United States and Italy September, 1878, providing that the consul general, consuls, vice consuls, and consular agents shall have exclusive charge of internal order on board of merchant vessels of their nation, and shall alone take cognizance of questions of whatever kind that may arise between the captain, officers, and seamen without exception, and especially of those relating to wages and the fulfilment of agreements reciprocally made. *The Salomon*, 29 Fed. Rep. 534.

And an adjudication by a Prussian consul at New York of a claim for wages by a Prussian seaman is held to be a bar to a proceeding in rem in the United States district court. The

if he has knowledge that the court has no jurisdiction; but an examination of these cases shows that the facts known to the officer did not affect the jurisdiction of the court, but related to irregularities in the prior proceedings, or to matters merely of defense to the action. See cases above cited. Of course, where the court has jurisdiction of the subject-matter and of the parties to an action, knowledge on the part of the officer or information to him that there is some irregularity in the proceeding can make no difference. *Underwood v. Robinson*, 106 Mass. 296. Nor can it make any difference that the officer is informed that there is a defense to the action, such as that the defendant has a receipt (*Twitcheil v. Shaw*, 10 Cush. 46, 57 Am. Dec. 80); or a discharge in insolvency (*Wilmarth v. Burt*, 7 Met. 257); or that the defendant is an infant (*Cassier v. Fales*, 139 Mass. 461). But the question of jurisdiction is a more serious matter, and if facts are brought to the attention of the officer about

which he can have no reasonable doubt, and he knows, or is bound to know, that on these facts the court has no jurisdiction of the controversy, he may well be held to proceed at his peril. We can see no hardship upon the officer in holding him responsible in this case for an illegal arrest and for a false imprisonment. If an officer has reasonable cause to doubt the lawfulness of an arrest, he may demand from the plaintiff a bond of indemnity, and so save himself harmless. *Marsh v. Gold*, 2 Pick. 285, 290. We are not aware that this case has ever been doubted, and in practice bonds of indemnity have often been required. In the case at bar, after receiving full information, he chose to proceed, and, in defiance of the treaty, to subject the subject of a foreign nation to a gross indignity, for the purpose of extorting money from him, under the guise of a precept, which the court had no jurisdiction to issue, and which it would not have issued, had the facts been before it. We approve of the language of

Elwine Kreplin, 4 Ben. 413, Reversing 9 Blatchf. 438.

In *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877, a mandamus compelling the circuit court to take jurisdiction in this case was denied where it had reversed the decision in the district court on an appeal.

And a consul has exclusive jurisdiction of a controversy between Prussian seamen and masters of a Prussian vessel in regard to contracts for wages although the proceeding may be *in rem*, under Prussian treaty May 1, 1828, providing that consuls, vice consuls, and commercial agents shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captain and crews belonging to the nation whose interests are committed to their charge without the interference of local authorities except in certain cases. *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877.

So, a German consul has the sole jurisdiction to determine whether or not American seamen shipped on a German vessel are entitled to their discharge in a United States port under the shipping articles, under treaty with Germany, December 11, 1871, Public Treaties, 258. The *Burchard*, 42 Fed. Rep. 608.

And the marine court of New York has no jurisdiction of an action for seamen's wages earned on board of a Swedish vessel, under treaty with Norway and Sweden, providing that consuls and vice consuls shall have full jurisdiction in such cases. *Norberg v. Hillgren*, 5 N. Y. Legal Obs. 177.

And a Norwegian consul in this country has exclusive jurisdiction of a dispute between a seaman and a master of a vessel in regard to wages, although such seaman is an American citizen and shipped at an American port, under treaty with Norway, July 4, 1827, art. 13, Public Treaties, p. 740, providing that the consuls of either nation shall have the right to sit as judges or arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nations whose interests are committed to their charge without the interference of the local authorities. The *Marie*, 49 Fed. Rep. 286.

So, a Norwegian consul has exclusive jurisdiction in a libel by a citizen of the United States for wages as seaman on a Norwegian vessel where he claimed that on his arrival in this country he was put ashore, manacled, and finally

discharged without further pay. The *Welhaven*, 55 Fed. Rep. 80.

In *Seldel v. Peschkaw*, 27 N. J. L. 427, it was said that a consul is authorized to hear complaints of seamen against the master.

In the following cases jurisdiction of a consul is held not to be so exclusive as to prevent other courts from entertaining jurisdiction in controversies between seamen and masters of foreign vessels under the peculiar circumstances of each case. The *Amalia*, 3 Fed. Rep. 652; *Welberg v. The St. Oloff*, 2 Pet. Adm. 428; *Orr v. The Achsah* (Phila. Dist. Ct. Dec. 1849), *Brightly's Fed. Dig.* 166; *Moran v. Baudin*, 2 Pet. Adm. 415; The *Lillian M. Vigus*, 10 Ben. 385; The *Havana*, 1 Sprague, 402; The *Becherdass Ambaldass*, 1 Low. Dec. 569; *Davis v. Leslie*, Abb. Adm. 123; *Bernhard v. Creene*, 3 Sawy. 230; *Patch v. Marshall*, 1 Curt. C. C. 452.

In The *Amalia*, 3 Fed. Rep. 652, where there was no consul or other officers of Sweden within this jurisdiction, the nearest being the vice consul at Boston, a libel was allowed in the United States district court of Maine against a Swedish vessel by a seaman notwithstanding the treaty between the United States and Sweden July 4, 1827, 8 U. S. Stat. 846, 352, providing that the country shall have the right to appoint consuls, vice consuls, etc., in the commercial ports and places of the other country; and that such consuls shall have the right as such to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nations whose interests are committed to their charge. In this case the master sailed from Gibraltar for Portland with an inadequate supply of provisions, violating the laws of Sweden, and compelling great hardship which authorized the discharge of the seamen.

In *Welberg v. The St. Oloff*, 2 Pet. Adm. 428, a libel was sustained notwithstanding the protest of the foreign consul where Swedish seamen asserted a claim for wages against a Swedish vessel. It was held that a deviation from the original voyage authorized a demand for wages, and where the libellant was treated with cruelty by the master for filing the libel the master was found guilty of contempt and fined \$20, to stand committed until paid. The Swedish minister denied the jurisdiction of the court on the ground that the Swedish maritime law prohibited the parties from suing for redress in

Mr. Freeman in *Savacool v. Boughton*, 21 Am. Dec. 204, where, after a discussion of the cases bearing upon the question of the liability of an officer, he says: "We apprehend, at all events, that the protection of process cannot so far extend as to protect an officer who, from all the circumstances of the case, does not appear to have acted in good faith, and whose conduct shows that his eyes were wilfully closed to enable him not to see and know that he was too ready an instrument in the perpetration of a grievous wrong." In the opinion of a majority of the court the instruction requested should have been given.

Exceptions sustained.

Knowlton, J., dissenting:

It seems to me that the opinion of the majority of the court is wrong, in holding

that the defendant was bound to receive statements made by the plaintiff or others for the purpose of determining whether he could lawfully serve a writ which was regular in form, and which on its face showed a case within the jurisdiction of the court. The exceptions on this point present a naked proposition of law, and raise no question in regard to the good faith of the defendant in performing his official duty. The writ which he served stated an ordinary case for the collection of a debt. An officer is bound to know the law, even to the extent of determining whether a statute on which his process is founded is or is not constitutional. But for the facts, he is not called upon to take the testimony of anybody in regard to anything outside of the statements contained in the process, nor even to act upon what he believes to be his own knowledge. The juria-

a place subject to a foreign government. The Swedish consul offered to settle the case and ship the libellants to Sweden on some other vessel, but afterwards declined on the ground that after the protest he had made he could not permit the seamen to be received on board of any other vessel.

In *The Becherdass Ambaldass*, 1 Low. Dec. 569, it was said that some circumstances may be strong enough to induce action of the admiralty court in a claim by seamen against a master, notwithstanding the protest by the consul, that in *The St. Oloff* Case there had been both cruelty and deviation, and the protest of the consul was disregarded.

In *Davis v. Leslie*, Abb. Adm. 123, it was said that the case of *Welberg v. The St. Oloff*, is of doubtful authority as to admiralty jurisdiction where the voyage is not terminated, unless it was placed upon the ground that the seamen were not proved to have been duly bound to the vessel.

The protest of a foreign consul will not prevent the district court from taking jurisdiction of a suit for wages, where the voyage of a foreign vessel has been broken up and the seamen discharged in an American port. *Orr v. The Ahsah* (Phila. Dist. Ct. Dec. 1849), *Brightly's Fed. Dig.* 166, *Mss.*, cited in *M'Affee v. The Creole*, 1 Phila. 190.

In *Moran v. Baudin*, 2 Pet. Adm. 415, a French sailor maintained a libel in admiralty for wages where the vessel had made many deviations from her course. No question of jurisdiction was made in this case. But in *Davis v. Leslie*, Abb. Adm. 125, it was said that this case was of questionable authority unless placed upon the ground that the seamen were not proved to have been duly bound to the vessel.

In *Thomson v. The Nanny*, Bee, 217, it was said that in the case of *Moran v. Baudin* there had been a total deviation of voyage for two years, and France and America were then allied, and no consular convention existed, and no plea was made to the jurisdiction.

In *The Lillian M. Vigus*, 10 Ben. 385, a libel by British seamen against a British vessel was entertained notwithstanding the protest of a British consul, where it did not appear that any of the seamen belonged to Nova Scotia where the vessel belonged, and several of them were from different European countries, and the bark had long since finished her voyage, and it was uncertain where she was, and when the libel was filed it was uncertain for what port she would sail.

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The court said that to send these sailors to Halifax to prosecute their claim would be practically equivalent to denying their claim, since there appeared to be no probability that they would find either the vessels or owners at that place.

And the United States district court may entertain jurisdiction against a British vessel in favor of a British master for wages, and will more readily take jurisdiction if no objection be made by the consul of the nation to which the vessel belongs. *The Havana*, 1 Sprague, 402.

In *The Belgenland*, 114 U. S. 355, 29 L. ed. 152, it was said that circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum, as in cases of foreign seamen suing for wages or because of ill-treatment; and the consent of their consul or minister is frequently required before the court will entertain jurisdiction, not on the ground that it has no jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not. The court said that where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of a consul.

In *The Becherdass Ambaldass*, 1 Low. Dec. 569, it was said that where the voyage is ended or broken up, and no treaty prescribes the mode of proceeding, a suit in admiralty may be brought for seamen's wages.

In *Bucker v. Klorkgeter*, Abb. Adm. 402, it was said that the courts of the United States will take jurisdiction of cases of foreign seamen against a foreign master for wages, where the voyage is broken up or ended in this country or when the men are discharged here. The court further said that the American courts show a greater favor to seamen than do the courts of Great Britain, for the former proceed irrespective of any interference on behalf of the seamen by his consul, while the English courts would seem still to insist that the sanction of such an officer to the action shall be procured unless the nature of the case forbids.

A certificate of a British consul as to the desertion of a British seaman was disregarded where it was not shown that the consul had knowledge that an entry to that effect on the ship's log was not made on the day of occurrence, and the entry was made by a person not attached to the ship, under the captain's direction. *The Lillian M. Vigus*, 10 Ben. 385.

diction which the court must have in order to justify him is jurisdiction of the case stated in the writ. It may turn out that there was no real case upon which to issue a writ, and that the prosecution is grossly malicious, or that there is a real case materially different from that stated, and which does not come within the jurisdiction of the court; but the officer is not bound to inquire into matters of this kind. This has been held in a great many cases in Massachusetts and elsewhere, and the reasons for the rule have been elaborately stated in different jurisdictions. These reasons seem to me fully to cover the present case. *Chase v. Ingalls*, 97 Mass. 524; *Cassier v. Fales*, 139 Mass. 461; *Donahoe v. Shed*, 8 Met. 326; *Clarke v. May*, 2 Gray, 410, 61 Am. Dec. 470; *Wilmarth v. Burt*, 7 Met. 257; *Twitchell v.*

Shaw, 10 Cush. 46, 57 Am. Dec. 80; *Underwood v. Robinson*, 106 Mass. 296, 297; *Rawson v. Spencer*, 113 Mass. 40-46; *Fisher v. McGirr*, 1 Gray, 1-45, 61 Am. Dec. 381; *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188; *Batchelder v. Currier*, 45 N. H. 460; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Warren v. Kelley*, 80 Me. 513-531; *Earl v. Camp*, 16 Wend. 562; *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Hann v. Lloyd*, 50 N. J. L. 1; *Taylor v. Alexander*, 6 Ohio, 147; *Hentline v. Reese*, 54 Ohio St. 599; *Wall v. Trumbull*, 16 Mich. 228-234.

The cases in Wisconsin and Illinois, cited in the opinion, are the only ones that I have been able to find, after considerable investigation, which hold a different doctrine. On the authorities cited above, I am unable to

In England the assent of the representative of the government to which the seamen belong is required before the court of admiralty will take jurisdiction of a claim for seamen's wages against a foreign vessel; but this assent is not required in the United States if the voyage is terminated or the contract of hiring dissolved by the wrongful act of the owner or master. *Davis v. Leslie*, Abb. Adm. 123. In this case it was said that if the vessel is still in the prosecution of the voyage, United States courts will not take jurisdiction unless the representative of the vessel's country assent.

The admiralty court will entertain jurisdiction of a suit by French and German citizens against a British master for cruelty to them as seamen, notwithstanding the protest of the vice consul. *Bernhard v. Creene*, 3 Sawy. 230.

In this case the court said that the consul is not the representative of the libellants nor authorized to speak for their governments because they are not British subjects, and the parties cannot be remitted to the home forum, for, being subjects of the different governments, there is no such tribunal. The consul said that he was about to examine into the question in the consular court, but to this it was said that such court had not yet been organized, and that if it was a case of concurrent jurisdiction the jurisdiction of the admiralty court having first attached would be exclusive. It was further said that the consular court has no jurisdiction over this claim or power to give relief.

In *Patch v. Marshall*, 1 Curt. C. C. 452, an admiralty court entertained jurisdiction of a libel for a tort by a seaman against the master of a British vessel notwithstanding the protest of the British consul, saying: "It is true this court should not call in question a British consul for his official acts respecting the crew of a British vessel in a foreign port. . . . But it does not follow that the conduct of the master of such a vessel in procuring the official intervention of the consul upon false allegations to the injury of an American citizen by imprisonment in a foreign jail is not to be here investigated."

A discharge by a consul, and securing one month's wages, are not a satisfaction of a claim for damages existing for any actual injuries inflicted by cruelty or as a bar to such claim, under U. S. Rev. Stat. § 4600, Amend. June 26, 1884, providing that a consular officer in case of apprehension of a seaman deserting on account of unusual or cruel treatment shall discharge him, requiring payment of one month's extra pay. *The W. L. White*, 25 Fed. Rep. 503. 45 L. R. A.

In *The Salomoni*, 29 Fed. Rep. 534, it was said that if a seaman file a libel in the admiralty court for an assault by a master on a seaman of an Italian vessel the treaty would not prevent the Federal court from entertaining jurisdiction.

But in the absence of termination of voyage, discharge of seaman, or brutality, the admiralty court will refuse to entertain jurisdiction in an action for damages by a seaman for assault and battery on a British vessel. *The Carolina*, 14 Fed. Rep. 424; *Fry v. Cook*, 14 Fed. Rep. 424.

And the same was held in an action by a Chinese seaman against a British vessel. *The Montapedia*, 14 Fed. Rep. 427.

The United States district court asserted jurisdiction of a libel for wages on request of a British consul who had advised a seaman to leave a British vessel loaded for Chili (then in insurrection), where the movements of the vessel were uncertain. *The Sirius*, 47 Fed. Rep. 825.

This jurisdiction was asserted notwithstanding English merchants' shipping act 1854, § 190, providing that no seaman engaged for a voyage to terminate in the United Kingdom shall sue for wages in any foreign court unless discharged at the master's written consent, or he proves ill usage.

d. As to discharge of seamen abroad.

Generally masters give bonds to return to the port bringing back the seamen shipped unless in case of desertion, death, etc. The consuls in foreign countries generally inquire into complaints and pass upon discharges of seamen and enter on the ship's roll their findings. A lawful discharge of a seaman, approved by a consul, will exonerate the master if he has paid to the consul the amount due to the seaman. If the discharge is wrongful, or the consul fraudulently approves the same, the facts may be inquired into notwithstanding the consul's action.

Act of Congress February 28, 1803, Rev. Stat. § 4582, provided for the payment of three months' extra wages to the consul when a vessel is sold abroad and her company discharged, or when a seaman, a citizen of the United States, is with his own consent discharged abroad. The Amendment of June 26, 1884, provides for the payment of one month's wages.

United States Rev. Stat. § 4583, amended June 26, 1884, provides that a consul shall require the payment of one month's extra wages when a discharge is made abroad on complaint of the seaman that the voyage is continued contrary to agreement, or when a seaman is dis-

see that it makes any difference whether the outside information communicated to the officer, if taken to be true, would show the real case to be one upon which such a precept cannot properly be issued, because it comes within a treaty giving exclusive jurisdiction to another tribunal, or would show the precept to be unwarranted for any one of numerous other causes. That the defendant in the original action happens to be a captain of a Norwegian ship, and to owe the plaintiff in his official capacity, gives him a privilege of which he may or may not avail himself, to take the case out of the general jurisdiction of the court. I think this fact

calls for the application of the same principle as a strictly personal privilege. Indeed, the principle of the cases seems to cover every kind of external fact which operates to take away a jurisdiction that appears to be perfect on the face of the papers. It has been held that an officer may, if he chooses, act upon his knowledge or information of actual facts which show that the court was without jurisdiction, and refuse to serve the writ. *Earl v. Camp*, 16 Wend. 562; *Hensline v. Reese*, 54 Ohio St. 599. But this is very different from requiring him, at his peril, to determine questions of fact. I think the exceptions should be overruled.

charged by a consul in consequence of an injury received in the services of the vessel.

The prior acts of 1803 and 1840 required payment to the consul of three months' extra wages unless the consul deemed it just to discharge without exacting extra wages.

A discharge of a seaman at a foreign port must be made before a consul. *Hathaway v. Jones*, 2 Sprague, 56.

And a consul may discharge a seaman abroad for refusing to do any duty. *Jordan v. Williams*, 1 Curt. C. C. 69.

A discharge of a seaman in a foreign port, under acts of Congress February 28, 1803, and July 20, 1840, can be ordered by a consul only upon the consent of the seaman. The certificate of a consul must present a distinct impression of a seal so that it may be identified. *The Atlantic*, Abb. Adm. 451.

And a consul at a foreign port has no power to discharge a seaman for disability arising from wounds contracted in the service of the ship when the seaman is confined to his bed on shore. *Callon v. Williams*, 2 Low. Dec. 1. In this case the court said that the statute authorizing a discharge by a consul was intended for a case in which there is some choice exercised to go or stay. Since the amendment of 1884 a consul may discharge for such a cause.

But where a vessel is wrecked in a foreign country, and the captain sells the vessel and the company are discharged, not by any consent of their own, but by a casualty, the act of Congress of 1803, providing for payment to the consul of wages of seamen, does not apply. *Gilpin's Ops. Atty. Gen.* 811.

And the act of Congress February 28, 1803, does not apply to American seamen employed in a foreign vessel. *Gilpin's Ops. Atty. Gen.* 880.

Where seamen are too sick to return in the vessel from a foreign port three months' extra wages are to be paid to the consul. *Gilpin's Ops. Atty. Gen.* 442.

And where an American seaman is by his own consent discharged in a foreign port, and is prevented by the conduct of the master from making an application to the American consul at the place of discharge, the seaman may recover wages, under act of Congress 1840, Rev. Stat. §§ 4582, 4584, providing for the payment of extra wages on discharge at a foreign port. *Wilson v. Borstel*, 73 Me. 273.

And where an American seaman is discharged by a master in a foreign port if three months' extra wages be not paid to the consul abroad the same may be recovered by libel. *Orne v. Townsend*, 4 Mason, 541.

Where a vessel is disabled, and the master has paid to the consul the whole amount of extra wages which would have been required of him if the vessel had been voluntarily sold, the master is relieved from further liability al-
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though the seamen may not have demanded their wages from the consul. *Drew v. Pope*, 2 Sawy. 72.

And where the certificate of a consul stated that a whaling seaman was discharged by reason of sickness, and his hurt was received in the ship's service, it was held that he was entitled to be paid from the ultimate proceeds the same proportion of his lay for the whole voyage as the time he served was of the time of the whole voyage, deducting what he had already received. *Brunent v. Taber*, 1 Sprague, 243.

Some cases hold that a certificate of a consul that the discharge is granted on the seamen's consent is conclusive as to that fact in the absence of proof of fraud. *Tingle v. Tucker*, Abb. Adm. 519; *Lamb v. Briard*, Abb. Adm. 367.

In the latter case the seaman contended that his consent was induced by the threats of the master and consul that he should be brought home in irons. But the court said that his conduct would have justified such treatment. This case was distinguished in *Callon v. Williams*, 2 Low. Dec. 1, on the ground that it showed the discharge to have been made on the seaman's consent.

But where seamen were ill treated and complained to the master at a foreign port, and the master agreed to discharge the mate if the men would navigate the ship to the next port, but the men refused duty because the master did not discharge the mate, and they were then discharged for disobedience, by the consul, it was held that they were entitled to extra wages required to be paid for discharge in a foreign port. *Coffin v. Weld*, 2 Low. Dec. 81.

The court said that if the consul had decided that there had been no cruelty his finding might be conclusive, but he made no such decision at any time.

In *Foye v. Leckie*, 1 Sprague, 210, where a second mate was wrongfully discharged before a consul without wages, having previously been placed in irons until the arrival at that port for refusing to obey an order given as punishment when there has been no offense, it was held that he was entitled to damages as indemnity for the wrong done.

And where a master had allowed a sailor to drift away on a raft, and afterwards refused him permission to board the vessel, he was held liable for a wrongful discharge notwithstanding the sailor had set up such claim as a set-off in an action by the master for converting the raft to his own use, and notwithstanding the master produced a certificate of a consul stating that the master has produced evidence satisfactory to him of the desertion of one of his crew, and that he had with his consent discharged another. *Hutchinson v. Coombs*, 1 Ware, 65.

And a whaling seaman discharged at his own request before a consul at a foreign port, where

his rights are not explained to him by the master or consul, is not bound by the settlement where he is not paid the full value of his services. *Jenks v. Cox, Holmes, 92.*

And where a seaman is discharged by a United States consul at a foreign port without the payment of three months' wages, such discharge will not bar an action for the portion accruing to the sailor unless the consul makes an official entry on the crew's list and upon the shipping articles, under act of Congress July 20, 1840. *Miner v. Harbeck, Abb. Adm. 546.*

In *Jay v. Almy, 1 Woodb. & M. 262*, it was said that the master is not excused for improperly discharging a seaman abroad by the consul's approbation.

Seamen do not forfeit their wages where they are suspicious of the character of the voyage, and complain to a consul, who orders a seizure of the vessel, although the facts may not be sufficient to justify a forfeiture of the vessel. *The City of Mexico, 28 Fed. Rep. 207.*

The fact that foreigners were employed as seamen in the merchant ships of the United States, or had deserted from an American ship and become destitute, does not divest the authority of the consul to require another American ship to bring them to the United States. *Matthews v. Offley, 3 Sumn. 115.*

But a consul or vice consul cannot maintain an action in his own name, under act of Congress 1803, providing for the recovery of a penalty for the benefit of the United States, where the master refuses to take on board destitute seamen and transport them to the United States, as the action must be brought in the name of the United States. *Ibid.*

And a master is not required to return to this country foreign seamen shipped at their own home for a particular cruise ending there, and discharged there without the consent of a consul. *United States v. Parsons, 1 Low. Dec. 107.*

Where a minor secretes himself in a whaling vessel, and is not discovered until the vessel is at sea, and the master sets the minor at work, he is entitled to wages, as it is the duty of the master to leave him at the first port in order that the consul may cause him to be sent to the home port. *Luscum v. Osgood, 1 Sprague, 82.*

A libel for wages due a British seaman was dismissed where the consul refused to discharge him, although he had been absent for several days from the vessel, and when he returned the master told him to go about his own business, and an entry was made on the ship's log of desertion; but in the libel case the master expressed his willingness to receive him on board and take him to home port. *Wilson v. The John Ritson, 35 Fed. Rep. 663.*

e. As to disabled vessels.

A consul has power to cause a survey to be made of disabled vessels, and his duty requires him to look after cargoes of stranded vessels, and to take prompt measures for their preservation. The United States Consular Regulations authorize the consul to appoint inspectors where complaint is made as to the seaworthiness of a vessel.

A survey of a disabled vessel may be directed by an American consul, as by usage a part of his official duty. *Potter v. Ocean Ins. Co. 3 Sumn. 27.*

In *Seidel v. Peschkaw, 27 N. J. L. 427*, it was said that a consul is to inquire into the seaworthiness of ships, and is to take measures for the preservation of stranded vessels of the United States and their cargoes.

But a consul has no authority to order a sale

of a ship in a foreign port either on complaint of the crew or otherwise, under act of Congress July 20, 1840, 5 Stat. at L. 396, providing for the discharge of seamen of an unseaworthy ship. *Power of Consuls, 6 Ops. Atty. Gen. 617.*

In *The Bee, 1 Ware, 336*, where a libel for salvage of a British vessel was filed in admiralty, the British consul asserted a claim for the owners claiming that the vessel was not abandoned at sea. Afterwards an objection to the jurisdiction of the admiralty court was made, but it was held that the objection came too late.

f. In prize cases.

A consul has no power to adjust the claims made against prize vessels.

A stipulation by the captains of the respective vessels, and by the French and Spanish consuls, that a vessel captured by a French privateer should be sold and the proceeds paid as the two governments should decide, was enforced in the United States district court. *Gernon v. Cochran, Bee, 209.*

In *Gilpin's Ops. Atty. Gen. 39*, it was said that the French consul at Charleston has highly misbehaved in holding a court within the United States for condemning a capture as prize, and in causing a sale to be made under his authority.

g. In suits between French citizens.

A state court had no jurisdiction of an action for slander between French citizens, under Convention, art. 12 (1778), providing that all disputes between the subjects of France in the United States, or between the citizens of the United States in France, shall be determined by their respective consuls or vice consuls either by reference to arbitrators or by summary judgment without costs. *Goddard v. Luby, 1 Bay, 440.*

This provision is omitted from the later consular treaty with France in 1853.

And a state court had no jurisdiction in a civil suit between two French subjects to hold the defendant to bail, although the consul of France had made a decree in favor of the plaintiff, and the plaintiff was without remedy. *Bertrand v. Gautier, 1 Yeates, 371.* In this case the court said that if the French consul has no power to enforce his own decree, the minister of France can readily remedy the defect by negotiation and agreeing on an additional article with the executive authority of the United States.

But under the consular convention between the United States and France, the consular jurisdiction of French consuls did not extend generally to all differences and suits between Frenchmen. *Villeneuve v. Barrion, 2 Dall. 235, note, 1 L. ed. 362.*

And a French consul had no such jurisdiction as to oust the state courts from jurisdiction in a case against a citizen of France where the plaintiff was not also a citizen of France, although he might not have been naturalized in this country, under the Consular Convention, art. 12, that provided that all differences and suits between the citizens of France in the United States, or between the citizens of the United States within the Dominion of France, shall be determined by the respective consul and vice consul, and that no officer of the country, civil or military, shall interfere therein. *Caignet v. Pettit, 2 Dall. 234, 1 L. ed. 362.*

The 12th article of the Convention between America and France, November 14, 1778, did not oust a state court from jurisdiction between one French subject and another French subject

who had taken the oath of allegiance to the United States. *Portler v. Le Roy*, 1 Yeates, 371.

III. Powers of consul in other matters.

a. To assert claims for his citizens and country.

A consul may assert a claim in behalf of his fellow citizens, even where the claimants are unknown, without any special authority. But he must have special authority before he can obtain actual restitution or proceeds.

A Spanish consul is authorized to assert a claim for property of his fellow citizen legally captured by a privateer fitted out in this country for a South American country at war with Spain and recaptured by the crew, and seized for violation by such crew of our revenue laws. But a consul cannot receive actual restitution of the property without special authority from the individuals entitled thereto. *The Bello Corrunes*, 6 Wheat. 152, 5 L. ed. 229.

And a consul of a foreign country was entitled to assert a claim for slaves belonging to the subjects of that country wrongfully captured and brought to this country by a privateer; but he was not entitled to have them surrendered without satisfactory proof as to who was the real owner. *The Antelope*, 10 Wheat. 66, 6 L. ed. 268.

And a consul in the absence of any authorized agent, could claim on behalf of subjects of his nation property seized where a British ship was captured by a privateer and all the cargo excepting 6,276 hides were condemned as enemy's property. The hides were claimed by the Spanish consul as Spanish property. *The London Packet*, 1 Mason, 14.

And a foreign consul has authority to petition the court to order the marshal to pay into the registry proceeds of a sale of property liable for salvage, in which the citizens of his country are interested, they being absent and having no other legal representative in this country. *The Adolph*, 1 Curt. C. C. 87. In this case the consul had not received his *exequatur* when he filed his petition.

So, a consul may intervene to contest the question of forfeiture for breach of neutrality, where his government has an interest in the vessel. *The Conserva*, 38 Fed. Rep. 431.

In a libel for salvage of a vessel where a claim was interposed by a Spanish consul for property as belonging to certain Spanish subjects unknown, an order was made directing the sale of the cargo and vessels and the proceeds to be brought into court for distribution. *Rowe v. Brig*, 1 Mason, 372.

In *L'Invincible*, 1 Wheat. 239, 4 L. ed. 81, a French consul interposed a claim on behalf of French owners where a French privateer was captured by a British cruiser and recaptured by an American privateer, and recaptured by British frigates, and recaptured by an American privateer and brought into a United States port as a prize.

And where a privateer of a Spanish colony at war with Spain seized a Spanish vessel, and the privateer brought it into a neutral port of this country, the consul of Spain filed a libel against the same, and his right was recognized. *The Divina Pastora*, 4 Wheat. 52, 4 L. ed. 512.

In *The Vrow Anna Catharina*, 5 C. Rob. Adm. 15, a claim of territory was made by a Portuguese consul for a vessel seized within neutral limits.

But a Spanish consul is not authorized, merely by virtue of his office, to interpose a claim for a prize belonging to British subjects seized by an American privateer in neutral Spanish territory.

during war between this country and Great Britain, as the claim for the violation of neutral territory must be made by the government. *The Anne*, 3 Wheat. 435, 4 L. ed. 428.

b. To administer on estates.

The Federal statute makes it the duty of consuls in foreign countries, where the law of the country permits, to take possession of the personal property of citizens of the United States who shall die within their consulates, there being no legal representative. The consuls have acted upon this statute in a good many cases; but where the question arose in England the court refused to recognize the right, and in Louisiana it is held that a consul has no right to be appointed administrator in such case.

A consul general of Italy has authority to demand the distributive shares in an estate belonging to persons in his country deposited in court, under treaty with Italy, providing that a consul general may have recourse to the authorities of the respective countries within their respective districts, in order to defend the rights and interests of their countrymen. *Re Tartaglio*, 12 Misc. 245.

And in an application for letters of administration a French consul is entitled to be heard informally as a national agent of parties supposed to be interested, under treaty with France securing to the consuls of both nations the right to apply to the authorities of their respective governments, whether Federal or local, judicial or executive, for the purpose of protecting informally the rights and interests of their countrymen, especially in cases of absence. *Ferrie v. Public Administrator*, 3 Bradf. 249.

A consul must account to the government for fees received by him, under U. S. Rev. Stat. § 1709, making it the duty of consuls and vice consuls to administer upon the personal estate left by any citizen of the United States who shall die within their consulates, and Consuls Regulations 1888, § 508, item 56, regulating fees in such cases. *United States v. Eaton*, 169 U. S. 331, 42 L. ed. 767.

And a consul in a foreign country acting as administrator, after the payment of debts cannot retain the surplus as against an administrator of deceased in order to assert a lien for a tort alleged to have been committed by the testate against him. *Sturgis v. Slacum*, 18 Pick. 36.

In *Seidel v. Peschkaw*, 27 N. J. L. 427, it was said that a consul is to take possession of the personal estate of such citizens of the United States as shall die within his consulate unrepresented, and to administer the same by paying the local debts and remitting the residue to the United States treasury.

But in *Thompson's Succession*, 9 La. Ann. 96, and *Lanfear v. Ritchie*, 9 La. Ann. 96, it is held that a vice consul of Sweden is not entitled to supersede an administrator of a Swedish subject appointed in Louisiana, as no international law or treaty gives any such right, and the distribution of assets of foreigners is the subject of special legislation in the state.

In *Aspinwall v. The Queen's Proctor*, 2 Curt. Eccl. Rep. 241, the administration of the effects of a citizen of the United States dying intestate in England, *in itinere*, limited for the purpose of paying his debts and transmitting the balance to the treasury of the United States, was refused to the American consul upon the nonappearance of any next of kin, where the Crown opposed the grant. In this case the court said:

"It has been said that by the law of the United States British consuls may take possession of the property of British subjects in similar circumstances. But this is not by the law of nations, but by custom or express enactment, and is not a law which this country is bound to follow; this country has not adopted the principle of reciprocity in this respect."

c. To exercise diplomatic functions.

A consul is not a diplomatic officer. The *Anne*, 3 Wheat. 435, 4 L. ed. 428. In this case the court said that there is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominion he assumes to exercise it.

In *Otterbourg v. United States*, 5 Ct. Cl. 430, it was said: "No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with, or to the government or country to which he shall be appointed, or any other country or government, when there shall be in such country any officer of the United States authorized to perform diplomatic functions therein, nor in any case unless expressly authorized by the President so to do." 11 Stat. at L. p. 53.

In *Functions of Consuls*, 7 Ops. Atty. Gen. 342, it was said that consuls in China and Turkey have not any diplomatic privileges except such as they might have in France during the absence of the minister.

d. To perform marriage ceremony.

It seems to be a question of some doubt as to whether or not a consul can perform marriage ceremonies, although it is held in Massachusetts that a marriage before a foreign consul is valid, and it has been suggested that a consul in a non-Christian country may perform marriage ceremonies.

In *Loring v. Thorndike* (1862), 5 Allen, 257, where an American citizen and woman of Hesse Darmstadt were temporarily residing at the city of Frankfort and were married by contract in writing in the presence of witnesses by and before the American consul at Frankfort, it was held that such marriage was valid. In this case there was some conflict in evidence as to the validity of such marriages in that country, but it was shown that the consul was in the habit of marrying foreigners, and that such marriages were recognized in that country as valid.

But where a marriage between a British subject domiciled in England and a female ward of court was celebrated in the presence of the British consul, and in the English church at Antwerp by a clergyman of the Church of England, who had been appointed chaplain of the church and was paid by the British government, the marriage was held invalid where certain ceremonies prescribed by the law of Belgium had not been observed. *Kent v. Burgess*, 11 Sim. 361, 5 Jur. 166.

Consuls have no lawful authority, as such, to solemnize marriages in countries comprehended within the pale of the international public law of Christendom. 7 Ops. Atty. Gen. 18, 342.

In regard to states not Christian, a contract of marriage is not subject to the *lex loci*, but it is governed by the law of the domicile, and in such cases a valid contract. Marriage may be solemnized by a consul of the United States in countries not Christian. 7 Ops. Atty. Gen. 18.

There is some question as to his authority in 45 L. R. A.

non-Christian countries. *Celebration of Marriages by Consuls, Functions of Consuls*, 7 Ops. Atty. Gen. 342.

In *Celebration of Marriages by Consuls*, 7 Ops. Atty. Gen. 23, it was said that "the Code (arts. 47, 48) provides that any civil act of Frenchmen abroad shall be valid if it be drawn up in pursuance of the forms of the place, according to the rule *locus regit actum*; or if it has been received conformably to the laws by the diplomatic agents or consuls of France. It has been doubted whether this applies to marriage, though the better opinion is that it does. (Dalloz, *ubi supra* [Dict. Jur. Mariage] Nos. 362, 363; Toullier, *Droit Civil*, tom. 1, No. 360; Merlin, *Répert.*, Mariage, p. 641.) It is said, however, that if one of the parties to a marriage by a French consul abroad is French and the other not, then the marriage is null, because the consul has no jurisdiction as to the party not French, and the marriage may be attacked by either party. (Dalloz, *ubi supra*, [Dict. Jur. Mariage] Nos. 365, 366.) In one of the cases where this point was decided, the parties possessed an act of marriage, with twenty years' cohabitation and two children. (Proudhon, *Tr. des Personnes*, tom. 1, note a.)"

e. To grant certificates.

A consul's certificate must show clearly his signature and seal, and is of no value in regard to matters not clearly within his official duties. In regard to a discharge of a seaman, the certificate must show upon what grounds the consul proceeded, and that his action is official, and that he had jurisdiction. A certificate as to an official act is admissible in evidence, and in some cases, in the absence of fraud and when supported by depositions, has been held conclusive as to official acts.

In order to entitle a consular certificate to be used in evidence the signature and the impression of the seal must be legible. *The Atlantic*, Abb. Adm. 451.

And a certificate under seal of the United States consul at Portugal, as to a copy of the Portuguese law, is insufficient. *Church v. Hubbard*, 2 Cranch, 187, 2 L. ed. 249.

And the fact that there is but one bill of lading will not justify admitting in evidence a copy certified by a United States consul to be a true copy where the original is in the possession of the libellant, as a consular certificate cannot be accepted as evidence except where it has been made such by statute. *The Alice*, 12 Fed. Rep. 923; *Citing Levy v. Burley*, 2 Sumn. 355; *Church v. Hubbard*, 2 Cranch, 187, 2 L. ed. 249; *United States v. Mitchell*, 2 Wash. C. C. 478.

And the certificate of a British vice consul at the Brazil, of the amount of the proceeds of damaged goods which, by the law of that country, are compelled to be sold under his direction, is incompetent. *Waldron v. Coombe*, 8 Taunt. 163.

So, a consular certificate as to the proceedings of an admiralty court is of no effect, as the law of nations recognizes a consul only in commercial transactions, but not as clothed with any authority to authenticate judicial proceedings. *Catlet v. Pacific Ins. Co.* 1 Paine, 594.

Consuls of the United States are authorized by the 24th section of the act of August 18, 1856, to perform any notarial acts, but a certificate as to official character of a foreign notary is not a notarial act. *Notarial Powers of American Consuls*, 12 Ops. Atty. Gen. 1.

And a consul is not a judicial officer, and a

passport issued by him is not evidence of the fact that the holder was at the place where it was issued, and that he resided there. *Foster v. Davis*, 1 Litt. (Ky.) 73.

A certificate of a consul to "prove another certificate of the time of a seaman's discharge from a hospital and proceedings in a police court, and a sentence of that court, and the nature of a wound inflicted on a seaman, and the hospital expenses, is not admissible in evidence, as such acts are not official. But it was admitted to show that the seaman was left at that port without the consul's knowledge or consent. *Brown v. The Independence*, Crabbe, 54.

And a certificate of a consul is not evidence to prove the arrival or departure of a vessel in an action brought in the name of the consul to recover a penalty for not depositing with the consul the ship's register at her arrival at his port, under act of Congress 1803, chap. 62, § 2, providing that for the refusal or neglect of a master to deposit his register with a consul or other commercial agent of the United States at a foreign port he is to forfeit and pay \$500. *Levy v. Burley*, 2 Sumn. 355.

And the certificate of a consul as to a seaman's discharge was held not to affect his right to wages, where the captain and the consul made up the account without consulting him, and paid over what they stated to be the balance, he then being entirely helpless, and it was not made with his own consent. *Brunent v. Taber*, 1 Sprague, 243.

And a consul's certificate of desertion of a seaman, obtained by a master of a ship without notice to the seaman, is not conclusive evidence in a summary action for wages before a justice of the peace. *Lewis v. Jewhurst*, 15 L. T. N. S. 275.

So, a certificate of a consul as to a desertion by a sailor will be disregarded where it is not shown to have been made with knowledge of all the facts. *The Lillian M. Vigus*, 10 Ben. 385.

And a consular certificate of the facts inducing the summary imprisonment of a seaman in a foreign port is not evidence. *Johnson v. The Coriolanus*, Crabbe, 239.

The court said that a certificate duly ornamented with the consul's official seal of the offense committed, of which he generally knows nothing but from the representation of the captain or of the officers of the vessel, should never be allowed to be read; and they are infinitely weaker than *ex parte* depositions.

A certificate of a consul that a seaman was "duly" discharged for disability arising from wounds contracted in the service of a ship is of no value as evidence, as the statute authorizing consuls to discharge seamen with their own consent does not apply to men who are so ill as to be unable to continue the voyage, and do not consent. *Callon v. Williams*, 2 Low. Dec. 1. In this case the court said: "A district judge of great experience is reported to have held that the consul's certificate of the seaman's consent to be discharged is conclusive evidence thereof (*Lamb v. Briard*, Abb. Adm. 367); but as the consul has not so certified in this case, that question does not arise."

It is not enough for a consul to certify that he gave a seaman a discharge "lawfully," or that he gave it "in accordance with the laws of the United States." It must be made to appear upon what grounds he proceeded, and the court cannot intend that it was on the joint request of the master and seaman, nor that it was on the sole application of the latter, nor either that one or other ingredient of fact actually existed. *The Atlantic*, Abb. Adm. 451.
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But a certificate of an American consul is *prima facie* evidence of the refusal of the master to take seamen on board, under act of Congress 1803, chap. 62, providing for the recovery of a penalty for the benefit of the United States, where the master refuses to transport destitute seamen to the United States. *Matthews v. Offley*, 3 Sumn. 115.

And a certificate by a consul as to the discharge by him of a seaman for mutinous conduct was held conclusive as to the termination of the connection of the seaman with the ship, in the absence of proof of fraud. *Tingle v. Tucker*, Abb. Adm. 519.

This was on the ground that the consul had examined the case officially, and decided the same upon a full hearing of the proofs.

A certificate of a consul of the United States in a foreign port that a seaman was discharged upon his own consent is conclusive against the seaman, unless the conduct of the consul be shown to have been corrupt or fraudulent, under act of Congress July 20, 1840, authorizing United States consuls to discharge absolutely mariners from vessels on the joint application of both master and the men. *Lamb v. Briard*, Abb. Adm. 367. In this case the consul, in addition, gave a deposition to the same effect corroborated by the evidence of the consul's assistant. In addition to this the seaman had given a receipt stating that he had been discharged at his own request, and that the sum paid was in full. This receipt was also authenticated by the consular seal and proved by the deposition of the assistant.

In this case it was said that it was doubtful whether evidence could be received on the part of the seaman impeaching the validity of the certificate and the official act of the consul, unless it amounted to proof of fraud or plain dereliction of duty on his part.

A certificate of an American consul at a foreign port that the ship's papers were lodged with him agreeably to the embargo act of Congress under his seal of office was admitted as evidence, and other parts of it as to other facts struck out. *United States v. Mitchell*, 2 Wash. C. C. 478.

In *Levy v. Burley*, 2 Sumn. 355, it was said by Story, J., that "in the case of *United States v. Mitchell*, 2 Wash. C. C. 478, my late brother, Mr. Justice Washington (a truly able and cautious judge) admitted a consul's certificate to be evidence that the ship's register was deposited with him, but he rejected it as to all other facts. I do not now meddle with this point, because it is not necessary to the decision of the case before the court; and there may be good reason to hold that the certificate, in relation to an official fact, of which the consul may have exclusive knowledge, may be properly admissible, when, as to all other facts, it would be inadmissible, because they might admit of proof *alibi*, or even of proof of a higher nature. If the certificate in this case had been of the positive deposit of the register, and were admissible as evidence of that fact (as Mr. Justice Washington held it was), then I should have no doubt that it was *prima facie* evidence of the arrival of the vessel; for it would be a natural presumption that it was deposited by the master in the ordinary discharge of his duty. But where the certificate is merely negative of the non-deposit of the register, it would seem at most to establish only its own verity."

Act of Congress 1803, chap. 62, § 4, providing for depositing ship's papers, does not make a consular certificate evidence of refusal or neglect. *Parsons v. Hunter*, 2 Sumn. 419.

f. To take depositions and affidavits.

Previous to the act of Congress of 1856, it seems that depositions and affidavits could not be taken before a consul under any act of Congress, although such officer would have the power under a state law rendering such depositions and affidavits valid. Such papers to be used in a state court must be taken in accordance with the local laws of such state.

United States Rev. Stat. § 1750, act of Congress August 18, 1856, provides that a consular officer is authorized to administer to or take from any person an oath affirmation affidavit, or deposition, and to perform any notarial act which any notary public is authorized by law to do, within the United States.

Depositions for extradition may be taken before a vice consul, under 22 U. S. Stat. at L. 216, providing that depositions shall be received if they be properly and legally authenticated so as to be entitled to be received for similar purposes before tribunals of a foreign country from which the accused shall have escaped, and Rev. Stat. § 1674, providing that "vice consuls" and "vice commercial agents" shall be deemed to denote consular officers who shall be substituted temporarily to fill the places of consuls general, consuls, or commercial agents when they shall be temporarily absent or relieved from duty, and the vice consul is not a deputy but an acting consul. *Re Herres*, 33 Fed. Rep. 167.

A deposition was held competent where it was taken before an officer who gave his official title as "Consular agent of the United States at Camargo, Mexico," although the seal contained the words "United States Commercial Agency," under U. S. Rev. Stat. § 1674, providing that consul general, consul, and commercial agent shall be deemed to denote full, principal, and permanent consular officers as distinguished from subordinates and substitutes. *Schunior v. Russell*, 83 Tex. 83.

In this case evidently a commission was issued for a deposition to be taken before a consul, and the question was whether "consul" and "commercial agent" were synonymous terms. No question was made as to the powers of a consul in such a case.

An affidavit for service by publication could be made in Spain before an American consul, under Ala. Code, § 153, authorizing proof of personal service on absent defendants to be made by affidavit, and U. S. Rev. Stat. § 1878, p. 311, authorizing consular agents to take affidavits. *Marine Wharf & Storage Co. v. Parsons*, 49 S. C. 136.

And an affidavit to justify an order for bail may be taken before a consul of the United States in Austria, under N. J. act March 10, Nixon's Dig. 132, P. L. 157, authorizing the administration of an oath or affirmation to hold to bail by any ambassador, public minister, *chargé de affaires*, or other representative of the United States for the time being, at any foreign court or government. A consul must be regarded as a representative of the United States within our statutes. *Seidel v. Peschkaw*, 27 N. J. L. 427.

And an affidavit made before a consul in a foreign country will be received, where a notary public certifies that by the laws of that country the British consul has power to administer an oath. *Ex parte Hutchinson*, 5 C. B. 499, 5 Dowd. & L. 523, 17 L. J. C. P. N. S. 111.

And an affidavit of a plaintiff in a cause residing at Havana, taken before the commercial and naval agent of the United States resident there, may be read in a New York court on a motion 45 L. R. A.

for a commission to take the examination of witnesses abroad. *Welsh v. Hill*, 2 Johns. 373.

But a consul in a foreign country could not administer an oath required under act of Congress July 4, 1836, in patent cases; but the oath should be administered by a competent magistrate of that country, and the deposition so made should be authenticated by the consul. *Gilpin's Ops. Atty. Gen.* (1840) 1820.

The power to administer an oath was given consuls by act of Congress 1856.

A stipulation that an answer may be sworn to before a notary public or other person authorized to administer an oath "by the law of France" will not sustain a verification of an American consul in France. *Herman v. Herman*, 4 Wash. C. C. 555.

The court said that the act of Congress giving consuls power to administer oaths is confined to particular cases of a maritime or commercial character; but that if the power was general it would not affect this stipulation.

g. To take acknowledgments of deeds and powers of attorney.

The power of a consul, vice consul, or consular agent to take acknowledgments of deeds and powers of attorney depends largely on the local statute where such instrument is to be used. It has been held that a statute authorizing a deed to be acknowledged before a consul includes a vice consul. But in the same state it was held that the term "consul" does not include a "consular agent."

A deed may be acknowledged before an American consul at a foreign port, where the grantor resides, under Mass. Stat. 1783, chap. 37, § 4, providing that deeds may be acknowledged before a magistrate in any other state or kingdom where the grantor resides. The term "magistrate" is held to mean a ministerial officer exercising like powers with those of a justice of the peace when acting in his ministerial capacity. Such an officer is a consul. *Scanlan v. Wright*, 13 Pick. 528, 25 Am. Dec. 344.

And an acknowledgment of a deed by a married woman before a United States commercial agent in Canada is sufficient to pass her title to land in Pennsylvania. *Moore v. Miller*, 147 Pa. 378.

An assignment of firm assets for creditors, executed in China by a resident partner before an American consul, is valid, under the Treaty of the United States and China of 1844, and act of Congress of 1848, authorizing United States authorities to carry out the treaty, (1st) under the laws of the United States; (2d) under the common law; (3d) under decrees and regulations by the commissioner. It was also held that the assignment was not void as against an English creditor, as the consular court is a court of the United States into which, by the general laws, an alien friend may enter for redress against a citizen of the country of which the court is an appendage. *Forbes v. Scannell*, 13 Cal. 242.

An acknowledgment of a deed taken before a vice consul in Hawaii in 1857 is valid, under Cal. act April 16, 1850, authorizing an acknowledgment proved without the United States to be taken by any judge, etc., of any state, Kingdom, or Empire, having a seal, or by any consul of the United States appointed to reside therein, as "any" consul embraces consuls of every grade. *Mott v. Smith*, 16 Cal. 553.

In *McMinn v. O'Connor*, 27 Cal. 238, it was held that a consular agent in Ireland in 1859 was not authorized to take and certify the ac-

knowledge of a deed to be recorded in California.

This decision does not distinguish *Mott v. Smith*, 16 Cal. 553, although the same statute was in effect at the time of the execution of both deeds.

In this case the statute authorized an acknowledgment before a "consul." The present statute authorizes an acknowledgment to be made before a "consul, vice consul, or commercial agent," and this decision evidently was on the ground that a "consular agent" is not embraced within the statute authorizing the acknowledgment before a "consul."

A letter of attorney to be used in bankrupt proceedings may be administered in a foreign country before a United States consul, under bankrupt act, § 20. sub. 3, providing that oaths required by the act may be administered by diplomatic or consular officers of the United States in any foreign country. *Re Eugenheimer*, 91 Fed. Rep. 744.

And a power of attorney authorizing a suit to be brought and acknowledged before a United States consul in a foreign country and authenticated by his seal is sufficiently proved without any other evidence of the genuineness of the signature or seal, under 1 N. Y. Rev. Stat. 747, 2d ed. sub. 3, authorizing an acknowledgment of a deed or a mortgage to be made before a consul. *St. John v. Croel*, 5 Hill, 573.

In *United States v. Badeau*, 38 Fed. Rep. 572, it was said that when a state statute declares that for the purpose of recording mortgages or deeds or powers of attorney persons in London may go before the United States consul and acknowledge such papers in the form prescribed by the state law, and that when he certifies the fact under his hand and seal they shall be entitled to be recorded, such act is done by the consul under an authority wholly in pursuance of a state law, and has nothing to do with the business of the consulate.

h. To retain ship's papers.

Act of Congress February 22, 1803, requires masters of vessels to deposit the ship's papers with the consul at the arrival in a foreign port.

This act does not apply where the vessel merely touches at a port without coming to an entry or transacting any business. *Toler v. White*, 1 Ware, 277.

And does not apply where the arrival is not for the purpose of business requiring an entry and clearance. *Harrison v. Vose*, 9 How. 372, 13 L. ed. 179; *Deposit of Ship's Papers with Consuls*, 6 Ops. Atty. Gen. 163; *Shipmasters*, 5 Ops. Atty. Gen. 161; *Shipmasters Abroad*, 4 Ops. Atty. Gen. 390.

And a master of a vessel is not required to deposit ship's papers in the hands of a consul, where the consul was at another point some 20 miles distant, and owing to the weather it would have been dangerous for him to have left his ship for that purpose. *Gould v. Staples*, 9 Fed. Rep. 159.

A consul has not power to withhold ship's papers in all cases, under act of Congress August 18, 1856, § 28 (11 Stat. at L. 63), providing that consuls are authorized to retain ship's papers until payment of demands and wages where suit has been brought and the vessel released on bond. He may detain the papers to enforce wages in certain cases and consular fees, but has no power to decide all disputed claims against American vessels. 9 Ops. Atty. Gen. 384.

A penalty for not depositing the ship's register with the consul on arrival in a foreign port, 45 L. R. A.

under consular act 1803, chap. 62, § 4, providing a penalty of \$500, must be sued for within two years, under act of Congress 1870, chap. 36, § 31. *Parsons v. Hunter*, 2 Sumn. 419.

l. To license illegal acts.

A consul has no power to grant a license to trade with an enemy or to do any illegal act. But a license to trade with the enemy may be ratified by the government represented by the consul.

An American consul at Mexico in conjunction with the assent of chief officers of the American squadron at Vera Cruz, cannot license a neutral residing in Mexico to sail his vessel under the Mexican flag and protect the same during war between Mexico and this country. *Rogers v. The Amado*, Newberry, Adm. 400.

In this case the alleged license was only a recommendation by the consul to the officers of the squadron to allow the vessel, owner, and family to pass out and return, and she was captured inside Mexican lines some six months later, having a Mexican passport.

A license made by a consul of a neutral power with a citizen of a belligerent state to protect from capture merchandise held by such citizen within the enemy's lines is against public policy and void. *Coppell v. Hall*, 7 Wall. 553, 19 L. ed. 246.

But a certificate for limited trade in an enemy's country, granted by a British consul and also by a British vice admiral to an American vessel, may be so ratified by the government as to entitle a release on capture by a British ship. *The Hope*, 1 Dodson, Adm. 226.

The advice of an American consul in a foreign port gives to the master of a vessel no justification for an illegal act in imprisoning seamen. *Wilson v. The Mary*, Gilpin, 31.

j. To contract.

A consul general cannot recover on a contract for his influence in favor of a military arms company to have his government purchase arms from that company, as it is against public policy. *Oscanyon v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

A consul selling a vessel in a foreign port cannot at such sale become a purchaser indirectly, so as to cut out a prior bottomry bond. *Riley v. The Obell Mitchell*, N. Y. Times, May 16, 1861, Fed. Cas. No. 11, 839.

k. To serve process.

A consul in the absence of any statute cannot serve process from a court in Louisiana in an action to have a curator appointed, where the defendant resides in France. *Re Dumas*, 32 La. Ann. 679.

I. T.

William H. QUIGLEY

v.

Alexander B. CLOUGH.

(.....Mass.....)

A barbed-wire fence running diagonally from the corner of a house across the grass on private premises to a street corner, put there to prevent people from taking a short cut across the grass, after plain wire fence has been found ineffectual for that

NOTE.—For negligence as to barbed-wire fence, see also *Loveland v. Gardner* (Cal.) 4 L. R. A. 395.

purpose, does not make the owner liable to a person who, by mistake after dark, left the line of the street, walked upon the grass, and was injured by the fence.

(May 10, 1899.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence which resulted in a judgment in defendant's favor. *Overruled.*

The facts are stated in the opinion.

Messrs. Arthur H. Russell and Ralph S. Bartlett, for plaintiff:

Chapter 272 of the acts of 1884 provides: "No barbed-wire fence shall be hereafter built or maintained within 6 feet above the ground, along any sidewalk located on or upon any public street or highway."

If the fence in question were maintained in violation of the statute it was a violation of a criminal statute, which violation is in itself evidence of negligence.

Stone v. Boston & A. Horse R. Co. 171 Mass. 536, 41 L. R. A. 794; *Hanlon v. South Boston Horse R. Co.* 129 Mass. 310; *Hall v. Ripley*, 119 Mass. 135.

The decisions relating to mantraps and spring guns apply.

Chenery v. Fitchburg R. Co. 160 Mass. 211, 22 L. R. A. 575; *Pierce v. Cunard S. S. Co.* 153 Mass. 87; *Marble v. Ross*, 124 Mass. 44; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248.

A landowner owes no duty to a trespasser except that he must not wantonly or intentionally injure or expose him to injury.

If the fence were in such a situation and of such a character as to be dangerous to persons passing along the street in the exercise of due care it became the duty of the defendant to take all proper precautions to avoid danger.

Larue v. Farren Hotel Co. 116 Mass. 67; *Lynch v. Nurdin*, 1 Q. B. 29; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Bird v. Holbrook*, 4 Bing. 628; *Beck v. Carter*, 6 Hun, 604; *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Orogon v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Lane v. Atlantic Works*, 111 Mass. 136.

Messrs. Alfred Hemenway and Salem D. Charles, for defendant:

The statute does not forbid the erection of fences of barbed wire. It only regulates their use along sidewalks. The statutory provision is not to be extended by construction.

Where the plaintiff is a trespasser, the defendant owes him no duty or obligation, except the negative one, not to injure him maliciously or with gross and reckless carelessness.

Johnson v. Boston & M. R. Co. 125 Mass. 75; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Wright v. Boston & M. R. Co.* 129 Mass. 440. 45 L. R. A.

A former fence had been replaced by this one, so that the defendant held out no invitation for people to cross his premises. It was not a trap for which the defendant would be liable.

Howland v. Vincent, 10 Met. 371, 43 Am. Dec. 442; *Rockwood v. Wilson*, 11 Cush. 226; *Mistler v. O'Grady*, 132 Mass. 139; *Reardon v. Thompson*, 149 Mass. 267; *McIntire v. Roberts*, 149 Mass. 450, 4 L. R. A. 519.

If the plaintiff voluntarily left the sidewalk and passed upon the defendant's land where he had no right to go, instead of stepping into the street where he could find a safe way provided for him to reach his team, he was guilty of taking a risk which the law will not excuse, and he was not in the exercise of due care.

Taylor v. Carew Mfg. Co. 140 Mass. 150.

Holmes, J., delivered the opinion of the court:

This is an action for personal injuries. The defendant had a house at the corner of two streets, which were at right angles to each other, and the sides of the house were parallel to, and at a distance from, the streets. The defendant maintained a barbed wire fence running diagonally from the corner of his house across the grass to the corner of the streets. The plaintiff, by mistake, after dark, left the line of the street, walked upon the grass, came against the fence, and was injured. The judge directed a verdict for the defendant, and the case is here on exceptions.

It does not need argument to show that this was not a fence maintained "along" a sidewalk, within Stat. 1884, chap. 272, § 1. But it seems that there had been a plain-wire fence in the same place, which had been replaced by the present one, and it appeared that the defendant said that he put up this one because the plain-wire fence did not serve his purposes. The plaintiff argues that, especially taking this indication of the defendant's purpose into account, the defendant is answerable, on the principle of liability for spring guns. *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 213, 22 L. R. A. 575.

But we are of opinion that the ruling was right. Barbed wire is well known, and has been widely used for fencing, as more efficient than common wire. Not only does experience not warrant saying that the use of it upon a man's own land, upon which he has a right to expect people not to trespass, shows an expectation that they will come there, and an intent to hurt them when they do, but everyone knows the contrary,—that barbed wire has been used by hundreds of people who had no malicious intent. It is or has been a common article of commerce, and the use of it simply shows an intent to make it more difficult to pass the line of the fence. Therefore the limitation laid down in *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575, applies. The remark of the defendant confirms, rather than weakens, our conclusion; for it implies that the plain-wire

fence was put there with the same purpose as the barbed. The common purpose can only have been to prevent people from taking a short cut across the defendant's grass, and that is the common sense of the matter.

Marble v. Ross, 124 Mass. 44, goes, at least, to the verge of the law. But there the vicious stag was an active source of harm, which attacked the trespasser. Here there was nothing but an inert object, intended to

prevent trespassing, which could do no harm unless the trespass itself brought the trespasser into contact with it. See *Daniels v. New York & N. H. R. Co.* 154 Mass. 349, 13 L. R. A. 248; *Holbrook v. Aldrich*, 168 Mass. 15, 36 L. R. A. 493; *Howland v. Vincent*, 10 Met. 371, 43 Am. Dec. 442; *McIntire v. Roberts*, 149 Mass. 450, 452, 453, 4 L. R. A. 519. *Exceptions overruled.*

ALABAMA SUPREME COURT.

Brooks FULLER, *Appt.*,

v.

STATE of Alabama.

(.....Ala.....)

1. The parole of a convict is in the nature of a conditional pardon, and within the constitutional grant of the pardoning power to the governor.
2. A convict who elects to accept a parole and avails himself of the liberty which it confers must do so subject to the conditions upon which alone it is granted to him.
3. The summary arrest of a convict who has violated his parole, and his summary return or remandment to servitude or imprisonment under his sentence, are not in violation of the constitutional guaranties governing the arrest and trial of criminals.

(June 1, 1899.)

APPEAL by petitioner from an order of the Probate Court for Montgomery County denying a petition for writ of habeas corpus to obtain the release of petitioner from custody to which he had been committed for violation of his parole. *Affirmed.*

Fuller was convicted of assault with intent to murder. The governor paroled him under authority of Code 1896, §§ 5461, 5462. He subsequently issued an order reciting that he had received information that Fuller had violated his parole, and directing that he be delivered to the convict department to serve out his term according to law. He was thereupon reincarcerated, and he filed a petition for his release upon the ground of lack of authority for his recommitment.

Further facts appear in the opinion.

Mr. John W. A. Sandford, Jr., for appellant.

Mr. Charles G. Brown, Attorney General, for appellee.

McClellan, Ch. J., delivered the opinion of the court:

Section 12 of article 5 of the Constitution confers the pardoning power on the governor in this language: "The governor shall have power to remit fines and forfeitures, under such rules and regulations as may be

NOTE.—As to parole of convict, see also *People v. Cummings* (Mich.) 14 L. R. A. 285, and *note*.

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prescribed by law, and, after conviction, to grant reprieves, commutation of sentence, and pardons (except in cases of treason and impeachment)." It is the settled law that this grant includes power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature, so long as it is not illegal, immoral, or impossible of performance, and that a breach of the condition avoids and annuls the pardon. *Ex parte Wells*, 18 How. 307, 15 L. ed. 421; *Woodward v. Murdock*, 13 Crim. L. Mag. 71, and notes (124 Ind. 439); *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State v. Barnes*, 32 S. C. 14, 6 L. R. A. 743, and cases cited; *State, O'Connor, v. Wolfer*, 53 Minn. 135, 19 L. R. A. 783, and cases cited; *note to People v. Cummings* (Mich.) 14 L. R. A. 285.

The parole of a convict is in the nature of a conditional pardon, and within the constitutional grant of the pardoning power to the governor. The power to grant pardons, absolute or conditional, cannot, of course, be taken away from the executive, nor limited by legislative action, but the general assembly may enact laws to render its exercise convenient and efficient. *Kennedy's Case*, 135 Mass. 48. The legislature of this state has enacted such a law in respect of that description of conditional pardons known as "paroles," and this statute is now embodied in §§ 5461, 5462, Code, which are as follows:

"Sec. 5461. Governor may Suspend Sentence and Parole Convict on Good Behavior. The governor may, whenever he thinks best, authorize and direct the discharge of any convict from custody and suspend the sentence of such convict without granting a pardon and prescribe the terms upon which a convict so paroled shall have his sentence suspended.

"Sec. 5462. Convict Failing to Observe Terms of Parole may be Rearrested and Required to Serve Out Sentence. Upon the failure of any convict to observe the conditions of his parole, to be determined by the governor, the governor shall have authority to direct the rearrest and return of such convict to custody, and thereupon said convict shall be required to carry out the sentence of the court as though no parole had been granted him."

These sections are really not open to construction, and little need be said in their in-

terpretation. The parole does not in any wise displace or abridge the sentence. It merely stops its execution for a time only; it may be, or indefinitely, it may prove. It suspends, not destroys. The suspension is like that which occurs constantly in the administration of criminal laws where the defendant appeals from the judgment of conviction. The execution of the sentence is by the appeal superseded and postponed pending the appeal, and, if the judgment is affirmed, the execution of the sentence thereupon begins, and continues for the period set down originally in the judgment. So the word is used in this statute, and, upon condition broken, the sentence, which has all along hung in its entirety over the liberty of the paroled convict, is to be executed upon him "as though no parole had been granted to him." This is the plain meaning of the statute; and, so interpreted, it involves, of necessary consequence, the proposition that upon condition broken, even after the time at which the sentence would have ended but for its suspension, the convict may still be remanded to custody; that the unserved, and hence unexpired, part of the sentence—that part which he was released from serving during the period of durance originally specified—may be executed upon him. So the law is written.

That it was competent for the legislature to so provide, we entertain no serious doubt. A parole, like every other pardon, is subject to rejection or acceptance by the convict. He has an unfettered election in that regard, and the executive order is not effective or operative until it has been accepted by him. If he prefers to serve out his sentence, as originally imposed upon him, to a suspension of it by subjecting himself to the conditions, nominated in the parole, he has the clear right to do so. But if he elects to accept the parole, and avails himself of the liberty it confers, he must do so upon the conditions upon which alone it is granted to him. One of these conditions is that his sentence shall continue *in fieri* and that the governor shall have the power to execute it in full upon him should he forfeit the liberty and immunity conditionally secured to him by the executive order. That a convict, having only a short time remaining of his sentence, would make an unwise choice by accepting a parole, upon onerous conditions, for a breach of which he might, years after, be remanded to complete his sentence, affords no argument against the constitutional integrity of the enactment. That a person cannot by convention with the governor become a convict, and that by mere convention with the executive a convict cannot alter his term of servitude, or the dates at which it is to begin and end, is no impeachment of a statute which provides for such alterations,—for the suspension of a sentence during a part of its original period, and its execution as to such part at a time beyond that fixed in the judgment of conviction for its termination. The same power which provides for the original sentence—the law—

making power of the land—provides, also, in this instance, for its suspension, and for its ultimate execution, in a given contingency, at another and different time, and it is equally potent in both respects. And the postponing of the sentence in such case is not merely by convention with the governor, but is, by force of a potential statute, well within legislative competency to deal with the execution of sentences imposed upon convicts. It is the law that in such case postpones, under certain circumstances, the execution of the sentence to another time, just as it is the law which postpones, upon appeal taken, the execution of sentence until another time. So it has been ruled of a similar statute in Massachusetts (*Conlon's Case*, 148 Mass. 168); such is the view of the supreme court of Minnesota, expressed in a well-considered opinion (*State, O'Connor, v. Wolfer*, 53 Minn. 135, 19 L. R. A. 783); and in South Carolina a like result is rested alone upon the governor's constitutional pardoning power (*State v. Barnes*, 32 S. C. 14, 6 L. R. A. 743, and cases there cited). And at an earlier day it was supposed in Massachusetts to be necessary to provide by statute that the time during which the convict is at large under parole should not be deducted from the unexpired sentence upon his remandment for breach of the condition of the parole, to the end that he should be made to serve beyond the time fixed for the termination of the original sentence. *West's Case*, 111 Mass. 443. This statute was afterwards amended as indicated in *Conlon's Case*, 148 Mass. 168. See also, on the general question of the constitutionality of statutes providing for paroling convicts, *State, Atty. Gen., v. Peters*, 43 Ohio St. 629.

But it is insisted that this statute, in so far as it undertakes to authorize the governor to determine that the condition of the parole has not been complied with, and the summary arrest of the convict thereupon by the direction of the governor, and his summary return or remandment to servitude or imprisonment under the sentence, is violative of organic guaranties of jury trial, that no warrant shall be issued to seize any person without probable cause, supported by oath or affirmation, etc. This position takes no account of the fact that the person being dealt with is a convict, that he has already been seized in a constitutional way, been confronted by his accusers and the witnesses against him, been tried by the jury of his peers secured to him by the Constitution, and by them been convicted of crime, and been sentenced to punishment therefor. In respect of that crime and his attitude before the law after conviction of it, he is not a citizen, nor entitled to invoke the organic safeguards which hedge about the citizen's liberty, but he is a felon, at large by the mere grace of the executive, and not entitled to be at large after he has breached the conditions upon which that grace was extended to him. In the absence of this statute, a convict who had broken the conditions of a pardon would, if there were no

question of his identity or the fact of breach of the conditions, be subject to summary arrest, and remandment, as matter of course, to imprisonment, under the original sentence by the court of his conviction, or any court of co-ordinate or superior jurisdiction,—a purely formal proceeding. If the person arrested denied his identity with the convict sought to be remanded, he might be entitled to a jury trial on that issue alone. If he denied only the alleged breach of the conditions of his enlargement, he would not be entitled to a jury on that issue, but it would be determinable in a summary way, by the court before whom he is brought. But the statute supervenes to avoid the necessity for any action by the courts in the premises. The executive clemency under it is extended upon the conditions named in it, and he accepts it upon those conditions. One of these is that the governor may withdraw his grace in a certain contingency, and another is that the governor shall himself determine when that contingency has arisen. It is as if the convict, with full competency to bind himself in the premises, had expressly contracted and agreed that, whenever the governor should conclude that he had violated the conditions of his parole, an executive order for his arrest and remandment to prison should at once issue, and be conclusive upon him. Of course, if, in the execution of the

order of arrest, the wrong man should be taken, he would be entitled to enlargement on habeas corpus; but there is no question of identity in the case before us. Upon such determination by the governor, evidenced by the executive order of arrest, the parole is avoided, and the person who has been at large upon it at once falls into the category of an escaped convict, so far as measures for his apprehension and remandment under the original sentence are concerned, and he is, no more than an escaped convict, entitled to freedom from arrest, except upon probable cause, supported by oath or affirmation, nor to a trial by jury, nor to his day in court for any purpose. *Kennedy's Case*, 135 Mass. 48; *Conlon's Case*, 148 Mass. 168; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State, O'Connor, v. Wolfer*, 53 Minn. 135, 19 L. R. A. 783.

Appellant relies mainly upon the case of *People v. Cummings*, decided by the supreme court of Michigan, 88 Mich. 249. Neither the argument nor the conclusion in that case is satisfactory, and its unsoundness is demonstrated, we think, in the notes appended to the report of it in 14 L. R. A. 285.

The order of the probate judge denying the convict's petition for habeas corpus is in consonance with the foregoing views, and it will be *affirmed*.

INDIANA SUPREME COURT.

STATE of Indiana, *Appt.*,

v.

George HOGRIEVER.

(.....Ind.....)

1. An affidavit charging violation of a statute against playing baseball on Sunday where an admittance fee is charged need not set out the name of any person paying such fee.
2. A statute prohibiting baseball on Sunday where any fee is charged is not void for uncertainty and ambiguity because it does not describe what is meant by "fee" or by whom it is to be paid.
3. The rule that a penal statute is to be strictly construed should not be unreasonably applied so as to defeat the sovereign will, when that will is expressed with ordinary certainty and is easily intelligible.
4. The constitutional prohibition against class legislation is not violated by a statute prohibiting the playing of baseball on Sunday where a fee is charged, under a penalty of a fine upon the players.

NOTE.—As to constitutionality of statute prohibiting baseball on Sunday, see also *State v. Powell* (Ohio) 41 L. R. A. 854.

As to constitutionality of Sunday laws in general, see *note to Judebind v. State* (Md.) 22 L. R. A. 721; also *People v. Havnor* (N. Y.) 31 L. R. A. 689; *Ex parte Jentsch* (Cal.) 32 L. R. A. 664; and *Eden v. People* (Ill.) 32 L. R. A. 659.

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5. Imposing a larger penalty on persons who play baseball on Sunday in violation of a statute than upon those who are engaged in hunting, fishing, rioting, quarrelling, and in acts of common labor, does not violate the constitutional right of citizens to equal privileges and immunities.

(May 23, 1899.)

A PPEAL by the State from a judgment of the Criminal Court for Marion County quashing an affidavit charging defendant with playing baseball on Sunday in violation of statute. *Reversed*.

The facts are stated in the opinion.

Messrs. William L. Taylor, Attorney General, *Merrill Moores*, and *C. C. Hadley*, for appellant:

It is difficult to see how any law which simply forbids "playing any game of baseball where any fee is charged, or where any reward or prize or profit, or article of value, is dependent upon the result of the game, on the first day of the week, commonly called Sunday," can interfere with any man's right of worship or freedom of thought or give preference to any particular creed.

It is an article of faith in the religion of a very extensive religious body that polygamy is a religious duty, and yet it has been absolutely forbidden by the laws of the various states and of the United States, and such laws have been uniformly sustained as

constitutional, and as not impairing religious freedom or liberty of conscience; nor does religious belief or duty constitute any defense to a prosecution for violating a penal statute.

Reynolds v. United States, 98 U. S. 161, 25 L. ed. 248.

The Sunday laws are not in contravention of the constitutional guaranty of religious liberty.

State v. Powell, 58 Ohio St. 324, 41 L. R. A. 854; *Voglesong v. State*, 9 Ind. 114; *Foltz v. State*, 33 Ind. 216; *Johns v. State*, 78 Ind. 333, 41 Am. Rep. 577; *Shaw v. Williams*, 87 Ind. 158, 44 Am. Rep. 756; *State v. Goode*, 5 Ohio N. P. 181; *Frolickestein v. Mobile*, 40 Ala. 725; *Scales v. State*, 47 Ark. 482, 58 Am. Rep. 768; *Ex parte Andrews*, 18 Cal. 684; *Ex parte Burke*, 59 Cal. 13; *Gunn v. State*, 89 Ga. 342; *Hennington v. State*, 90 Ga. 396, 4 Inters. Com. Rep. 413; *State, Walker, v. Judge of Section "A,"* 39 La. Ann. 136; *Judefind v. State*, 78 Md. 515, 22 L. R. A. 721; *Com. v. Has*, 122 Mass. 42; *State v. Amba*, 20 Mo. 216; *St. Joseph v. Elliott*, 47 Mo. App. 422; *State v. O'Rourke*, 35 Neb. 614, 17 L. R. A. 830; *Lindenmuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 562, 25 Am. Rep. 235; *Specht v. Com.* 8 Pa. 322, 49 Am. Dec. 518; *Charleston v. Benjamin*, 2 Strobb. L. 508, 49 Am. Dec. 608; *Gabel v. Houston*, 29 Tex. 346; *Ex parte Sundstrom*, 25 Tex. App. 151; *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 303; *Church of the Holy Trinity v. United States*, 143 U. S. 470, 36 L. ed. 231.

From the very beginning of the law personal liberty has been restricted by the old maxim *Sic utere tuo ut alienum non laedas*. This liberty of action has always been restricted by the police power of the state.

Health Department of New York v. Trinity Church, 145 N. Y. 39, 27 L. R. A. 710; *State v. Powell*, 58 Ohio St. 324, 41 L. R. A. 854; *State v. O'Rourke*, 35 Neb. 628, 17 L. R. A. 830; *Frolickestein v. Mobile*, 40 Ala. 728; *Ex parte Andrews*, 18 Cal. 681; *Hennington v. State*, 90 Ga. 397, 4 Inters. Com. Rep. 413; *People v. Griffin*, 1 Idaho, 479; *State, Walker, v. Judge of Section "A,"* 39 La. Ann. 137; *People v. Bellet*, 99 Mich. 155, 22 L. R. A. 698; *Lindenmuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 561, 25 Am. Rep. 235; *People v. Moses*, 140 N. Y. 215; *People v. Havnor*, 149 N. Y. 202, 31 L. R. A. 690; *Holden v. Hardy*, 169 U. S. 392, 42 L. ed. 791.

Judges ought to abstain from interfering with the action of the legislature where the statute does not impose any burdens or restrictions, but merely prohibits certain transactions which are prejudicial to others.

27 Am. L. Rev. 871; *Ex parte Andrews*, 18 Cal. 682; *People v. Havnor*, 149 N. Y. 199, 31 L. R. A. 689; *State, Duensing, v. Roby*, 142 Ind. 181, 33 L. R. A. 213.

The provision of the Constitution against the impairment of the obligation of contracts does not prevent the statutory regulation of future contracts.

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Fry v. State, 63 Ind. 559, 30 Am. Rep. 238; *Churchman v. Martin*, 54 Ind. 383; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397.

This is by no means the first time in the history of the state that the state has undertaken to regulate lawful occupations, or the uses of property.

Eastman v. State, 109 Ind. 278, 58 Am. Rep. 400; *State, Burroughs, v. Webster*, 150 Ind. 607, 41 L. R. A. 212; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002; *Wilkins v. State*, 113 Ind. 514; *Ferner v. State*, 151 Ind. 247; *Singer v. State*, 72 Md. 404, 8 L. R. A. 551; *People, Nechamcus, v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Health Department of New York v. Trinity Church*, 145 N. Y. 43, 27 L. R. A. 710; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576; *Churchman v. Martin*, 54 Ind. 383; *State v. Ohio Oil Co.* 150 Ind. 21.

If playing ball on Sunday can be constitutionally forbidden in an act which includes it with other offenses (*State v. O'Rourke*, 35 Neb. 614, 17 L. R. A. 830; *State v. Williams*, 35 Mo. App. 541; *State v. Miller*, 68 Conn. 373; *Re Rupp*, 33 App. Div. 468), it must be true that it can also be forbidden in an act in which it only is denounced, which act was obviously passed for the purpose of supplementing the general Sunday law, and supplying what the legislature deemed an omission.

Daniels v. State, 150 Ind. 348; *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577; *Lindenmuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235; *People v. Moses*, 140 N. Y. 214; *People v. Dennin*, 35 Hun. 327; *Theisen v. McDavid*, 34 Fla. 440, 26 L. R. A. 234; *Nesbit v. State* (Kan. App.) 54 Pac. 327; *State, Walker, v. Judge of Section "A,"* 39 La. Ann. 136; *Bohl v. State*, 3 Tex. App. 685; *Hennington v. State*, 90 Ga. 396, 4 Inters. Com. Rep. 413; *State v. Baltimore & O. R. Co.* 24 W. Va. 783, 49 Am. Rep. 290; *Norfolk & W. R. Co. v. Com.* 88 Va. 95, 13 L. R. A. 107; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166; *Schoolcraft v. Louisville & N. R. Co.* 92 Ky. 233, 14 L. R. A. 579; *Pittsburg, C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1; *Missouri P. R. Co. v. Mackey*, 127 U. S. 203, 32 L. ed. 107; *Re Oberg*, 21 Or. 406, 14 L. R. A. 577; *People v. Japinga*, 115 Mich. 222; *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696; *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689.

As to ordinary persons there can be no denial that the state has the same right to forbid baseball on Sunday, or altogether, if it believes it to be detrimental to the public welfare, that it has to forbid horse-racing, or any other offenses classed as *mala prohibita*.

State, Duensing, v. Roby, 142 Ind. 192, 33 L. R. A. 213.

An affidavit for a statutory offense is sufficient if it describe the offense in substantially the words of the statute, and it is not necessary to follow the exact words of the statute, but equivalent words may be used.

State v. Sarlle, 135 Ind. 200; *Sloan v. State*, 42 Ind. 571; *State v. Miller*, 98 Ind. 72; *State v. Sutton*, 116 Ind. 527; *Riggs v. State*, 104 Ind. 261; *Franklin v. State*, 108 Ind. 47; *State v. Anderson*, 103 Ind. 173; *Henning v. State*, 106 Ind. 389, 55 Am. Rep. 756; *Lavelle v. State*, 136 Ind. 235; *State v. Williams*, 139 Ind. 45; *Voght v. State*, 145 Ind. 14; Gillett, Crim. L. § 132.

The distinction has never been drawn between such offenses as the unlawful sale of liquor to persons of a certain class, on the one hand, and the keeping open a place for the unlawful sale of liquor at prohibited times, or without license.

Black, Intoxicating Liquors, § 464; *State v. Crawford*, 64 Ark. 194; *Newman v. State*, 101 Ga. 538; *State v. Moseli*, 49 Kan. 142; *Com. v. Mulrey*, 170 Mass. 106; *Hudson v. State*, 73 Miss. 784; *State v. Wingfield*, 115 Mo. 439; *State v. Ford*, 47 Mo. App. 601; *Osgood v. People*, 39 N. Y. 451; *People v. Polhamus*, 8 App. Div. 133; *State v. Delaire*, 4 N. D. 312; *State v. Williams* (S. D.) 75 N. W. 815; *State v. Bielby*, 21 Wis. 209; *State v. Brown*, 41 La. Ann. 771; *Nelson v. United States*, 30 Fed. Rep. 117; *Hipes v. State*, 18 Ind. App. 428; *Dutton v. State*, 2 Ind. App. 448.

It is the duty of the judge to make such construction as shall suppress all evasions for the continuance of the mischief. When the thing done is substantially that which was prohibited it falls within the act simply because, according to the true construction of the statute, it is the thing prohibited.

Maxwell, Interpretation of Statutes, chap. 4, § 1, p. 133; *Sutherland, Stat. Constr.* 354; *State v. Hirsch*, 125 Ind. 212, 9 L. R. A. 170; *State v. Indiana & I. S. R. Co.* 133 Ind. 72, 18 L. R. A. 502; *State, Duensing v. Roby*, 142 Ind. 182, 33 L. R. A. 213; *State v. Gerhardt*, 145 Ind. 450, 33 L. R. A. 313.

Ambiguity and doubt are no ground for holding a law void.

Pomeroy v. Beach, 149 Ind. 511; *Miller v. State*, 149 Ind. 607, 40 L. R. A. 109; *Vancleave v. State*, 150 Ind. 273; *Daniels v. State*, 150 Ind. 348; *State, Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212.

Mr. Charles S. Wiltsie also for appellant.

Messrs. Frank B. Burke and Henry Warrum, for appellee:

The affidavit does not state facts sufficient to constitute a public offense.

The very fact that the affidavit refers to these third persons ("spectators") should have suggested to the pleader that particularity and certainty were required in describing them.

Harris, Crim. L. 265, 266; 10 Enc. Pl. & Pr. pp. 505, 506; *State v. Stucky*, 2 Blackf. 289; *State v. Jackson*, 4 Blackf. 49; *State v. Noland*, 29 Ind. 212; *Zook v. State*, 47 Ind. 45 L. R. A.

463; *Alexander v. State*, 48 Ind. 394; *MoLaughlin v. State*, 45 Ind. 338.

The affidavit does not charge an offense under § 2087. The statute does not make it a misdemeanor to play base ball on Sunday "where admission fee is charged spectators to witness the game."

The language of this section is so vague, indefinite, and uncertain that as a penal statute it is void.

The fee contemplated is a license or privilege fee which may be exacted for such game. *Sumner v. State*, 74 Ind. 52.

The act is ambiguous and uncertain, and therefore void.

Penal statutes must be strictly construed.

United States v. Wiltberger, 5 Wheat. 95, 5 L. ed. 42; *Kent v. State*, 8 Blackf. 163; *Steel v. State*, 26 Ind. 82; *Western U. Teleg. Co. v. Steele*, 108 Ind. 163; *Western U. Teleg. Co. v. Axtell*, 69 Ind. 202.

The spirit of a criminal statute will prevail over the latter only to secure the release or acquittal of one charged with its violation. It never overrides the letter of the law to subject one to the penalties imposed.

United States v. Reese, 5 Dill. 405; *United States v. Whittier*, 5 Dill. 35; *United States v. Garretson*, 42 Fed. Rep. 25.

A court cannot create a penalty by construction, but must avoid it by construction unless it is brought within the letter and the necessary meaning of the act creating it.

Western U. Teleg. Co. v. Axtell, 69 Ind. 202; *Western U. Teleg. Co. v. Wilson*, 108 Ind. 311; *Burgh v. State, McCormick*, 103 Ind. 134; *Fletcher v. Soudes*, 3 Bing. 580; *Cooley's Bl. Com.* *92; *King v. Bond*, 1 Barn. & Ald. 392; *Ex parte McNulty*, 77 Cal. 164. Crimes cannot be created by vague implications.

Atlanta v. White, 33 Ga. 229; *Underhill v. Longridge*, 29 L. J. M. C. N. S. 65; *Western U. Teleg. Co. v. Steele*, 108 Ind. 163; Maxwell, Interpretation of Statutes, 368; *Coke, Inst.* 4, p. 332; *Endlich, Interpretation of Statutes*, 329; *Ex parte McNulty*, 77 Cal. 164; *United States v. Fisher*, 2 Cranch, 390, 2 L. ed. 314; *Andrews v. United States*, 2 Story, 203; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

The courts have no authority to supply words of limitation or give a meaning to a penal statute that the statute itself does not contain.

Endlich, Interpretation of Statutes, § 24; *McConvill v. Jersey City*, 39 N. J. L. 38; *State v. Parilow*, 91 N. C. 550, 49 Am. Rep. 652.

If the facts are capable of two constructions, one leading to conviction and one to acquittal, the defendant is entitled to that construction that will acquit.

Dickinson v. Fletcher, L. R. 9 C. P. 7; *Potter's Dwar. Stat.* 225; *United States v. Reese*, 5 Dill. 405; *Kent v. State*, 8 Blackf. 163.

When there is such an ambiguity in a penal statute as to leave reasonable doubt of its meaning, it is the duty of the court not to inflict the penalty.

Com. v. Standard Oil Co. 101 Pa. 119; *The Enterprise*, 1 Paine, 32; *Hines v. Wilmington & W. R. Co.* 95 N. C. 434; *State v. Finch*, 37 Minn. 433.

Dowling, J., delivered the opinion of the court:

The appellee, with three other persons, was charged, upon affidavit, in the police court of the city of Indianapolis, with a violation of the statute prohibiting the playing of baseball on Sunday where any fee is charged. He was found guilty and fined. He appealed to the Marion criminal court, and on his motion the affidavit was quashed, and he was discharged. The state appealed, and the error assigned is the ruling of the court on the motion to quash.

The affidavit thus brought under review is in these words:

STATE OF INDIANA, }
MARION COUNTY, } ss:
CITY OF INDIANAPOLIS. }

Be it remembered that on this day before the judge of the police court of the city of Indianapolis personally came Chris Krüger, who, being duly sworn, upon his oath says that Albert H. Pardee, George Hogriever, Ed. H. Deady, Jess. Hoffmeister, late of said city and county, on the 22d day of May, in the year of 1898, at and in the city of Indianapolis, county aforesaid, did then and there unlawfully engage in playing a game of baseball, where an admittance fee of twenty-five cents each was charged, and paid by the spectators then and there being, the said day being the first day of the week, commonly called Sunday, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Indiana.

[Signed]

Chris Krüger.

Subscribed and sworn to before me this 23d day of May, 1898.

Charles E. Cox, Judge.

The affidavit is assailed upon the grounds (1) that it does not state facts sufficient to constitute a public offense; (2) that the act of the legislature upon which it is based is unconstitutional; and (3) that the said act is ambiguous and uncertain, and therefore void.

The statute so assailed is in these words: "It shall be unlawful for any person or persons to engage in playing any game of baseball where any fee is charged, or where any reward, or prize, or profit, or article of value is depending upon the result of such game, on the first day of the week, commonly called Sunday, and every person so offending shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding \$25." Acts 1885, p. 127 (Burns's Rev. Stat. 1894, § 2087). Among the objections taken to the sufficiency of the affidavit, it is urged that if the word "fee," in the statute, means a charge for admission, then the name of some person paying it should be stated, and in support of this ob-

jection we are referred to 10 Enc. Pl. & Pr. pp. 505, 506; Harris, Crim. L. pp. 265, 266; *State v. Stucky*, 2 Blackf. 289; *State v. Jackson*, 4 Blackf. 49; *State v. Noland*, 29 Ind. 212; *Zook v. State*, 47 Ind. 463; *Alexander v. State*, 48 Ind. 394; and *McLaughlin v. State*, 45 Ind. 346. But the rule as laid down in these authorities goes only to the extent that when the names of third parties enter into the offense, and are necessary for the description of the crime charged, and for its identification, they must be set out. In the case of *State v. Stucky* the indictment charged a sale of liquor "to divers persons" without license. Held, that the names of the persons should be stated, if known. In *State v. Jackson* the charge of selling liquor to an Indian of the Miami tribe, whose name was unknown, was held good. *State v. Noland* was an indictment for suffering a house to be used for gaming. Held, that the names of the persons who were suffered to gamble should be set out, if known. *Zook v. State* and *Alexander v. State* were prosecutions against owners of billiard tables for permitting minors to play billiards. Held, that the names of the minors, and of the persons with whom they played, should be stated, or the reason given for not doing so. *McLaughlin v. State* was an indictment for selling liquor to persons intoxicated, etc. Held, that the names of the persons to whom sales were made should be set out, if known. It will be observed that none of these offenses bears the least resemblance to the misdemeanor before the court, in its character, circumstances, or legal description, and the rule which governs those cases does not apply to the offense set forth in this record. The object and meaning of the statute under examination are plain. The intention of the people of the state was by this law to prohibit the playing of baseball on Sunday where a fee was charged. "Where" signifies, "a place at which," or, "under circumstances in which." Standard Dict.; Webster, International Dict. The law applies to exhibitions in which the actors or players engage in the game of baseball. It discriminates between free exhibitions of this kind, and those where a fee must be paid by the persons witnessing the performance. It knows but two parties to such an exhibition,—the players and the spectators. It does not in the least concern itself with managers or owners of baseball teams, lessors or lessees of the grounds where the game is played, or the proprietors of adjoining lands or buildings. It is immaterial to whom the fee is paid, whether directly to the players, to their agent or manager, or to some person or company hiring or otherwise securing the services of the players. The natural meaning and obvious signification of the word "fee," in its connection in this statute, is the sum charged each person admitted to witness the exhibition. It is not necessary to set out the name of any person paying such fee for admittance. It is enough to aver that a fee

for admittance was charged. This indicates that the exhibition was not free, but was given for the purpose of gain, and in that respect it sufficiently describes the offense. *Hull v. State*, 120 Ind. 153. On the trial it would not be necessary to prove that any particular person paid a fee for admittance. It would be sufficient to show that the exhibition was not free, but that persons desiring to witness it were required to pay a fee or buy a ticket to secure that privilege. Evidence that one or more persons did pay fees for admittance would, of course, be competent proof that it was not a free entertainment, but one where a fee was exacted from the spectators. This construction of the statute does not extend its scope beyond the fair and natural import of its terms.

We are next asked to hold the statute void for uncertainty and ambiguity, and the supposed defect consists in the use of the words "where any fee is charged." It is said that this part of the act is indefinite and uncertain, and that it cannot be understood what is meant by "fee," or by whom it is to be paid. What we have said in regard to the affidavit is a sufficient answer to this objection. There are but two kinds of exhibitions,—one free, where the spectator is admitted without charge; the other restricted, where the spectator is charged a fee for admittance. Two classes of persons, only, are recognized by the statute as concerned in such exhibition,—the players, and the persons assembled to witness the game. Keeping these facts in view, there is not the slightest difficulty in determining what is meant by the term "fee," or by whom and to whom it is to be paid.

The constitutionality of the statute is attacked, and, in connection with this assault, it is contended that, the act being penal, it is to be strictly construed. We recognize the importance of the rule as to the construction of penal statutes in all cases to which it properly applies, but we do not believe it should be so unreasonably enforced as to defeat the sovereign will, when that will is expressed, as it is here, with ordinary certainty, and is easily intelligible. A law established by the legislature is entitled to the respect of every branch of the state government. It should never be lightly overthrown or set aside as unconstitutional. A statute enacted with the constitutional formalities comes before this court sustained and authenticated by the sanction and approval of two of the three great departments of the state government. The power to set aside and declare void an enactment so sanctioned and approved is the highest exertion of the constitutional authority of this court,—a prerogative always exercised with reluctance, and never asserted where the question of the constitutionality of a statute is in doubt. Counsel for appellee insist that the act prohibiting the playing of baseball on Sunday, where a fee is charged, and subjecting the players to a fine, is in conflict with those clauses of the Federal and state Constitutions which forbid class legislation. The 14th Amendment of the Constitu-

tion of the United States provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens, . . . nor deny to any person within its jurisdiction the equal protection of the laws." The Constitution of the state of Indiana contains this clause (art. 1, § 23): "The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Does a statute which prohibits the playing of games of baseball on Sunday, where a fee is charged, abridge the privileges or immunities of citizens of the United States, or deny to any person within the jurisdiction of the state the equal protection of its laws? Does it grant to any citizen or class of citizens privileges or immunities which, upon the same terms, do not equally belong to all citizens? The argument of counsel for appellee is that baseball playing is an occupation by which persons skilled in the game earn a livelihood; that the persons engaged in this particular calling cannot be singled out, and prohibited from exercising it on Sunday, under different and more severe penalties than those imposed on citizens engaged in other kinds of business; and that, as the statute before us makes this discrimination, it violates the organic law. Whether or not the game or sport is entitled to recognition as a form of labor, and therefore stands on the same footing as blacksmithing, farming, or selling merchandise, is not material. The state deals with it, in the exercise of its police power, to circumscribe certain evils which are likely to result from its unrestrained practice, to repress certain known pernicious tendencies, and to protect the citizens of the state in the enjoyment of that repose and quiet on the day set apart by secular laws for rest and recuperation to which they are entitled. The objects of the game of baseball, as stated in the brief of counsel for appellee, are to furnish entertainment and amusement to the spectators of the sport. It is said to be popular. It attracts great throngs, including persons of all ages and of both sexes. Both chance and skill enter into the doubtful results of the game. It affords opportunity for, and furnishes strong inducements to, that species of gambling known as "betting." The contests between the players are often close and exciting, and the decisions of umpires unsatisfactory. Tumults, riots, and breaches of the peace at the games are not uncommon. Wherever these conditions exist, the peace and quiet of neighborhoods are liable to be disturbed, and the public order broken. Under such circumstances, it follows that extraordinary police regulation and supervision become necessary; and, this being the case, these exhibitions fall, unquestionably, within the class of entertainments and occupations which, in the legitimate exercise of the police power of the state, may be regulated, restrained, or even prohibited, by the people, through the legislature, without a violation of any provision of the Constitu-

tion, state or Federal. Familiar instances of the exercise of this power are found in the laws and in municipal ordinances relating to the selling of liquor, the maintenance of dance houses and concert saloons, theaters, circus performances, horse racing, the keeping of places for sports and games, billiard rooms, the ringing of bells, regulating the speed of horses on streets and highways, regulating sales in markets, relating to persons having infectious diseases, regulating the business of mining, and many others. The statute of this state known as the "General Sunday Act" has a wider scope than is sometimes ascribed to it. It prohibits not only acts of common labor, but it forbids rioting, hunting, fishing, and quarreling on the first day of the week, commonly called Sunday. It applies to amusements and recreations as well as to labor and conduct tending to a breach of the peace. Burns's Rev. Stat. 1894, § 2086. Its constitutionality has repeatedly been assailed by litigants, and as often affirmed by the decisions of this court. In *Voglesong v. State*, 9 Ind. 112, it is said: "The constitutionality of the Sunday act we shall not discuss, though the counsel in this case has presented a very learned and able printed argument against its validity. The question can hardly be considered as an open one. The grounds upon which such acts are sustained have been thoroughly examined, and are generally admitted to be substantial. This court has acted upon them as such." Again, in *Foltz v. State*, 33 Ind. 215, the court says: "It is urged that the law under which the prosecution was had is obnoxious to the Constitution of the state. We decline the discussion of this question, for the reason that the act in question has been so long recognized and acted upon, and so often affirmed by this court, that it cannot longer be regarded as an open question in this state." The question of the validity of the Sunday act was again before the court in *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577, and was disposed of in these words: "The second question is this: Is the 95th section of the act of April 14, 1881, in conflict with any constitutional provision? A long line of decisions affirms the validity of this law. It has been sustained against repeated assaults. It has been a part of the statutory law of the state since its organization. Cases old and new have sustained and enforced it. *Rogers v. Western Union Teleg. Co.* 78 Ind. 169, 41 Am. Rep. 558, and authorities cited; *Mueller v. State*, 76 Ind. 310, 40 Am. Rep. 245. Like statutes have been upheld in almost all the states of the Union. The cases in which the constitutionality of similar statutes has been sustained are practically innumerable. A few of the more important are the following: *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226; *Health Department of New York v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710; *State v. Powell*, 58 Ohio St. 324, 41 L. R. A. 854; *State, Walker, v. Judge of Section "A."* 39 La. Ann. 137; *People v. Bellet*, 99 Mich. 151; 22 L. R. A. 696; *Lin-*

denmuller v. People, 33 Barb. 548; *People v. Harnor*, 149 N. Y. 195, 31 L. R. A. 689; *Holden v. Hardy*, 169 U. S. 392, 42 L. ed. 791; *State v. O'Rourke*, 35 Neb. 614, 17 L. R. A. 830; *State v. Williams*, 35 Mo. App. 541; *Re Rupp*, 33 App. Div. 488; *People v. Moses*, 140 N. Y. 214. These decisions, and many others which might be named, indicate the general sentiment and the fixed public policy in the states of the Union on the subject of Sunday legislation. That sentiment is too widely spread and profound, and that policy too firmly embedded in the laws and in the decisions of the courts, to be changed or overthrown.

But it is said that under the general statute making hunting, fishing, rioting, quarreling, and engaging in acts of common labor unlawful, the person offending is subject only to a fine of not more than \$10, while the baseball player, under the act of 1885, for practically the same offense, may be subjected to a penalty of \$25. Hence, it is claimed, the effect of this act, if upheld, is to grant to other citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens. The constitutional authority of the legislature to enact any statute making it unlawful to do certain acts on the first day of the week, commonly called Sunday, being admitted, violations of such laws are not privileges and immunities which must be secured to all citizens alike, and upon the same terms. Where several different acts are prohibited by law, a difference in the penalties for violations of such several acts cannot be said to constitute a breach of the constitutional provisions intended to secure equal rights to all citizens. It is but reasonable that in every case of the violation of law the penalty should be graduated by the character and circumstances of the offense, and in proportion to its injurious consequences to the public. This principle has been recognized and adopted in this state from the earliest period of its government. Special penalties for selling liquor on Sunday have been enforced. Thirteen separate species of embezzlement are mentioned in the Criminal Code, and seven distinct kinds of punishment are provided for the crime, ranging from imprisonment for six months to confinement for twenty-one years. Many other instances may be found in the statutes. The state officer who is found guilty of the crime of embezzlement may be imprisoned twenty-one years, and fined double the value of the money embezzled. A tenant who embezzles the crops of his landlord can be imprisoned only three years. Could the state officer overthrow the statute which denounces his crime, as class legislation, because the penalty for another species of embezzlement is imprisonment for three years only? Natural justice requires that the penalty shall bear some proportion to the nature and circumstances of the offense. The legislature is clothed with the power of defining crimes and misdemeanors, and fixing their punishment; and its discretion in this respect, exercised within consti-

tutional limits, is not subject to review by the courts. If the legislature deemed it expedient for the public welfare that a baseball player, who gave a public exhibition of his skill on Sunday, where a fee was charged, in the presence of numerous spectators, should be fined \$25 for the offense, but that a citizen who shot a partridge, caught a fish, shod a horse, or sold a yard of cloth would be sufficiently punished by a fine of \$10, shall the courts go to the absurd length of saying that this was class legislation, and that the Constitution had been violated? The act in question applies equally to all that class of persons who play baseball on the first day of the week, commonly called Sunday, where a fee is charged for such exhibition. It neither directly nor indirectly grants privileges or immunities to one citizen or class of citi-

zens, or denies them to another. The graduation of penalties for offenses differing in their circumstances and surroundings is a matter wholly within the competence and discretion of the legislature, and in this case we discover no abuse of that discretion.

As a result of these views, we are of the opinion that the affidavit in this case was sufficient in form and substance; that the act approved April 4, 1885 (Acts 1885, p. 127: Burns's Rev. Stat. 1894, § 2087), is constitutional; and that it is not void for uncertainty.

The judgment is reversed, with instructions to overrule the motion to quash the affidavit, and for further proceedings in accordance with this opinion.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

Samuel SMITH, *Appt.*,

v.

George L. ROBERTSON *et al.*

(.....Ky.....)

A contract for the services of an unlicensed stallion is invalid, so that no recovery thereon can be had under Stat. chap. 108, § 4201, making the owner liable to indictment and fine for failure to procure the license.

(April 27, 1899.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Fayette County in favor of defendants in an action brought to recover for the services of a stallion. *Affirmed.*

The facts are stated in the opinion.

Messrs. Webb & Farrell for appellant.
Mr. George Denny for appellees.

Guffy, J., delivered the opinion of the court:

It is substantially alleged in the petition in this action that in the year 1895 the plaintiff, Smith, was the owner of a stallion known as "Imported Deceiver," and that the defendants, George L. and Eva M. Robertson, were the owners of a chestnut mare, and that by an agreement between plaintiff and defendants said mare was bred to said stallion, and that by the terms of the said agreement defendants promised and agreed to pay plaintiff the sum of \$150 for the services of said stallion, to be due and payable when said mare had a foal by said stallion; that upon the 3d of April, 1896, said mare produced a foal, the get of said stallion; and that the services of said stallion were worth the sum of \$150, which sum the defendants

promised to pay for a foal. The plaintiff claimed a lien upon said colt, and instituted this action to obtain a judgment against the defendants, and for an enforcement of their lien upon said colt. The first paragraph of the answer pleaded a defect of parties, alleged that the stallion Imported Deceiver was owned by Samuel Smith, S. C. Lyon, Nat. Pettit, and others, unknown to the defendants, and that plaintiff, Smith, owned only one-eighth interest in said horse; hence they prayed that plaintiff's petition be dismissed. In the second paragraph it was pleaded, in substance, that, when said colt got by said stallion was foaled, defendants should have an option either to give the owners of said stallion one-half interest in said foal at weaning time, or pay to the owners the sum of \$150, and that they determined, instead of paying the \$150, to give said plaintiff and his associates one-half interest in said colt, and so notified plaintiff about the 1st of May, 1896, and alleged that they were now willing and able to do so. In the third paragraph it is substantially alleged that the plaintiff nor any of his associates had paid any license fee in Jessamine county, where said stallion was during the season of 1895, and relied upon the statute in such cases made and provided in bar of plaintiff's right to recover. The court overruled the plaintiff's demurrer to the first and second paragraphs of the answer, but sustained the demurrer to the third paragraph. The reply may be treated as a traverse of the remaining paragraphs of the answer, and also showed a right of plaintiff to recover the \$150 under an arrangement between himself and the other joint owners, providing the same could, in law, be collected. The rejoinder may be treated as a traverse of the reply. After the issues were

NOTE.—As to the effect of failure to procure a license for business on the validity of a contract thereon, see *note* to *Buckley v. Humason* (Minn.) 16 L. R. A. 423; also *Fairly v. Wappoo* 45 L. R. A.

Mills (S. C.) 29 L. R. A. 215; *Vermont Loan & T. Co. v. Hoffman* (Idaho) 37 L. R. A. 509; and *Randall v. Tuell* (Me.) 38 L. R. A. 143.

fully made up, and proof taken, the court adjudged in favor of the defendants, and dismissed the petition of plaintiff, and from that judgment this appeal is prosecuted.

It is insisted for appellant that the burden of sustaining the agreement between the parties as to the option of defendants to give plaintiff one-half interest in the colt instead of paying \$150 is upon the defendants, and that they have totally failed to sustain the defense by even a preponderance of the evidence. The question first to be disposed of is as to the correctness of the ruling of the court in sustaining the demurrer to the third paragraph of the defendant's answer; in other words, the main question for decision in this case is whether the owner of a stallion, who has not procured a license to stand same, can recover for the services of the stallion. It is not disputed but what the Kentucky statutes require license to be paid by all persons who stand stallions for hire; and it is further provided by law that, if a person is engaged in such business without license, he is liable to a fine of not less than \$50 nor more than \$1,000. But it is suggested that the statute in question is a statute for revenue, and not for any other purpose, and that a contract for the services of an unlicensed stallion may nevertheless be collected, although a penalty is denounced against the keeper of such stallion if he stands the same without license. This question is discussed in *Buckley v. Humason* (Minn.) 16 L. R. A. 423, note, in which the following from Mr. Benjamin is quoted with apparent approval: It is there stated: "First—That where a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only or for any other object. . . . Secondly—That when the question is whether a contract has been prohibited by statute, it is material, in construing the statute, to ascertain whether the legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter that it was. Thirdly—That in seeking for the meaning of the lawgiver, it is material also to inquire whether the penalty is imposed once for all, on the offense for failing to comply with the requirements of the statute, or whether it is a recurring penalty repeated as often as the offending party may have dealings. In the latter case, the statute is intended to prevent the dealing to prohibit the contract and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced." Section 4201, chap. 108, Ky. Stat. provides: "Any person who shall engage in any business, or sell or offer to sell any article on which a license is required before procuring the license, and paying the tax thereon as required by law, shall be deemed guilty of a 45 L. R. A.

misdeemeanor and, on conviction, be fined not less than fifty nor more than one thousand dollars for each offense, unless otherwise specially provided." It will be seen from this statute that a person furnishing the services of an unlicensed stallion for hire or compensation would be liable to indictment, and subject to a fine for each offense. Each contract or service so rendered or performed would evidently be a separate offense, hence it seems that such action would bring the offending party within the rule announced above. In § 547, Bishop, Contr. it is said: "And the rule is that, when a statute forbids a particular business generally, or to unlicensed persons, any contract made in such business by one not authorized, or made with the view of violating the statute, is void. Within this principle is a sale of goods to be used in the business from one who has knowledge of the proposed use." And in § 549 it is said: "The law, for convenience, for adaptation to our infirmities, and, to some degree, from necessity, has, besides its doctrines of fundamental right, rules more or less technical, and a policy of the like sort. So it must refuse to enforce, or, in other words, it must hold void, contracts which violate such rules or policy. A fortiori, it cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of, what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong,—are void. If the court should enforce them, it would employ its functions in undoing what it was established to do. The act would be in the nature of suicide." In *Woods v. Armstrong*, 25 Am. Rep. 671, it is said: "Where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void nor expressly prohibit it." 8 C. 54 Ala. 150. On page 675, 25 Am. Rep., a number of English authorities are referred to. *Law v. Hodgson*, 2 Campb. 147, was an action for the value of bricks smaller than the statutory dimensions, and the statute simply fixed a penalty for violation. The statute only declared that bricks shall be made of certain dimensions. Lord Ellenborough said: "The first section of this statute [17 Geo. III. chap. 42] absolutely forbids such bricks to be made for sale. Therefore the plaintiff, in making the bricks in question, was guilty of an absolute breach of the law; and he shall not be permitted to maintain an action for their value." *Brown v. Duncan*, 10 Barn. & C. 93, was an action on a guaranty

for sales of liquors, which were distilled without license under a statute which fixes a penalty. It was held that, these being mere revenue regulations, a breach did not render the act so illegal as to prevent a recovery for sales. The case was distinguished from the brick case on the ground that this statute was only to protect revenue, while the other was to protect public good. The same doctrine was announced in *Johnson v. Hudson*, 11 East, 180, in respect to the importation of tobacco. But in *Cope v. Rowlands*, 2 Mees. & W. 157, this distinction is overruled, the court saying that if a contract be rendered illegal, it can make no difference, in point of law, whether the statute which made it so has in view the protection of the revenue, or any other object. In *Drury v. Defontaine*, 1 Taunt. 136, Mansfield, Ch. J., said: "If any act is forbidden under a penalty, a contract to do it is now held void." The statute of New York forbids the transaction of business in the name of a partner not interested in the firm, and requires that the designation "Co." or "Company," shall represent an actual partner, and a violation of this statute is made a misdemeanor punishable by fine. Under this statute it was held that all contracts in violation of it were absolutely void. *Swords v. Owens*, 43 How. Pr. 176. To the same effect is the decision of *Hallett v. Novion*, 14 Johns. 273. Many other decisions to the same effect are found in the subsequent pages of the volume hereinbefore referred to. *Vanmeter v. Spurrier*, 94 Ky. 22, was an action brought by Spurrier and another on a note given to the Thompson & Edwards Fertilizer Company by Vanmeter and others, the consideration being commercial fertilizer sold and delivered in sacks to the purchaser. Two distinct grounds of defense are stated in the answer, which is also made a counterclaim. The second defense is that by reason of the non-compliance with the provisions of an act to regulate the sale of fertilizers in this commonwealth, and to protect agriculturists in the use of fertilizers, approved April 13, 1886, the note is void, and unenforceable. The statute required certain things to be done by the seller of fertilizers, and a further provision of the statute provided that any vendor of any commercial fertilizer who shall sell or offer for sale such fertilizers without first previously complying with the provisions of the act shall, upon indictment, and upon being found guilty, be fined \$100 for each violation or evasion. It is further provided that the director shall receive, for analyzing the fertilizer and affixing his certificate, the sum of \$15, etc. It was further provided that the director should pay all such fees into the treasury of the Agricultural or Mechanical College of Kentucky, to be used for the purpose of meeting the legitimate expenses of the station, etc. The court, in discussing the several questions involved, said: "It is admitted that the retail price of the fertilizers sold to appellants was worth over ten dollars per ton, and that no

one of the packages had attached to it when sold the label, required by section 3 of the statute; and the main question, therefore, is whether the contract sued on is, by reason of such noncompliance with and disregard of the statute, void and unenforceable. It is too well settled for argument that a contract prohibited by statute will not, nor should be, enforced by the court. But whether a contract has been prohibited sometimes depends upon construction of such statute when not clear in meaning, and we will at present assume such is this case." The court then proceeds to quote from Benjamin on Sales, which substantially embodies the quotation herein made from 16 L. R. A. 423. The court then said: "Tested by either one of these rules, the statute in question would have to be construed as intended to prohibit the contract in case of noncompliance with, or breach of, its provisions. For the legislature had in view, when enacting it, not the security and collection of the revenue, even partly, but had in view the protection of the public from fraud in contracts for sale of fertilizers; and it is expressly provided in § 4, the fine shall be imposed for each violation or evasion of the act. In *Lindsey v. Rutherford*, 17 B. Mon. 248, the following proposition, stated in Chitty on Contracts, was referred to with approval: 'A contract is void if prohibited by statute, though the statute only inflicts a penalty, because such penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object.' But it was nevertheless there held that contracts for sale and purchase of bills of exchange were not prohibited by the statute then under consideration, which required each person conducting the business of brokers or exchange dealers to obtain a license, under penalty of a fine; the court being of opinion the statute was intended to raise revenue, not to strike a blow at the business. But neither the conclusion in that case nor reason for it affects the question before us; for there is a marked difference between a statute the prime or sole purpose of which is to secure or raise revenue by a license tax and one enacted to protect the public against fraudulent sale of goods, or for other reason of public policy. . . . That a penalty implies prohibition in such case as this, though there be no prohibitory words in the statute, has been decided, not only by this court in *Lindsey v. Rutherford*, but by numerous courts in England, as well as in this country." The court then quotes with approval from the case of *Woods v. Armstrong*, heretofore referred to. From an early period of the history of this country persons desiring to stand a stud horse were required to obtain a license, and a penalty denounced against them for engaging in such business without license, and it can hardly be assumed that the sole purpose was to raise revenue, but manifestly one of the objects

was to encourage men to procure and stand a superior breed of horses by excluding owners of inferior stock from engaging in such business, unless they would in like manner procure a license; it being reasonably presumed that the owner of inferior stock would hardly be able to obtain sufficient custom to justify him in licensing his horse. In view of the authorities and reason heretofore given, we are of the opinion that no compensation can be recovered for the services of the stallion without his owner or keeper has procured a license as provided by law. This conclusion dispenses with the necessity of considering whether the testimony in this case sustains the finding of the court below upon the issues presented, for it clearly appears from the proof, as well as from the rejected pleading, that no such license had been procured licensing the stallion as required by law; hence it is immaterial whether the judgment of the court below was predicated upon a correct view of the law or not, its judgment being in fact correct, and in accordance with the law of the case.

The judgment is therefore affirmed.

LOUISVILLE TRUST COMPANY, Assignee, etc., of Myer Brothers, App't.,
v.

P. A. GAERTNER.

(.....Ky.....)

1. An assignee of a lease cannot avoid the statutory lien on his property for rent by setting up the fact that the assignment was invalid because made without the consent of the lessor if the latter has acquiesced in it.
2. The lien on the goods of an assignee of a lease, created by Stat. §§ 2305, 2307, 2317, to the extent of one year's rent accruing after the assignee's interest begins, cannot be avoided by his assignee for creditors by a transfer of the lease.

(*Du Relle and Guffy, JJ., and Hazelrigg, Ch. J., dissent.*)

(April 28, 1899.)

APPEAL by plaintiff from a judgment of the Chancery Division of the Circuit Court for Jefferson County in favor of defendant in a proceeding to determine the extent of defendant's lien upon property of plaintiff's assignor. *Affirmed.*

The facts are stated in the opinions.

Messrs. Samuel A. Lederman and Kohn, Baird, & Spindle for appellant.
Mr. C. B. Seymour, for appellee:

The landlord's lien for rent against the goods of an assignee or under-tenant found on the leased premises is as extensive as the indebtedness of the tenant, and is not limited by the personal liability of the assignee or under-tenant.

NOTE.—On the question of the liability of an assignee of a leasehold for rent, see note to *Bonnetti v. Treat* (Cal.) 14 L. R. A. 151; also *Woodland Oil Co. v. Crawford* (Ohio) 34 L. R. A. 62, and note (as to oil and gas leases).
45 L. R. A.

Ky. Stat. §§ 2305, 2307, 2317; *Sutton v. Perkins*, 2 Ky. L. Rep. 233.

An assignee of a lease is a tenant.

Trabue v. McAdams, 8 Bush, 74.

A colorable assignment by an assignee of a lease will not defeat the landlord's lien on goods on the premises.

Craddock v. Riddlesbarger, 2 Dana, 209;

Lougee v. Colton, 2 B. Mon. 115.

Neither *Trabue v. McAdams*, 8 Bush, 74, nor *Muldoon v. Hite*, 6 Ky. L. Rep. 663, relates to the landlord's lien; each of them relates solely to the personal liability of the under-tenant.

Mr. Lewis N. Dembits also for appellee.

Hobson, J., delivered the opinion of the court:

This case is before us upon an agreed statement of facts. In August, 1895, appellee, Gaertner, executed to one Rosenberg a written lease of a storehouse owned by him in Louisville, which was also signed by Rosenberg, for the term of two years from April 1, 1896. By the lease it was provided that the premises should not be underlet, or the term, in whole or in part, assigned, transferred, or set over, by the act of the lessee, by process or operation of law, or in any other manner whatever, without the written consent of the lessor, but that the lessee might sublet the building to a responsible party, to be used for the same or a similar business, who should be acceptable to the lessor, in which event the lessee was to remain liable on the lease until its expiration. In January, 1897, Rosenberg assigned the unexpired portion of his term to Myer Bros., and delivered his lease to them; and they took possession and occupied the property, claiming as assignees of the term, and remained in possession, paying the rent to Gaertner. On July 21, 1897, they made an assignment for the benefit of their creditors to the Louisville Trust Company. The assignment from Rosenberg to Myer Bros. was made in parol, and was not evidenced in any writing. It is also agreed that Myer Bros. were acceptable to the lessor. At the time of the Myer Bros. assignment the rent for June was due. On July 22, 1897, after the deed of assignment to the trust company, the company, for the purpose of protecting the assigned estate, and of avoiding any future liability for the rent of the leased property, assigned all its and its assignor's interest in the unexpired part of the term to one Kling, who accepted the assignment. That assignment is in writing. Gaertner gave no consent, written or oral, to either assignment, but continually looked to Rosenberg as tenant under the lease. The trust company claims that upon these facts the assigned estate is liable to Gaertner only for the rent due to August 1, 1897, which it has paid him. Gaertner claims that the estate is liable to him, not only for the rent due at the time of the assignment to the trust company, but for all the rents to become due thereafter, for the ten months to elapse before the expiration of the lease to Rosenberg, and that he has

a prior lien upon the assets for all that rent. By a written agreement between Gaertner and the company, made before the sale of the stock of goods assigned, it was agreed that no distress warrant or attachment need issue for the rent of the premises, and that whatever lien Gaertner might have on the personally should hold good on the proceeds. Gaertner filed proof of his rent claim with the trust company.

The question presented to the court for decision is whether the assignment by the trust company to Kling of the unexpired portion of the term operated to accomplish the avowed purpose of relieving the assigned estate from Gaertner's landlord's lien, which could have been asserted if no assignment had ever been made by the assignee of the term. The question thus presented is one of great interest, and has been elaborately and ably briefed.

It seems clear that the assignment by Rosenberg to Myer Bros. in violation of the terms of the lease, as it was made without the landlord's consent, was voidable only, and could be taken advantage of by the landlord only, by re-entry and declaration of forfeiture of the lease. 2 Taylor, Land. & T. § 492. It is equally clear from the record that if there be a difference between an assignment of a term, in whole or in part, and a subletting, this was an assignment; for it is stipulated in the agreed statement of facts that the remainder of the term was assigned. The original lessee had transferred his whole estate, therefore, and had no reversion, though he was still liable upon his covenant to pay the rent. There was no privity of contract between the assignee of the term and the lessor. It is insisted that, as assignee, he was liable only because of his possession, and so was only liable for covenants broken while he remained in possession of the property, and for such rents as accrued after he took possession. What effect does an assignment over by the assignee of a term have upon his liability for rents to become due thereafter? The rule, in the absence of statutory modification, is, thus stated by Taylor (vol. 2, § 452): "An assignee may always discharge himself from liability for subsequent breaches, in respect to rent as well as to other covenants, by assigning over, though it is done for the express purpose of getting rid of his responsibility, and although the second assignee neither takes possession nor receives the lease. And he may assign to a beggar, a *feme covert*, or to a person who is on the eve of quitting the country forever, provided the assignment shall be executed before his departure; and even although the assignee may receive from the assignor a premium as an inducement to accept the transfer. The same result follows, notwithstanding the assignment of the lease remains in the hands of the solicitor of the assignor, who has a lien for the expense of preparing it, or the lease contains a covenant not to assign. For the assignment destroys the privity of estate, which was the only ground upon which the assignee was lia-

ble; and though the tenant's liability on his covenant to pay rent may subsist during the continuances of the lease, there is no personal confidence reposed in the assignee of the lessee." The question presented, therefore, is, Has this rule been modified by statute, as to the property of the assignee on the premises?

The statutes, so far as material to this controversy, are as follows: "Rent may be recovered from the lessee or other person owing it, or his assignee or undertenant, or the representative of either, by the same remedies given in the preceding sections. But the liability of the assignee or subtenant shall only be for the rent accrued after his interest began." "A distress warrant or attachment for rent shall bind, and may be levied upon any personal property of the original tenant found in the county; and upon the personal property of the assignee or undertenant found on the leased premises, and if the tenant has removed his property to another county the distress or attachment may be directed to such county." "If after the commencement of any tenancy a lien be created on the property upon the leased premises liable for rent, the party making or acquiring such lien may remove the property from the premises upon the following terms, and not otherwise; that is, by paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due; what is so paid and secured not being more altogether than a year's rent." "All valid liens upon the personal property of a lessee, assignee, or undertenant, created before the property was carried upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created whilst the property is on the leased premises, and on property upon which the landlord hath a superior lien for his rent, then to the extent of one year's rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference, and be first satisfied, provided the same is sued out in one hundred and twenty days from the time the rent was due." "Landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or undertenant, owned by him after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due more than one hundred and twenty days." Ky. Stat. §§ 2305, 2307, 2314, 2316, 2317. Our statutes also provide as follows: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, is not to apply to this revision; on the contrary its provisions are to be liberally construed with a view to promote its objects." Id. § 460. Construing the sections above quoted under this rule, with a view to promote their object, we think it clear that they give the landlord a superior lien, for not exceeding one year's rent, due or to be-

come due, on all property of the tenant, subtenant, or assignee on the premises, subject to execution; the liability of the assignee or subtenant being only for the rent accrued after his interest began. Appellee therefore had a superior lien on all the property of appellant, as assignee of Myer Bros., on the premises, for one year's rent, due or to become due, at the time it executed the assignment of the balance of the term to Kling. They had no right to make any assignment of the lease without the written consent of the appellee, and it certainly was not the intention of the statute that the tenant could, by a violation of the lease, and without the consent of the landlord, divest him of his lien on the tenant's property for his rent, and thus defeat the entire purpose of the statute. Rosenberg had no right to assign his lease to Myer Bros.; but only the lessor could complain of this, and, he acquiescing in the assignment, Myer Bros. became his tenants. An assignee of a lease, accepting the assignment of it, takes it subject to all the covenants contained in it; and so Myer Bros., or appellant, as their representative, had no right to assign this lease to another. The law suffers no man to profit by the violation of his own contract, and it would be a plain denial of the purpose of these statutes to allow an assignee of a lease to defeat the lien secured by it to the landlord by a wrongful act of his own, and without the concurrence of the landlord. If, on the day before the assignment to Kling was made, appellee had taken out an attachment for the rent due or to become due under this lease, would it be contended that his attachment might be defeated by the assignment made to Kling on the following day? The plaintiff may defeat the lien of his attachment by his acts, but nothing that the defendant can do alone can have this effect. But an attachment, if taken out, would have added nothing to the efficacy of the landlord's lien. The statute gave him a lien, with or without the attachment, and the property subject to the lien could as well be withdrawn from the operation of the attachment as from the operation of the lien given by the statute, by the act alone of the assignee or subtenant. The doctrine that a lien is only an incident to a debt, and that where the personal liability is terminated the lien is gone, has no application to a statutory right like this. The landlord might be perfectly satisfied where his tenant assigned his term to another who filled the storehouse with goods, thus securing the rent; for, without regard to personal liabilities, he is given by the statute a superior lien on the goods for his rent, and it was never intended that after this was done the assignee could move out his goods at any time he pleased, and, by assigning the lease to a beggar, throw upon the landlord the entire loss of his rent. Appellee's lien on the personal property of the assignee or undertenant on the premises is simply a right *in rem* conferred by statute. Such rights often exist when there is no personal liability, as on the get of a stud for the services of the

horse, or on the property of a married woman in favor of a mechanic before our enabling acts. On the day that Myer Bros. made the deed of assignment to appellant, appellee had a lien on the stock of goods for a year's rent, due or to become due. By that deed Myer Bros. created a lien on the property in favor of all their creditors. But this lien so created on the property in the hands of appellant was by the express provisions of § 2316, quoted above, subject to the lien of appellee; and appellant who was trustee for the creditors, and charged by law (Ky. Stat. § 74) with the duty of applying the proceeds of the property first to the discharge of the liens on it, could not by its sole act, without his consent, destroy appellee's lien, when the statute required it to be paid before other claims.

Judgment affirmed.

Du Belle, J., dissenting.

I earnestly dissent from the opinion of the majority. This case is before us upon an agreed statement of fact, which, with the legal questions presented, is fully set forth in the majority opinion. There was no privity of contract between the assignee of the term and the lessor. As assignee, he was liable because of his possession, and was liable for covenants broken only while he remained in possession of the property, and for such rents only as accrued after he took possession. 2 Taylor, L. & T. § 449. He bore the burden so long as he enjoyed the benefit. What effect does the assignment over by the assignee of a term have upon his liability for rents to become due thereafter? The rule, in the absence of statutory modification, is given in the majority opinion, as stated by Taylor (vol. 2, § 452). To the same effect, see Wood, Land. & T. p. 546. It does not appear to be contended that this doctrine is changed, as to personal liability of the assignee over, by the Kentucky statute of landlord and tenant, but that the statute fixes upon his goods a lien, to the extent of the personal liability of the original lessee, within the limit of a year, as fixed by the statute. The statutes involved are found in §§ 2305, 2307, and 2317 of the Kentucky Statutes, which are as follows:

"Sec. 2305. Rent may be recovered from the lessee or other person owing it, or his assignee or under-tenant, or the representative of either, by the same remedies given in the preceding sections. But the liability of the assignee or subtenant shall only be for the rent accrued after his interest began."

"Sec. 2307. A distress warrant or attachment for rent shall bind, and may be levied upon any personal property of the original tenant found in the county; and upon the personal property of the assignee or undertenant found on the leased premises, and if the tenant has removed his property to another county, the distress or attachment may be directed to such county."

"Sec. 2317. A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the

household furniture, and other personal property of the tenant, or under-tenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. And if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so removed for fifteen days from the date of its removal, and may enforce his lien against the property wherever found."

The remedies referred to in § 2305 are the remedies by distress and landlord's attachment.

It is urged on behalf of appellee that, upon the theory that Myer Bros. were assignees of the term, they became the tenants upon coming into possession. Says the counsel for appellee upon this subject: "An assignee of a lease is a tenant, to all intents and purposes. The original lessee may still be liable upon his covenant of payment, while the assignee is liable by reason of his occupation; but the former is not a tenant after he has assigned and left possession, while the assignee in possession is a tenant,"—referring to Taylor, Land. & T. § 16. And again: "The assignee comes at once into privity with the landlord, and while he remains owner of the term under the assignment he is liable on all the covenants of the lease. 'An assignee is personally liable to the lessor upon all covenants which run with the land, the premises also remaining liable to a distress by the latter for the rent.' Id. § 109, and authorities quoted in note 6." This is entirely true, as I think, and entirely in accordance with the doctrine quoted from Taylor. The assignee in possession is a tenant, in that he holds the land. But he holds it, not under contract with the owner, and has no privity of contract with him, but only privity of estate, which, being terminated, his character of tenant ceases coterminously with his possession of the property. It is sought, however, on behalf of appellee, by establishing the proposition that the assignee is a tenant, to subject his goods to a lien for rent, coextensive with the liability of the original lessee under his contract, subject only to the limitation that it shall not extend beyond rent for one year. It is conceded by both sides that the remedy by distress in Kentucky is not in any wise similar to the common-law right of distraint, but is purely statutory, in that it gives a lien upon, and right of sale of, the goods of the tenant; and this, in some instances, independent of the continuation of the relation of landlord and tenant. Conceding this to be true, it follows that, the lien being given independently of the contract rights existing between the parties, and the remedy for its enforcement being an extraordinary and frequently oppressive one, the statute must be strictly construed, and cannot, by implication, be extended beyond the plain legislative intent. This has been frequently held 45 L. R. A.

in this court. *Gedge v. Schoenberger*, 83 Ky. 92, and *Hutsell v. Deposit Bank*, 19 Ky. L. Rep. 1481, 39 L. R. A. 403. "It is no mere remnant of the old common-law right," says counsel for appellee, "but it exists by virtue of the act of 1811. 2 Morehead & B. Ky. Stat. 1358."

Now to consider the statutes: Section 2305 gives a remedy by distress or attachment against the lessee or other person owing it, or his assignee or under-tenant, or the representative of either, providing that the liability of the assignee or subtenant shall only be for the rent accrued after his interest began. Section 2307 provides what property shall be subject to levy, and under what circumstances. But neither of these sections in any wise refers to the liability to secure which the lien is given, or alters such liability of person or goods from that which existed under the contract, or, at common law, arose out of the relations of the parties. It has never been held that the property of the subtenant was liable for rent beyond the term of his tenancy. Section 2317 gives the landlord a superior lien upon the property of the tenant or under-tenant, but provides that such lien shall not be for more than one year's rent, due or to become due. It seems to be contended that this gives the landlord, by implication, a lien for one year's rent. But while it is generally true that the expression of one thing is to be construed as the exclusion of others, it does not always follow that the converse of the rule is true. In Black, Interpretation of Statutes, it is said (p. 149): "It is sometimes said that the converse of this rule is equally available in statutory construction; that is, that the express exclusion of one thing will operate as the inclusion of all others. Thus, if a statute explicitly provides that a court, in certain cases, shall not impose a fine of less than \$100, this implies the power to impose a fine of \$100 or more. But this inversion of the rule is to be applied with even greater caution than the rule itself. We should not infer the inclusion of one thing from the exclusion of another, unless such an inference is very clearly in accordance with the intention of the legislature, or unless it is necessary to give the statute effect and operation. Particular care should be observed in resisting the conclusion that the express shutting out of one thing will necessarily let in its opposite." And in the case at bar it would seem clear—assuming that counsel for appellee is correct in his contention that an assignee of a term is included under the word "tenant" in the section mentioned—that the lien given extends for rent not to exceed one year, for and during the continuance of the term of the person whose goods are to be subjected to its payment. The term of the original tenant extends until the expiration of his lease. The term of the assignee extends only until his relation of tenant, existing solely by virtue of privity of estate, shall cease; and that ceases upon his assignment of his assigned term. This conclusion is fortified by the reasoning in *Trabus v. Mo-*

Adams, construing an exactly similar statute in 8 Bush, 75, where the lessees of mines had assigned the benefit of their lease to one McAdams. In a suit for the rent, McAdams claimed that he had assigned over the term assigned to him. Said this court, through Judge Lindsay: "McAdams, not only by express agreement but by operation of law, became the assignee of said lease, and thereby undertook the responsibilities of an assignee of an unexpired term. . . . Nor does his liability depend upon personal possession of the premises. By taking the transfer he was notified of the terms of the lease, and thereby accepted them, and undertook their performance. Nor could he discharge the undertaking, or relieve himself from liability as assignee, by anything short of an actual, absolute transfer or assignment of the entire unexpired term. Such an assignment, he insists, he did make to Looney; but, when the testimony in the case is carefully scrutinized, it does not, as we think, admit of any such conclusion." And in 6 Ky. L. Rep. 663 (*Muldoon v. Hite*), it was held by the superior court that the assignee of a lease may always discharge himself from any liability for subsequent breaches, both as regards rents and other covenants, by assigning over, even though it be done for the express purpose of getting rid of his responsibility. These cases were apparently cases where the personal liability alone was sought to be enforced. But the reasoning of the *McAdams Case* is extremely persuasive; and I am clearly of opinion that the goods of the assignee are not liable for rent to become due after the expiration of the assignee's tenancy of the property, and that this may be terminated by an assignment over.

It is claimed that Myer Bros. were subtenants, and that there is no real difference in legal liability between assignees and subtenants. The distinction seems to me, however, to be well marked. 2 Taylor, Land. & T. §§ 448, 449, and 1 Taylor, Land. & T. § 109. Assuming the doctrine laid down by Judge Lindsay in the *Trabue v. McAdams Case*, 8 Bush, 75, to be correct,—and it has never been questioned in this state,—we have, or may have, three classes of persons to whose property the lien given by the statute may be held to attach, *viz.*, a tenant, the assignee of a term, or a subtenant. Each has a liability,—the original tenant, by virtue of his covenant; the assignee and the subtenant, so far as the landlord is concerned, by virtue of their privity of estate. The statute gives a lien, in general terms, upon the goods of each of them for rent. As against the tenant, clearly, this lien applies to and secures only the rent "due or to become due" from him, with the limitation that it shall not exist for rent due for more than one hundred and twenty days, nor for more than one year's rent due or to become due. If his lease is by its terms to terminate at the expiration of a month, it cannot be contended that the landlord has a lien for a year's rent to become due. If, by its terms, his lease is terminable upon thirty days'

notice, can it be contended that the landlord has a lien, to be enforced by attachment, for a year's rent to become due? Yet that is the logic of the majority opinion, for the assignee of the term, whose term is conceded to be terminable at any moment when he may assign to someone who will accept the assignment, whose position of tenant or holder of the property is thus terminable, may, under this statute, be held for a year's rent thereafter to become due, not from him, but from the man who contracted to pay it. And so, applying the doctrine to the case of a subtenant, one who holds a single store-room in a large house, under a sublease which by its terms is to end in a month, must, under the majority opinion, be held, so far as his goods are concerned, liable for a year's rent for the entire property; and this was without any pretext that any of such rent, except one month's rent of the limited part of the property which he holds, is ever due, or to become due from him. Where a statute, in general terms, gives a lien for rent against the property of three distinct classes of persons, the fair, the just, and the logical rule of construction would, it seems to me, be to hold that the lien given upon the goods of any one of the three classes mentioned should attach to his goods to secure and compel the payment of the liability for which he was responsible, and not for a liability incurred by someone else. With a fair, reasonable, and just application of the statute confronting it, the majority of the court has chosen to apply the statute in a manner which may, and undoubtedly will, work manifest injustice. The construction for which I have contended could work injustice to no one. It would hold the assignee or the subtenant liable for everything they had ever agreed to pay to anybody, and could work no injustice to the landlord; for he would get, or could get, everything which had ever been contracted to be paid to him by anyone. If he desired to hold his original tenant, there is no obligation upon him to execute a release. If the original tenant, being insolvent, undertook to remove his goods, they could be subjected to the landlord's claim by distress warrant or landlord's attachment. And, in addition to these rights, he would be entitled to a remedy against the goods of the assignee and the goods of the subtenant for every cent which could be legally or justly demanded of them.

The majority opinion lays stress upon §§ 16, 17, chap. 21, of the General Statutes (now to be found in § 460, Ky. Stat.), as to the construction to be given statutes in derogation of the common law. This statute, which has in part been held merely declaratory of the common law, in so far as it provides that words and phrases shall be understood according to the common and approved use of language (*Bailey v. Com.* 11 Bush, 688), has been frequently referred to as authorizing the court to apply a somewhat more liberal construction than prevailed at the common law, in order to effect the intent of the legislature. When the in-

tent is clear from the language of the statute, that purpose is to be carried out by the courts, although the language used may be inapt. But it does not authorize the court to assume a purpose not deducible from the language of the statute, and then to effect that imaginary purpose by applying the language to a state of facts not within its terms, as well as to the condition to which it is clearly applicable.

One other comment I desire to make upon the majority opinion: It concedes that the assignment of the lease in violation of its terms could be taken advantage of by the landlord by re-entry, and declaration of forfeiture of the lease, only, and authority is referred to in support of this proposition. But, after so holding, the opinion, in its conclusion, holds that as the terms of the lease forbade an assignment, and as Myer Bros., by accepting the assignment, took it subject to its covenants, they had no right to assign their lease, because, says the opinion, "the law suffers no man to profit by the violation of his own contract, and it would be a plain denial of the purpose of the statutes to allow an assignee of a lease to defeat the lien secured by it to the landlord by a wrongful act of his own, and without the concurrence of the landlord." That is to say, as against the assignee of a lease the landlord has a higher right than he has against the original lessee. Against the lessee, the landlord can only re-enter and forfeit the lease. Against the assignee, he can impose an additional penalty, by subjecting the assignee's goods to the payment of another's obligation. The judgment, in my opinion, should be reversed.

Hazelrigg, Ch. J., and Guffy, J., concur in this dissent.

City of NEWPORT *et al.*, *Appts.*,
v.

COMMONWEALTH of Kentucky.

(.....Ky.....)

1. The appearance of a city to an amended petition making it a defendant in an action originally brought against an alleged waterworks corporation which had no existence gives jurisdiction as if the petition was originally filed against the city.
2. A municipal corporation may be taxed for its franchise to operate waterworks, as in respect to them it occupies the position of a private corporation.
3. A decision as to the taxes of one year is not *res judicata* as to the validity of taxes for subsequent years, as the

NOTE.—The above case is a novel one so far as it holds a municipal corporation to be taxable for its franchise to operate waterworks.

The doctrine that a city operates such waterworks in its private capacity is not sustained in *Springfield F. & M. Ins. Co. v. Keeseville* (N. Y.) 30 L. R. A. 660, where water rents are 45 L. R. A.

causes of action are distinct and different, though they may be similar.

(Paynter, J., dissents.)

(April 26, 1899.)

A PPEAL by defendants from a judgment of the Circuit Court for Franklin County requiring defendant to pay taxes on its waterworks. *Affirmed.*

The facts are stated in the opinion.

Mr. Horace W. Root for appellants.

Messrs. W. S. Taylor and M. H. Thatcher for the Commonwealth.

Du Relle, J., delivered the opinion of the court:

The secretary of the Newport Waterworks made a verified statement, as required by § 4078, Ky. Stat., in order for the board of valuation and assessment to determine the value of its franchise for taxation for the year 1894, upon which statement that board proceeded to value and assess the corporate franchise of the Newport Waterworks. Suit was brought in the Franklin circuit court for the taxes of that year, alleging that the Newport Waterworks was a corporation having and exercising privileges and franchises not allowed by law to natural persons. Summons having been served upon the president and chief officer of the board of waterworks trustees, there were filed a demurrer, a special demurrer for want of jurisdiction of the defendant, the Newport Waterworks, and an answer, in which the Newport Waterworks alleged that there did not and never had existed a corporation of that name, and denied that it was a corporation, or was organized or doing business as such. A few days after the filing of these pleadings, and before they were acted upon, the commonwealth amended its petition, making the city of Newport a party defendant, alleging that it was a municipal corporation, a city of the second class; that it owned and operated the Newport Waterworks; that, by the terms of its charter, it was authorized to, and did, own and operate the waterworks, and charge tariff rates for water, as other companies; that the waterworks were not used by the city for governmental purposes, but as a private enterprise, the accounts thereof being kept distinct and independent of the governmental affairs of the city, all citizens who used the water being charged the regular tariff rate; that the city, so far as the waterworks and waterworks property were concerned, was engaged in the business of an ordinary water company, operating the works for profit; that, while not a corporation, the Newport Waterworks was used and operated as a water company, and had a secretary, duly elected by the city of Newport,

held to be only a mode of taxation and part of the general scheme of raising revenue to carry on the work of government.

That such waterworks are clothed with a public trust. See *Huron Waterworks Co. v. Huron* (S. D.) 30 L. R. A. 848.

the owner of the property, and duly selected as such secretary by the commissioners of the waterworks, who had theretofore been selected as such commissioners by the city, as provided in its charter; and that by said secretary the report to the board of valuation and assessment was made. Subsequently the city entered its objection to the filing of the amended petition, and moved to set aside the filing, on the ground that neither at the time of the institution of the action, nor before nor since, was there any such defendant or corporation as the Newport Waterworks, and therefore there was no action commenced, or in being, to which the amendment could be made. This objection, and the demurrer to the petition, were overruled, and a judgment rendered, which was afterwards, by agreement, set aside, and an answer filed by the city of Newport pleading to the merits. An agreed statement of facts was filed, the case submitted, and judgment rendered against the city for the tax.

It is first urged that it was error to permit the amended petition to be filed, making the city of Newport a party defendant, upon the ground that there was no action pending against any natural or artificial person, and therefore nothing to be amended; that an amendment presupposes a real action or proceeding already pending in court; that, in this case, there was nothing to which an amendment could go, because there was no petition stating, or attempting to state, a cause of action against any real person, natural or artificial; and that the original petition was a nullity. It is further urged that this case is not one of misnomer, or of a suit against a real person by a wrong name, or against one person erroneously sued under the name of another,—in which cases it seems to be conceded that an amendment might be made, under the authority of § 134 of the Civil Code of Practice, and the cases of *Heckman v. Louisville & N. R. Co.* 85 Ky. 631, and *Louisville, N. & G. S. R. Co. v. Hall*, 12 Bush. 131. Upon the other hand, it is urged on behalf of the commonwealth that as the city, by its own officers, caused the report for franchise tax to be made in the name of the Newport Waterworks, and the waterworks were distinct in management from the city government, being controlled by commissioners selected by the city, and by whom water rates were fixed, the waterworks were, in effect, a quasi corporation, or a company or association, within the meaning of §§ 4077, 4078, Ky. Stat. But, without going into that question, it seems to us that the amendment and the original petition may be considered together as an original petition against the city of Newport, to which the city entered its appearance without reservation. Nor does the case of *Houston v. Kidwell* (Ky.) 12 Ky. L. Rep. 386, cited by counsel for appellant, seem to us to be in conflict with this view. That was an action for a new trial. The petition was erroneously dismissed. Afterwards an amended petition was filed alleging the discovery of additional evidence, but which was merely cumulative.

The judgment dismissing the original petition was not appealed from, and it was held that the amended petition could not be treated as a petition, for the reason that the relief sought was *res judicata* by the final judgment on the first petition, from which no appeal had been taken. Nor does the citation from Newman, Pl. & Pr. p. 288, apply. That refers to a case where the wrong person brings an action for a liability existing, but existing in favor of another person than the plaintiff. And, while it is there said that "the foregoing rules apply, for the most part, equally to a mistake in the name of the defendant as of the plaintiff," that does not apply to a case like this, where the original petition is good upon its face, but a mistake has been made in the name of the party upon whom the liability rests, as the owner of specific, described property. In such case, there would seem to be little difference whether the owner was sued originally by the name of another existing person (as in the *Heckman's Case*, 85 Ky. 631, and *Hall's Case*, 12 Bush. 131), or was sued by the name of a nonexistent person. The question whether the city might have taken advantage of the mistake by special entry of its appearance and dilatory pleading is not here presented, as it appeared without reservation. The answer presents several defenses: First. That the city was authorized, by act of the legislature, to build and operate a waterworks system, and has built such system, and operates it through a board styled the "Commissioners of Waterworks," having issued \$800,000 of bonds, \$708,000 of which are still outstanding; that it exercises no right or privilege with respect to its waterworks which a natural person might not do; that its waterworks are situated within its corporate limits, or upon its own land outside the limits; that the report made by the secretary of that board was erroneous; that, including the interest upon the bonded debt created to build and operate the waterworks, the expense of operation was more than \$35,000 in excess of the actual receipts; that the waterworks department of the city is not a paying institution, and its actual receipts in any year since the act authorizing it to be built have not been sufficient to meet both its operating expenses and the interest upon the bonds issued to build it, but that the city, by the annual levy and collection of a tax, meets and pays off the interest and bonds of the waterworks falling due in each year; that it will not be self-sustaining for many years to come; and that its tangible property used in connection with the waterworks system was, in the year 1894 and subsequent years, assessed by the state for taxation, and taxes thereon paid. Second. That the city exercises no special or exclusive privileges or franchises not allowed by law to natural persons, with respect to its waterworks; that the works are used for governmental purposes, and not as a private enterprise; that the accounts of the waterworks are not kept distinct and independent of the governmental affairs of the city; that it is

not engaged in the business of an ordinary water company, and that the waterworks are not a private enterprise, operated for profit. Third. That, by an act adopted March 8, 1878, it was provided that the waterworks should be exempt from county and state taxation so long as it should be unproductive; and that it has been unproductive since its establishment. Fourth. That the imposition of a franchise tax is in violation of the state Constitution, and also in violation of subsection 1, § 10, art. 1, of the Federal Constitution, prohibiting the passage of a law impairing the obligation of contracts, for the reason that, at the time of the issuance of the bonds, there was no franchise tax authorized to be collected from the city on account of the waterworks system, and the bondholders have a vested right to the bonds free from such a tax. Fifth. That the liability of the city to a franchise tax is *res judicata*, by a judgment rendered in a suit by the commonwealth against the Newport Waterworks and the city of Newport for a franchise tax, on account of the city's ownership and operation of the waterworks, for the year 1893, under the same law under which the present action was instituted; the subject-matter of that suit being identical with the subject-matter of the case at bar, except that in that action the suit was to collect the tax for the year 1893, and the present suit is for the year 1894. As to the fourth ground, it is sufficient to say that the bondholders were not parties to this proceeding, and that, so far as we are informed, it has never been held that the fact that no tax was levied upon the property at the time of its acquisition had the effect to prevent the imposition of a tax thereon in subsequent years. The claim of exemption under the act of 1878 cannot be sustained, as it is not claimed that any contract right existed thereunder, and the exemption thereby given is repealed by the present Constitution.

The first and second defenses present the question, in substance, whether a municipal corporation can be subject to a franchise tax. It seems, under the case of *Owensboro v. Com.*, *Stone* (Ky.) 20 Ky. L. Rep. 1281, 44 L. R. A. 202, that the waterworks might be exempt from taxation as public property used for public purposes, under § 170 of the Constitution, if operated solely for the purpose of extinguishing fires, cleaning the streets, and the like, which, under the opinion in that case, would be deemed governmental purposes; and that, if the tangible property held and used for that purpose would not be taxable, neither would the city be taxable on a franchise to so operate and use it. Is the case altered by the fact that the city, while operating the waterworks for the convenience of its people, makes a charge against them for furnishing them with water? In the case of *Com. v. Makibben*, 90 Ky. 384, it was held by this court that the power granted to the city of Newport to operate its waterworks was not granted as necessary to carrying on its municipal government as a political power, but merely as a private cor-

poration for the convenience or profit of its citizens, and therefore not only taxable by the commonwealth, but not to be constitutionally exempted from taxation. Said the court, through Judge Bennett: "But may a city be treated as a private corporation in the exercise of powers not necessary to carrying on its municipal government as a political power? We have heretofore said that it may be so treated. We have also said that its property necessary to carrying on its municipal government as a political power is not subject to state taxation; but if it is not necessary for such purpose then it must be treated as the property of a private corporation, and is subject to state taxation, unless it is expressly exempted in consideration of public services,"—referring to *Louisville v. Com.* 1 Duv. 298, 85 Am. Dec. 624, and *Barbour v. Louisville Bd. of Trade*, 82 Ky. 649. In the same opinion, the court quoted, with approval, as follows, from *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669, in which case it was decided that the city, in erecting waterworks, acted in its private, not public, character: "But the distinction is quite clear and well settled, and the process of separation practicable. To this end regard should be had not so much to the nature and character of the various powers conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." So, in *Covington v. Com.* 19 Ky. L. Rep. 106, it was held, in an opinion by Chief Justice Lewis, that the waterworks of the city of Covington could not, under the Constitution, be exempted by special statute from taxation,—referring to *Clark v. Louisville Water Co.* 90 Ky. 516, in which the same question was decided. It seems, therefore, to be well settled that the tangible property used for waterworks purposes is subject to taxation; and that the municipality, as to it, occupies the position of, and is to be treated as, a private corporation. Section 4077, Ky. Stat., which requires a franchise tax to be paid by certain enumerated companies, includes water companies in the list of companies required to pay such tax, and also requires such tax to be paid by "every other like company, corporation, or association." And § 4082, *Id.*, provides that "whenever any person or association of persons not being a corporation nor having capital stock, shall, in this state engage in the business of any of the corporations mentioned in the 1st section of this article [§ 4077], then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property em-

played therein, shall be deemed and treated as the capital stock of such person or association of persons for the purpose of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation." The three sections (4077, 4078, and 4082), taken together, clearly indicate the intent of the legislature that no corporation, company, association, person, or aggregation of persons should be permitted to engage in any of the businesses enumerated in § 4077, without thereby being required to make report to the board of valuation and assessment, and becoming subject to the so-called franchise tax. Under the doctrine laid down in the cases referred to, the municipality occupies, as to its waterworks, the same position as would a private corporation owning such works. It follows, inevitably, therefore, from that doctrine, that not only is the tangible property used by the city for waterworks purposes taxable by the commonwealth as nonmunicipal and private property, but that, as to that property, it is subject to a franchise tax, and must make report therefor, as required in § 4078.

The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893 and the present action was attempting to collect a tax for the year 1894; that said action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition. A copy of the judgment was filed as part of the answer, and it was further averred that the judgment had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive. The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity, exist, regardless of former adjudications as to the validity of a different tax. In *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 314, 38 L. ed. 456, the supreme court held: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell v. Sac County*, 94 U. S. 357, 24 L. ed. 199. But, as was held in that case, where the second action between the same parties is upon

a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered.

The same principle was reaffirmed in *Nesbit v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562, and in *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 302, 36 L. ed. 972, 981. In the case of *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633, 640, the supreme court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the taxes for a subsequent year; each year's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes of action (as, two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision." 152 U. S. 314-316, 38 L. ed. 456. In *Lake Shore & M. S. R. Co. v. People*, 46 Mich. 208, a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents. Said Chief Justice Marston, delivering the opinion: "The decree in the Wayne circuit would not prevent the state from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance, except as a precedent. In this case, it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich. 443 [*Michigan S. & N. I. R. Co. v. Auditor General*], already referred to, and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause,

but one arising since then, and the state is not in this case seeking to recover any portion of the taxes the collection of which was restrained in that case." We do not think the plea of *res judicata* avails in this case. As stated in 21 Am. & Eng. Enc. Law, p. 227, the rule is: "To make a matter *res judicata* there must be a concurrence of the four conditions following, namely, first, identity of the subject-matter; second, identity of cause of action; third, identity of persons and parties; fourth, identity in the quality of the persons for or against whom claim is made." The taxes for the subsequent year constitute a new cause of action, it may be, similar to the cause which was adjudicated, but a distinct and different cause. The rulings of the court upon the legal questions involved, if rendered by this court, are authority here, to the extent, and no further, that like decisions would be, in a suit between different parties. In our opinion, it would be against public policy to hold that a judgment of a circuit court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years, merely because counsel for the commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the commonwealth bound by the laches of its officer. The decision of the circuit court as to the taxes of 1893 is not binding upon this court as to the taxes for subsequent years.

It follows, therefore, that the judgment must be affirmed.

Paynter, J., dissents.

Subsequently, on June 3, 1899, Du Rello, J., handed down the following additional opinion:

The original opinion in this case, prepared by direction of the court, correctly set forth the views of the majority of the court. It did not fully state the views of the minority upon the question of *res judicata*. When the petition for rehearing was filed, the minority took the position that the opinion should be so extended as to rest the decision upon a doctrine in which all could unite, and not decide, or appear to decide, a question not necessarily raised by the record, and upon which the members of the court are not in harmony. The majority, however, have decided to adhere to the opinion as originally delivered, and the views of the minority upon this question are here presented.

The plea of *res judicata* in this case avers that the subject-matter of the former suit was identical with that involved in this action; that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894; that the former action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition, a copy of the judgment being filed as a part of the answer. It was further averred that the judgment

had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive. It will be observed that this plea does not show upon what ground the court based the judgment relied upon as *res judicata*, nor does the judgment itself show on what ground it was based. Giving the fullest effect to the pleading, and assuming, as we must, under the averment that the subject-matter of the former suit was identical with the subject-matter of this, that the same defenses were pleaded in that case as in this, and that the court decided that case upon the merits, and dismissed the petition, it still does not appear whether the petition in that case was dismissed because the court held that there was a contract exemption from taxation in favor of appellant, because it held that a municipality could not be subjected to a franchise tax with respect to its use of any of its property, or because it held valid some one of the other defenses pleaded in this action, and presumably pleaded in that. It therefore becomes necessary for us to consider whether the doctrine of *res judicata* is applicable to all of the defenses pleaded; for, if inapplicable to one, as that defense may, for all that appears in the answer, have been the one upon which the former case was decided, we must apply the maxim *Fortius contra proferentem*, conclude that that was the defense upon which the case was decided, and hold the pleading insufficient.

This brings us to consider the question whether *res judicata* as to the validity of a tax for one year can apply in a suit for a tax for another year. The authorities, in general, are to the effect that when, in a court of competent jurisdiction, upon a proper issue, a contract out of which several distinct promises to pay money arose has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of the contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to do so; and the question is whether the judgment of a court fastening one such burden upon the citizen estops him to contest the validity of a similar burden thereafter sought to be imposed upon him, and, on the other hand, whether the refusal of the court to impose such a burden estops the government from thereafter asserting a similar right against that citizen. And, in considering this question, we shall consider it on the theory that there is no question of contract involved, but that the question arises solely upon the legality of the tax, as in a case where the question is upon the constitutionality of the law, or as to whether the property sought to be taxed is embraced by the law.

In *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 314, 38 L. ed. 456, the Supreme Court held: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior

suit the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell v. Sac County*, 94 U. S. 357, 24 L. ed. 199. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. . . . The same principle was affirmed in *Nesbit v. Riverside Independent Dist.* 144 U. S. 610, 36 L. ed. 562, and in *Wilmington & W. R. Co. v. Albrook*, 146 U. S. 279, 302, 36 L. ed. 972, 981. In the case of *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633, 640, the supreme court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. 'The cases' said the court, 'are unlike those where two causes of action (as two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the state should be forever barred in its collection of taxes by an erroneous decision." 152 U. S. 314-316, 38 L. ed. 456. But in *New Orleans v. Citizens' Bank*, 167 U. S. 396, 42 L. ed. 210 *et seq.*, in an elaborate opinion, the supreme court, while admitting that in the *Keokuk Case* the opinion, *arguendo*, discussed the question of whether a judgment against the validity of a tax for one year would be a bar to a suit for taxes for a subsequent year, held the expressions of the court used in argument in that case to be *dictum*, and distinctly decided that "the estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies." And again, on page 398, 167 U. S., and page 211, 42 L. ed.: "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identical L. R. A.

cally the same facts upon which the right of exemption is now claimed."

The language used in the case of *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633, has been greatly qualified, if not repudiated, by the same court, in *Goodenow v. Litchfield*, 59 Iowa, 226, where the court said: "The question whether the estoppel is effectual will depend upon the issues in the two actions. If the right to recover and defense thereto are based upon precisely the same ground, why litigate again a question that has been determined? In such case the very right of the matter has been determined by a court of competent jurisdiction."

Upon the other hand, in *Lake Shore & M. S. R. Co. v. People*, 46 Mich. 208, a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon the legal questions arising in the first case are important only as precedents. Said Chief Justice Marston, delivering the opinion: "The decree in the Wayne circuit court would not prevent the state from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance except as a precedent. In this case it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich. [*Michigan, S. & N. I. R. Co. v. Auditor General*, 9 Mich. 448], already referred to, and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause, but one arising since then, and the state is not, in this case, seeking to recover any portion of the taxes the collection of which was restrained in that case." In *State v. Bank of Commerce*, 95 Tenn. 222, it was held that a judgment adverse to a claim for taxes for one year constituted no bar to a suit for taxes of a subsequent year; and in the recent case of *Union & P. Bank v. Memphis*, 101 Tenn. 154 (decided April 2, 1898), the same court, through Judge McAlister, said: "Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, in which it was held, by a majority opinion, that a judgment in a tax case is as

conclusive of the taxes of other years as it is of the taxes for the years actually involved. In *State v. Bank of Commerce*, 95 Tenn. 231, we said: "These suits being for other years than those sued for in the *Farrington Case* [*Farrington v. Tennessee*, 95 U. S. 686, 24 L. ed. 560], that decision is not as an adjudication conclusive of the present case."

We do not think that the plea of *res judicata* avails in this case. The power to tax is a high governmental power, exercised against the will of the person taxed, and, in our opinion, a decision as to one cause of action arising under a tax statute is no more binding upon the government or the citizen than the construction of a penal statute would be in a second prosecution against the same person for an offense exactly similar. The former adjudication would, in such case, have weight as a precedent, but would not bind the parties by way of estoppel. The rulings of the court upon the legal questions involved are authority here to the extent, and no further, that like decisions would be in a suit between different parties as matter of public policy, and upon grounds of public necessity, we think the principle of *res judi-*

cata ought not to be applied to questions of taxation, where the state is exercising its sovereign power. We concur, therefore, in the conclusion reached by the majority, that this court cannot follow the doctrine held by the supreme court in *New Orleans v. Citizens' Bank* to its full extent. But whether the state is bound by a former adjudication that there exists a contract exemption from taxation, or as to the construction of such contract, is a question not necessarily involved here, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the commonwealth exercising the highest of its sovereign powers,—a power necessary to its very existence,—and the same commonwealth, its sovereignty laid aside, binding itself as a mere corporate entity by a sealed instrument. But it is not, in our judgment, necessary to go into this question, nor even to decide that there is a difference. We think the opinion should be extended upon the lines here indicated.

Hazelrigg, Ch. J., and Burnam, J., concur in this separate opinion.

LOUISIANA SUPREME COURT.

LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY

v.

BOARD OF ASSESSORS *et al.*, Appts.

(51 La. Ann. 1028.)

- *1. Taxes imposed on a nonresident, whose property is not in the state, are null, as tax laws can have no extraterritorial effect.
- *2. Debt due to a nonresident (still in nonconcrete form) has its situs at the domicile of the creditor, and not at the domicile of the debtor.

(January 9, 1899.)

A PPEAL by defendants from a judgment of the Civil District Court for the Parish of Orleans canceling an assessment upon credits of the plaintiff for the year 1897. *Affirmed.*

The facts are stated in the opinion.

Messrs Francis C. Zacharie and James J. McLoughlin for appellants.

Messrs. Saunders & Miller and E. W. Huntington for appellee.

*Headnotes by BREAUX, J.

NOTE.—For taxation of the property of non-residents, see also *Wells, F. & Co.'s Express v. Crawford County* (Ark.) 37 L. R. A. 371; *Buck v. Miller* (Ind.) 37 L. R. A. 384; *Schmidt v. Falley* (Ind.) 37 L. R. A. 442.

As to situs for purpose of taxation of debts evidenced by notes and mortgages, see *Boyd v. Selma* (Ala.) 16 L. R. A. 729, and *note*; also *Holland v. Silver Bow County Comrs.* (Mont.) 27 L. R. A. 797.
45 L. R. A.

Breaux, J., delivered the opinion of the court:

Plaintiff brought this suit to have the assessment of its "credits" canceled for the year 1897. Plaintiff was assessed for money loaned on interest, all "credits," and all bills receivable for money loaned or advanced, or for goods sold, and all "credits" of any description. We understand that the issues now relate to the assessment of "debts" that were due for premiums, and that the other items of property assessed do not give rise to any question for our decision.

The plaintiff corporation has no domicile in this state, but it has a resident board of directors, a resident secretary, and an assistant secretary. The latter is secretary of the board, but not of the company. They are an advisory board to the home board. The resident secretary, it appears, manages the business, and renders his accounts, and makes remittances to plaintiff. The company complied with the requirements of act No. 245 of 1897, by opening an office in this state for the purposes stated in the article of the Code. The position of plaintiff is that credits due the company for uncollected premiums are only taxable at the domicile of the company. This is controverted by the defendants, who urge, in substance, that the plaintiff's "credits" fall within the grasp of the revenue law adopted in 1890, taxing the property of nonresidents.

The whole theory of taxation, under the Constitution of 1879, which governs in this case, was based on the idea that the taxes were a property tax, and that the property

assessed should be seized and sold to satisfy the taxes for which it was assessed. The old method of recovering taxes by suit against the debtor was abolished, and in its place the Constitution ordained that the property assessed should be seized and sold for the taxes. No great difficulty should now arise in assessing and collecting the taxes on every item of property stated in the revenue act as subject to taxation.

Now, as to debts: A mere debt—a promise to pay—has no value within the limits of the state, if it be due to one not domiciled in the state. Its value is at the domicile of the creditor, where it has its situs. It is not property, save at the domicile of the creditor. If assessed and sold for taxes, we are inclined to think that the title would be greatly wanting in essentials to a perfect legal title. If treated and considered as a license tax for carrying on business, collection may be effected perhaps, but that would only prove that the proposition is correct; for a license tax is not a property tax. The opinion from which we will quote in a moment is broader in its scope than needful to sustain our view. The facts in that case are that an attempt was made to tax foreign creditors. The court decided against it, and held that the debts owed by individuals are not property of the debtor in any sense; that they are promises, obligations, duty, and only possess value in the hands of the creditors, where they are property, and in whose hands they may be taxed. To call debts property of the debtors is a misuser of terms. Debts have no situs separate from the domicile of the creditor. This principle might be supported by citations from numerous adjudications, but authorities could not add to the manifest truth. Justice Field, organ of the court in *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. 300, 21 L. ed. 179. This question of taxing "credits" was considered by Mr. Cooley. He, in language not ambiguous, gives it as his opinion that debts owing to foreign creditors by individuals are not taxable at the domicile of the debtor. Cooley, Taxn. p. 15. Upon the same subject, we extract from the book of another commentator: "A debt not evidenced by negotiable paper, according to our view, may be taxed at the residence of the debtor; according to another view, at the residence of the creditor." "The weight of authority sustains the latter view." Burroughs, Taxn. p. 41. "The situs of the debt is the creditor's domicile." Wharton, Conf. L. § 80. Debts "have no other situs than the residence of their holders and owners." Desty, Taxn. p. 326. The decisions of this court have repeatedly held that "credits" have their situs at the domicile of the creditor, as will be seen by the following extracts: "The tax collector affirms the validity of the tax on the ground that § 10 of act 98 of 1886 directs that movable property shall be assessed in the parish where it is located. This applies to tangible movables, but not to incorporeal rights generally, which follow the person of

the owner, and are not susceptible of physical location. It is well settled that the situs of a debt, as property, is at the domicile of the creditor."—citing *Murray v. Charleston*, 96 U. S. 433, 24 L. ed. 760; *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. 300, 21 L. ed. 179; and Cooley, Taxn. p. 15. Justice Fenner was the organ of the court in the case from which we have just quoted. *Meyer v. Pleasant*, 41 La. Ann. 646. It is well to bear in mind that, under the revenue law of 1886, "debt" was included as property subject to taxation. This decision was rendered in June. In December of the same year, Justice Poche, as the organ of the court, in *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015, said: "In the case of *Meyer v. Pleasant*, 41 La. Ann. 645, hereinabove referred to, it was held, in harmony with settled jurisprudence, that the situs of a debt is at the domicile of the creditor." Also: "And, on that subject, it is beyond question the right of a corporation, as well as of a natural person, to have a legal domicile, and that domicile is in the state where it was incorporated. With the leave of other states, a corporation can extend its operations to other states, but it does not thereby acquire a new domicile in every state in which it does business. It retains the domicile of its birth, and, like natural persons, it is at that domicile that its obligations for, and its liability to, taxation for debts, or other incorporeal rights which it owns, must be tested and settled,"—citing *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 11, 26 L. ed. 644, and *Yuba County v. Pioneer Gold Min. Co.* 32 Fed. Rep. 183. Again, the court in that case, in substance, says that the corporation was a foreign one, and continued as a foreign corporation, without any change in its status growing out of its compliance with article 236 of the Code. The question came up again in 1892. Justice Fenner, whose opinion is entitled to great weight, particularly in view of the fact that he had considered the question in *Meyer v. Pleasant*, cited 41 La. Ann. 645, was the organ of the court, and said: "There is no doubt of the legislative power to modify the rule of comity *mobilia personam sequuntur* in many respects. Movables, having an actual situs in the state, may be taxed there, though the owner be domiciled elsewhere. Even debts may assume such concrete form in the evidences thereof that they may be similarly subjected when such evidences are situated in the state, as in the case of bank notes, . . . bills of exchange, or bonds. But as to mere ordinary debts, reduced to no such concrete forms, they are not capable of acquiring any situs distinct from the domicile of the creditor, and no legislative power exists to change that situs, so far as nonresident creditors are concerned. As said by the Supreme Court of the United States: 'To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts, belongs to the creditors to whom they are pay-

able, and follows their domicile wherever they may be. Their debts can have no locality separate from the parties to whom they are due." *Railley v. Board of Assessors*, 44 La. Ann. 769. In the case of *Olason v. New Orleans*, 46 La. Ann. 1, this court said: "Under the principles enunciated in those cases, the fact that the plaintiff has a resident clerk acting for it in the city of New Orleans, and that it has an office and pays a license there, is unimportant. For the purpose of a determination of the issue involved herein, we have to deal with the plaintiffs as nonresidents, and, in so dealing with them, we are of the opinion that the judgment of the lower court is correct." The court in this case held, substantially, that the credit owing to a foreign firm is not subject to taxation. In *State, Mechanics & L. Ins. Co., v. Board of Assessors*, 47 La. Ann. 1545, the court held: "But it has never been decided that tangible personal property could not be assessed at the owner's domicile, notwithstanding its actual situs was abroad, in some other state or country,"—a proposition not before us at this time. If it were, it would meet with our entire approval. There is no question here of the situs of personal property which has a visible existence, as stated in the case from which we have quoted. This was not a case involving a "mere ordinary debt" as subject to taxation. The other cases decided by this court, subsequent in date, made no question of the right to assess tangible movables. The court said in one of the cases: "The defendants cite the case of *Olason v. New Orleans*, 46 La. Ann. 1, to sustain their contention. The decision in *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 44 La. Ann. 760, 16 L. R. A. 56, is of more direct application." The decision gave full recognition to the exception from taxation here of debts due the foreign corporations, but maintained the assessment on the cash of the company necessary here for its business purposes. The principle of the decision in *Bluefields Banana Co. v. New Orleans Bd. of Assessors*, 49 La. Ann. 43, applies to this case.

We cannot hold that cash thus liable to taxation is exempted. There is no question in the case before us for decision of cash, which is undeniably a tangible, movable subject of taxation.

The defense urges that the doctrine *mobilia sequuntur personam* is subject to so many exceptions that it can be applied only in the simplest cases,—a proposition to which we have not the least objection to offer. It is unquestionably true. None the less it does not apply in the following case: Let us suppose, if a person domiciled in England binds himself to insure an owner of property who has a domicile in this state, on condition that the owner pays him an amount fixed within a stipulated time, the promise of the assured to pay for this insurance would not be subject to taxation in this state. For the same reason, the assured's promise to pay in the case now before us for decision is not subject to taxation here.

45 L. R. A.

The defense also urges that the decisions of *Meyer v. Pleasant*, 41 La. Ann. 646, and *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015, do not sustain subsequent decisions, because, under the tax acts of 1886 and 1888, there were no provisions in conflict with the doctrine *mobilia sequuntur personam*. In a former law, i. e., law of 1886, all "credits" were subject to taxation due by any "person, company, association, or corporation in and out of this state," and all "credits" held, controlled, or administered by "agents" and others in this state. Section 1 of the act, as in the act of 1890. The revenue law enacted in 1888 is substantially the same, and was not less broad than the act of 1890. The law, requiring "debts" owed by the foreigners to be assessed for taxation, as we take it, was intended for all such debts as are evidenced by note or by mortgage, or that are in such other concrete form as to render it possible to subject them to taxation under the present laws. No attempt has been made since the cited decisions were rendered to localize "debts," or "open accounts," such as those upon which the taxes are now claimed. The state of Louisiana possesses jurisdiction for purposes of taxation under present laws, over bonds owned by corporations actively engaged in business within the state, without regard to the owner's demands; also, judgments,—such bonds and judgments being in themselves property which may have a situs away from the owner's domicile. As to "open accounts" with a foreign company, for such protection as it may offer, the law to date has not localized them so as to render it possible to assess them here and sell them for taxes. While it may be that a domicile in the state as to these accounts may well be required as a condition precedent to a foreign company's business in the state, they cannot, in our view, be assessed here as foreign "credits," under the wording of the present law.

We have reviewed the decisions of the Supreme Court of the United States of date comparatively recent, which the defense contends shows a change in the jurisprudence since the decision rendered in 15 Wall., before cited. We found in the first case reviewed that the company sought to be taxed was a corporation created by the commonwealth of Kentucky for the purpose of erecting a railroad bridge, with its approaches, over the Ohio river, between the city of Henderson, in Kentucky, and the Indiana shore. The court held that the tax in controversy was nothing more than a tax on tangible property of the company in Kentucky, consisting of tax franchise. The company was a Kentucky company, and, under the revenue law of the state, tax is levied on the home company, i. e., "on all property of corporations organized under the laws of the state whether such property be in or out of the state, including the intangible property of such corporations," which property,—that is, the intangible property,—whether situated in or out of the state, shall

be considered and estimated in fixing the value of the corporate franchise, as we understand all property, tangible or intangible, of home companies. This decision sustains our view. The franchise and other intangible property it holds is subject to taxation at the domicile of the owner,—where it has situs. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 160, 41 L. ed. 953. Another case of the same court, from which the defense quotes, was an Ohio case. It purports to provide for a tax upon "property within the state of Ohio," and a mode of assessment to ascertain the value of the property in Ohio, and not to assess intangible property, having its situs in another state. *Adams Express Co. v. Ohio State Auditor*, 165 U. S.

223, 41 L. ed. 696. We take it that the Supreme Court of the United States, in *Horn Silver Min. Co. v. New York*, 143 U. S. 315, 36 L. ed. 168, 4 Inters. Com. Rep. 57, was concerned with the question of a franchise, and found, under the law of New York, that the company was bound for the tax upon its franchise property, which the courts have repeatedly held has a situs within the limits of the state by which it was granted.

We find no error in the judgment. It is affirmed.

Nicholls, Ch. J., absent.

Rehearing denied May 15, 1899.

MARYLAND COURT OF APPEALS.

BALTIMORE CONSOLIDATED RAIL-ROAD COMPANY, Appt., v.

Warfield PIERCE.

(.....Md.....)

1. The mere fact that a servant acts unlawfully, wilfully, or wantonly does not show that he is no longer in his master's employment, so as to relieve the latter from liability for injuries thereby caused.
2. The question whether a servant's act was done in furtherance of the master's business and within the scope of his employment is generally one for the jury.
3. The master's liability for the act of a motorman in running his car against a buggy at a crossing is a question for the jury, notwithstanding the claim that he did it maliciously, if there were any circumstances from which it could be fairly inferred that he was simply endeavoring to clear the track so he could proceed with the car or do something in furtherance of his master's business.
4. On the offer of an instruction that there is no evidence legally sufficient to entitle the plaintiff to recover, if made at the close of all the testimony, both plaintiff's and defendant's, the court must consider the whole evidence, and not that of the plaintiff alone.
5. Testimony of plaintiff in an action for injuries by collision with a street car, that he believed the motorman tried to murder him, will not preclude a recovery for the injury, if it is found to have been done within the scope of his employment.

(June 21, 1899.)

A PPEAL by defendant from a judgment of the Circuit Court for Baltimore County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Milton W. Offutt and George Dobbin Penniman, for appellant:

The motorman saw the buggy as soon as he reasonably could have been expected to have seen it on such a night, and there was not the slightest bit of evidence in the case that he could have seen it sooner. He did everything possible to stop his car and nearly succeeded in doing so before it hit the buggy. Therefore even if the buggy had been standing on a portion of road where both the cars and vehicles had equal rights to use the road, there could be no liability on the part of the defendant.

Lake Roland Elev. R. Co. v. McKewen, 80 Md. 593.

If the servant stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed from the nature of his employment to have authorized or expected the servant to do, the master is not liable.

Cooley, Torts, 535.

The appellee was not a passenger to whom the appellant owed any high duty of protecting from assaults of its employees.

If the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that of a passenger is obvious. The one is a trespasser he has stepped aside to commit; the other is committed in the course of his employment.

Central R. Co. v. Peacock, 69 Md. 257; *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *M'Manus v. Crickett*, 1 East, 106; *Groft v. Alison*, 4 Barn. & Ald. 590; *Boweler v. Noidstrom*, 1 Taunt. 568; *Middleton v. Fowler*, 1 Salk. 282; *Richards v. West Middlesex Waterworks Co.* L. R. 15 Q. B. Div. 660; *Clark & Lindsell*, Torts, 2d ed. 1896, 70; *Pittsburg, A. & M. Pass. R. Co. v. Donahue*, 70 Pa. 119; *Vanderbilt v. Richmond Turnp. Co.* 2 N. Y. 479.

NOTE.—As to master's civil responsibility for wrongful or negligent act of his servant, in the absence of any contractual relation, see note to 45 L. R. A.

Ritchie v. Waller (Conn.) 27 L. R. A. 161; also *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 28 L. R. A. 433

Messrs. Z. Howard Isaac, W. Gill Smith, and R. R. Boorman, for appellee:

Defendant's first prayer asked the court to take the case from the jury, and the evidence shows that there was abundance of proof in the case to establish the plaintiff's claim, and it was properly refused.

Northern C. R. Co., State, v. Price, 29 Md. 440; *State, Harvey, v. Baltimore & O. R. Co.* 69 Md. 339; *Fitzpatrick v. Baltimore & O. R. Co.* 35 Md. 44; Wharton, Neg. 2d ed. § 169; *Ward v. General Omnibus Co.* 42 L. J. C. P. N. S. 265; *Limpus v. London General Omnibus Co.* 1 Hurlst. & C. 526; Wood, Mast. & S. 295; 16 Am. & Eng. Enc. Law, p. 465, title *Negligence*; 14 Am. & Eng. Enc. Law, p. 817, title *Master and Servant*, and cases cited; *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220.

The plaintiff's second prayer was clearly an improper one, as it was asking the court to segregate the testimony of one witness, who had been contradicted by another witness in the case, and to ask a verdict on his testimony alone, which the court properly refused, not being the province of the court to encroach upon the jury's duties to determine the question of facts.

State, Harvey, v. Baltimore & O. R. Co. 69 Md. 339.

Boyd, J., delivered the opinion of the court:

The appellee sued the appellant for injuries sustained by the former through the alleged negligence of a motorman employed by the company on its electric railway on Park Heights avenue in Baltimore county, and, having recovered a judgment, this appeal was taken from the ruling of the court in granting two prayers of the plaintiff and rejecting four of the defendant.

The only questions urged before us, however, are presented by the defendant's first and second prayers. The first asked the court to instruct the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover, and the second that "the plaintiff having testified on the stand that the motorman of the defendant wilfully and maliciously endeavored to injure him, the plaintiff is not entitled to recover in this action." It is contended that the plaintiff's testimony, if true, shows that the act of the motorman was wilful and malicious, and was not within the scope of his employment, so as to make the defendant responsible in damages for the injury sustained.

At the argument the appellee claimed there was evidence of negligence (1) when the collision occurred between the car of the defendant and the buggy in which the plaintiff was riding, and (2) after the collision, when the car followed the horse which was drawing the vehicle in which the plaintiff was, as it ran down the road. We will consider the case in that order.

1. The plaintiff's own testimony was the only evidence offered by him which reflects on the first branch of the case, but the prayers were offered after the testimony on both

sides was in, and we must therefore, in passing on the legal sufficiency of the evidence, consider the whole record so far as applicable, and we will refer to the testimony at some length. The accident happened in January, sometime after dark. The plaintiff had been in the city of Baltimore and reached Gray's Hotel about seven o'clock, where he remained a half hour or more, and then continued out Park Heights avenue.

In his testimony he thus described the accident: "When he got to Seven-Mile lane there was an electric light lit at the crossing—one on each trolley pole; when he went to cross the bed of defendant's road at Seven-Mile lane, his horse frightened and ran down the railroad about 120 feet towards Baltimore; when he went to cross, the car of the defendant was approaching from the north, about 150 feet north of the Seven-Mile lane; he had plenty of time to cross before the car could reach the crossing at the Seven-Mile lane; the car came down the track behind him; when his horse was running down the track he holloed not to run into him; a man in the car holloed 'Look out! look out! look out! You will hit that man;' about that time witness had his horse stopped and under control; the car stopped about 15 of 20 feet behind him; while he was in the act of raising up to get out of the wagon for the purpose of leading the horse off the track, the car started up again and the motorman said, 'I will give the s— of a b— a shot anyhow,' the car struck the wagon and witness did not recollect anything more until the next morning when he found himself at Gray's." On cross-examination he was asked, "Do you undertake to say to this jury the man who controlled the car deliberately ran into you; that he attempted to murder you?" To which he replied, "Yes, sir; I do honestly think he certainly did." Then he was asked, "He tried to run you down and murder you?" to which he replied, "He certainly did, or he would not have used that expression if he had not."

The plaintiff also testified that he took one milk punch at Gray's, but had not taken any other drink that day. Mr. Gray said on cross-examination that the plaintiff had taken two milk punches, but left his place sober, and on re-examination he said he was not sure whether he took one or two. The evidence of the other witnesses for the plaintiff, including the physician who attended him after the accident, was to the effect that he was not drunk. Mr. Ingram, who lived on Park Heights avenue about 700 yards above Seven-Mile lane, said a man, who was drunk, and whom he identified as the plaintiff, came to his place about eight o'clock of the evening of the accident inquiring for Spring Grove Asylum; that he led his horse down the driveway towards the avenue, and he sent for an officer but the man had gone when the officer arrived; that they looked up the avenue about 400 yards above the Seven-Mile lane, saw the car stop, he and the officer procured a lantern and went up the railroad towards where the car stopped; they

saw the track of a buggy wheel or a wagon on the railroad and it turned off, they supposed, just below where the car stopped, and a little further down they picked up a hat which the plaintiff admitted on the stand to be his. The officer and another witness corroborated Mr. Ingram in most particulars. The motorman after saying that his car left Pikesville at 8.30 o'clock gave this account of the accident: "That his car struck a one-horse buggy driven by a man on the railroad track of the defendant, about 400 yards north of Seven-Mile lane; that he was about 300 yards from the entrance to Ingram's place; that he saw the buggy on the track when he was distant about 50 or 60 feet; that he reversed, used sand and the brakes, but could not prevent striking the buggy; that he struck it light and only broke two links in the chain of the fender; that if he had had 4 feet more the car would not have struck the buggy; that when struck the horse jumped down on the driveway and went across the road and disappeared."

He denied the use of the language attributed to him or any words to that effect, and claimed he had used all means to avoid the accident; that the night was dark and the tracks wet and slippery. The evidence also showed that the railroad between Ingram's entrance and the Seven-Mile lane was constructed of ballast and "T"-rails, the same as a steam road, and was elevated above the bed of the driveway.

The theory of the appellant is that if the evidence of the plaintiff be taken as true he cannot recover because the act of the motorman was wilful and malicious, and if that be not accepted the only other evidence was that of the defendant's witnesses, who exonerate the defendant from all blame.

There is some actual, and a great deal of apparent, conflict between the authorities as to the liability of the master for wilful and wanton acts of his servants. In many of the cases cited by the text-books, and elsewhere, the acts of the servants were committed under such circumstances as clearly place them outside of the scope of their employment, and hence there can be no responsibility on the part of the master as, *quoad* the particular act complained of, the relation of master and servant did not exist.

Then again, there are a great many cases in which the master has been held liable, owing to the fact that such relations existed between him and the injured party as to make him responsible, although, strictly speaking, the servant was not authorized by the master to do the particular act—such, for example, as when a passenger of a common carrier is injured by an assault or other wanton act of the servant. The case of *Central R. Co. v. Peacock*, 69 Md. 257, is an example of the former, while *Baltimore & O. R. Co. v. Barger*, 80 Md. 23, 26 L. R. A. 220, shows what rule this court has applied with reference to the latter. But neither of those classes are wholly applicable to the case before us.

Our predecessors in *Brown v. Purviance*, 2 45 L. R. A.

Harr. & G. 316, stated the general rule to be that "a master is answerable for all injuries arising from the negligence or unskilfulness of his servant in executing duties assigned him; but when he abandons his duty, and wilfully becomes a wrongdoer, the master is exempt from all responsibility for such wrongful acts." It was there said that the case of *M'Manus v. Crickett*, 1 East, 106, "fully and satisfactorily settled," the nature of the liability to which a master is subjected for the acts of his servant, and although *M'Manus v. Crickett* has been criticised, explained, and modified by many authorities, it will be observed that the rule stated by our predecessors, as above quoted, in terms only relieved the master when the servant abandoned his duty—meaning, of course, his duty to his master by virtue of his employment.

As was well said in *Evans v. Davidson*, 53 Md. 245: "In one sense where there is no express command by the master, all wrongful acts done by the servant may be said to be beyond the scope of the authority given; but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown."

In that case some hands of the defendant, who were employed to do general farm work on his farm, on seeing cattle in his cornfield started to drive them out, and one of the servants killed the plaintiff's cow by negligently striking her with a stone. The court below took the case from the jury because there was no evidence legally sufficient to entitle the plaintiff to recover. This court reversed that decision on the ground that driving the cow out of the field was within the scope of the servant's employment and the defendant was therefore liable.

The defendant had not employed or authorized the servant, expressly or impliedly, to kill the cow, and he did not even know the cattle were in the corn, but as driving out the cattle came within the scope of his employment the master was liable, although the particular method of executing the act embraced in the scope of the employment was not expressly authorized or even contemplated. It is true that in that case the servant was only charged with being negligent, but whether negligently or wilfully done in the course of the servant's employment, and in furtherance of the master's business, the latter is liable, but if the act of the servant is wilfully or wantonly done and not connected with or having relation to his employment, then, of course, the master cannot be held responsible.

The pivotal question, therefore, in such case usually is whether the servant was acting at the time in the course of his master's service and for his benefit, within the scope of his employment, and the mere fact that he acted

unlawfully, wilfully, or wantonly does not necessarily show that he is no longer in his master's employ. The statement in *M'Manus v. Orickett* that "the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent gained a special property for the time, and so for that purpose the chariot was the servant's," carries the doctrine too far, and is not in accord with most of the modern decisions.

In *Cate v. Schaum*, 51 Md. 309, this court said: "Indeed the authorities are numerous to show that a master is liable for the illegal acts of his servant, done by force or in wantonness, while in the performance of an act within the scope or course of his employment." The cases on this question are very numerous, and in the note to *Ritchie v. Walter*, 63 Conn. 155, as reported in 27 L. R. A. 161, there is a very elaborate discussion of the authorities, including most of the cases referred to by the appellant, but under our view of this case it would not serve any good purpose to further prolong the discussion of them on this point.

The question whether the act of the servant complained of was done in furtherance of the master's business, within the scope of the servant's employment, is generally one of fact to be determined by the jury. In *Cleveland v. Newsom*, 45 Mich. 63, it was held that the burden was on the defendant to show that the servant was not engaged in the course of his employment. In *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, the court said it is ordinarily a question to be determined by the jury.

But as was said in *Ritchie v. Walter*, 63 Conn. 155, 27 L. R. A. 161, when the servant's deviation from the strict course of his employment or duty is slight and not unusual, the court may determine, as a matter of law, that he is still executing the master's business, and if the deviation is very marked and unusual it may determine the contrary. If, as in the *Peacock Case*, 69 Md. 257, the driver deliberately abandons his car and makes an assault on one not a passenger on the sidewalk, the court must determine the question, because the act is too clearly out of the course of the servant's employment to hold the master responsible.

If this motorman had jumped off his car and gone to the plaintiff and then struck him on the head, the effect of such an act on the liability of the master would also be clear, as the fact that he had departed from his employment would be marked; and if there was uncontradicted evidence that, after stopping the car, he deliberately started up again, using language such as the plaintiff attributed to him, and ran into the vehicle occupied by the plaintiff, rendering him unconscious, without any evidence or circumstances to show that he was acting in furtherance of his master's business, within the scope of his employment, the master might be equally exempt.

For it would be making an unreasonable distinction to say that he would not be responsible if the motorman used his brake-

handle, for example, in making the assault, but would be, if he, with the same deliberation and intent, used the whole car to accomplish his unlawful purpose. But as the motorman's business was running the car, if there were any circumstances from which it could be fairly inferred that he was simply endeavoring to clear the track so he could proceed with his car, or do something in furtherance of his master's business, it would be a question for the jury.

So, if the motorman had started his car under the circumstances described by the plaintiff, without the use of such language as is attributed to him, or something else to explain his motives, the court would have been called upon to submit the case to the jury, for it might well have been attributed to reckless negligence. When these prayers were offered the motorman had been on the stand and had unqualifiedly denied that he had made this statement or anything to that effect. It is true that he also gave an entirely different account of the accident, and if the jury believed him in all respects the company would have been entitled to a verdict.

But when an instruction to the effect that there is no evidence legally sufficient to entitle the plaintiff to recover is offered at the conclusion of all the testimony,—both the plaintiff's and defendant's,—the court must consider the whole evidence, and not that of the plaintiff alone, for that offered by the defendant may supply a defect in the proof of the plaintiff. *State, Harvey, v. Baltimore & O. R. Co.* 69 Md. 339. The jury may have believed the plaintiff's story, as to the circumstances of the accident, in all respects excepting the statement attributed to the motorman, and might have found that the motorman was simply negligently discharging his duties.

Indeed, if we take into consideration the verdict in connection with the defendant's third and fourth prayers, it is evident they in point of fact did so. The third prayer, which was granted, submitted the case on the theory presented by the motorman's testimony, and by the fourth the jury were instructed that if they believed the motorman, after he had seen the plaintiff's carriage and had completely stopped his car, "wantonly and maliciously and to gratify some private purpose, and not because it was necessary that he should again start said car in pursuance of his employment, again started said car and ran into plaintiff's carriage and frightened the plaintiff's horse, and caused the accident" the defendant was not responsible, and their verdict must be for it.

But the court could not say, as it was asked to do by defendant's second prayer, that "the plaintiff having testified on the stand that the motorman of the defendant wilfully and maliciously endeavored to injure him, the plaintiff is not entitled to recover in this action." It is true that he said he believed the motorman tried to murder him, but that was simply his opinion. Although we have examined many cases reflecting on

the question of the liability of the master, when the act of the servant is shown to be wilful and deliberate, including all of those cited by appellant, we have not found any in which the court took the case from the jury because the plaintiff testified or thought that the servant's act was wilful and malicious.

Juries must be governed by the facts as disclosed by the evidence, and reach their own conclusions, under the instructions of the court, and must not in cases like this render their verdicts on the mere opinions or conclusions of the witnesses, even if they be parties to the suit. So far as the plaintiff's evidence was concerned, that was to be taken in connection with the other evidence in the case.

If it be conceded that if the evidence of the plaintiff be true, it alone did not make out a case against the defendant, and that the evidence of defendant, if believed by the jury, was sufficient to acquit it of default (if that offered by the plaintiff be excluded), the difficulty still exists that the court in passing on the prayers was not authorized to consider the one and exclude the other, but was compelled to take all the testimony on both sides into consideration. We are therefore of the opinion that the court was right in rejecting these prayers.

2. There was also some evidence from which the jury might have reached the conclusion that there was negligence after the collision and while the horse was running away. A witness for the plaintiff testified that the horse was running rapidly, "and the car was right after it;" when they reached Gray's, that the car ran on rapidly, passed about 125 yards before it stopped. His attention was attracted by a noise up the road—someone cried out. Others testified to the same effect, and there was some evidence tending to show that someone on the car was making the noise.

One witness said the horse was running at the rate of 15 or 18 miles an hour, and that the car was keeping pace with the horse. The motorman admitted that he wanted to get close to the horse, so to stop him, if he could, although he said that the man in the buggy was holloing, and fixed a lower rate of speed than the plaintiff's witnesses did.

When the horse was stopped it was found that "the hind part of the wagon was jammed up into the front part" and the plaintiff was between the right front wheel and the shaft, his feet being caught under the seat, his stomach next to the shaft and his "rump" against the wheel, his head was dragging and the hair worn off the top of his head, which had a deep cut in it.

It is therefore quite possible that the injury sustained, at least some of it, was received after the collision and while the horse was running away. There was certainly some evidence tending to show negligence during that time, as the effort of the motorman to overtake the horse may have caused it to continue to run.

There may be some question as to whether
45 L. R. A.

the declaration was properly drawn to include negligence after the collision, but no reference is made to the pleadings in the prayers, and hence their correctness must be determined exclusively by a reference to the evidence. 2 Poe, Pl. § 302, and note, where many cases in this court to that effect are cited. By the seventh prayer the defendant itself submitted this question to the jury.

Being of the opinion that there was evidence of negligence after the collision to be submitted to the jury, we think these prayers were properly rejected for that reason, as well as those we have previously referred to, and no other question being urged before us the judgment will be affirmed.

Judgment affirmed, appellant to pay costs above and below.

Otillia CREAMER *et al.*, Appts.,
v.

John McILVAIN *et al.*

(.....Md.....)

1. The mere fact that horses ran away and an accident occurred will not justify an inference of negligence, without some evidence of the circumstances under which it occurred.
2. The fact that a horse ran away several years before, when only a colt, because of the breaking of a strap and the dropping down of the pole, making a report like a pistol or a gun, does not constitute any evidence of a disposition or proneness of the horse to run away.
3. Signs of being unruly which horses that had previously been gentle and easily managed exhibited during a drive will not require the owner to discontinue his drive and leave them at a place at which he has temporarily stopped, instead of driving them home, or permitting them to be driven by one of the party, who is a competent driver.

(June 20, 1899.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. Cabell Bruce, George Savage, and William R. Barnes, for appellants:

It is sufficient if the defendant has seen or heard of things which would suffice to convince a man of ordinary prudence that the animal was ill-disposed.

Shearm. & Redf. Neg. 5th ed. § 630.

Knowledge of bad conduct in other instances, or in another instance, is enough.

Arnold v. Norton, 25 Conn. 92; *Kittredge*

NOTE.—As to presumption of negligence from occurrence of accidents in general, including personal injuries on highways, see *note* to *Barnowski v. Helson* (Mich.) 15 L. R. A. 33.

v. *Elliott*, 16 N. H. 77, 41 Am. Dec. 717; *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Cockerham v. Nixon*, 11 Ired. L. 269; *Buckley v. Leonard*, 4 Denio, 500; *Mann v. Weiland*, 81* Pa. 243.

Slight circumstances are sufficient to establish the *scienter*. Marks on a stable panel are evidence of knowledge of the propensity of a horse to kick.

Simson v. London General Omnibus Co. L. R. 8 C. P. 390.

The mere fact that a dog was tied is sufficient evidence of knowledge to go to the jury.

Goode v. Martin, 57 Md. 606, 40 Am. Rep. 448.

Messrs. Gans & Haman and Vernon Cook, for appellees:

Evidence that a person is negligent on one occasion is no evidence that the same person is negligent in doing the same thing on another occasion.

Baltimore Elevator Co. v. Neal, 65 Md. 453; *Baltimore v. War*, 77 Md. 593.

Even if there were some evidence that Kemp was incompetent or negligent, how could this incompetence or negligence be, by any possibility, imputed to McIlvain, who was driving at the time of collision?

Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 59 Am. Rep. 159; *Baltimore & O. R. Co. v. State, Strunz*, 79 Md. 335.

The mere fact of a runaway horse is not *per se* evidence of negligence,—certainly not when the cause of the runaway is shown, and when that cause is something beyond the control of the defendant.

Here the runaway was caused by the unusual noise and buzzing sound made by the electric car.

2 *Shearn & Redf. Neg.* 647; *Benoit v. Troy & L. R. Co.* 154 N. Y. 223; *O'Brien v. Miller*, 60 Conn. 214; *Holmes v. Mather*, L. R. 10 Exch. 261; *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145; *Herrick v. Sullivan*, 120 Mass. 576; *Gottwald v. Bernheimer*, 6 Daly, 212; *Unger v. Forty-second Street & G. Street Ferry R. Co.* 51 N. Y. 499; *Sullivan v. Scripture*, 3 Allen, 564.

To show that a horse is prone to run away, there must be evidence of a fixed habit; one or two previous instances are not sufficient.

Kenyon v. Gilmer, 131 U. S. 24, 33 L. ed. 111; *Maggi v. Outts*, 123 Mass. 537; *Benoit v. Troy & L. R. Co.* 154 N. Y. 223.

Kemp could not be legally bound by any admission made by McIlvain.

Brinkley v. Platt, 40 Md. 529; 1 Jones, Ev. § 265; Taylor, Ev. § 751; *Eakle v. Clarke*, 30 Md. 322; *Walkup v. Pratt*, 5 Harr. & J. 52; *Cooke v. Waring*, 2 Hurlst. & C. 338.

The case should not go to the jury upon a mere scintilla of evidence.

State, Foy, v. Philadelphia, W. & B. R. Co. 47 Md. 87; Poe, Pl. 318.

Boyd, J., delivered the opinion of the court:

The appellants sued the appellees for injuries sustained by Mrs. Creamer as the result of the horses drawing a vehicle occupied 45 L. R. A.

by the appellees running into one in which the appellants were riding.

There are two counts in the declaration—the first alleging that “the defendants, because of their negligence and incompetency to properly drive horses, so negligently and unskillfully managed a team by which they were being conveyed in the same direction that said team struck the vehicle in which the plaintiffs were seated,” and the second that “a vehicle under the management of the defendants, and drawn by two horses which the defendants knew to be prone to become uncontrollable and to run away, ran into and struck with great violence the vehicle in which the plaintiffs were seated, said horses having become uncontrollable, and ran away because of their proneness to become uncontrollable.” At the trial of the case the court below granted two prayers—the first in substance instructing the jury that there was no evidence legally sufficient to entitle the plaintiffs to recover under the first count, and the second being to the same effect as to the second count. Having stated the two grounds for recovery relied on by the plaintiffs, we will consider them in the order they are presented in the declaration.

1. The evidence shows that Mr. Kemp was the owner of the horses and the vehicle in which he and Mr. McIlvain were riding. They had been taking a drive and were returning to the city of Baltimore by way of the Pimlico road. Mr. Kemp drove until they reached a house on the roadside known as “Halstead’s,” where they determined to stop. Before reaching Halstead’s, from the direction they were coming the road on the right was made of soft dirt the middle being macadamized, and there being an electric railway on the other side. There was some difference of opinion between the witnesses as to the speed of the horses as they approached and drove into Halstead’s, but the evidence on the part of the plaintiffs was for the most part to the effect that they were moving very rapidly—so much so that some of the witnesses thought that at least one of them was running as they turned into that place.

The testimony of several was that Mr. Kemp, who was driving at the time, lost control of the horses and dropped one of the lines, and although that was denied by the appellees, who undertook to explain how one of the lines came off Mr. Kemp’s hands, it may well be conceded that if the injury complained of had happened as they approached or drove into Halstead’s the alleged negligence of the appellees—certainly of Mr. Kemp—would necessarily have been a question for the consideration of the jury. For although it is shown that it is customary for those driving fast or spirited horses to “speed” them on that dirt road, it is a part of the public road, and if persons drive at such rate as the testimony shows these parties were on the road and as they went into Halstead’s, which is a place of public resort, it would not have been within the province

of the court to say that there was no evidence of negligence, if a collision had occurred by reason of such fast driving at those points as is disclosed by the record. But the accident did not happen there.

The appellees, after having had their horses taken in charge by the hostler, went into the house and remained there some time. Mr. Creamer said he and his wife remained there probably five minutes after the appellees arrived; that they drove a short distance out on the road, when they turned and drove towards the city. Mr. Kemp testified they stayed there "some little time" before starting, and Mr. McIlvain said he supposed it was ten or fifteen minutes. When they started Mr. McIlvain drove, according to the evidence of Mr. Kemp and himself, because the former was not well, and was suffering from a pain in his side. After going down the road about a half mile, one of the horses became frightened at an electric car, which was making an unusual noise, and jumped against the other horse, and the two started to run. When they were about three quarters of a mile from Halstead's, they ran into the vehicle which the appellants were driving, which caused the injury complained of.

From the time they left Halstead's there is not a particle of evidence of negligence on their part. It is true that one of the witnesses for the plaintiff said, in speaking of their leaving Halstead's, that "they went off in a kind of a flurry." Just what he meant by that is not very clear, but in speaking of the way they came into Halstead's the same witness said, "they came in with a little flurry, that is, a little extra;" but he also said, "I don't think they came at a very fast rate of speed; as far as the rate of speed they came in is concerned they came in as a pair of spirited horses;" but his opinion was that they did not know "how to handle horses." Mr. McIlvain said: "I drove from Halstead's, and they acted very gentle with me." Although some of plaintiffs' witnesses thought that the horses were not properly managed as they entered Halstead's, the uncontradicted testimony shows that at that time Mr. Kemp was driving, whilst Mr. McIlvain drove after they left that place and was driving when the accident happened. Nor was it attempted to be denied that Mr. McIlvain had been driving horses constantly for ten or twelve years, and had frequently driven those which caused this accident.

No evidence was offered even tending to prove that either Mr. Kemp or Mr. McIlvain was not a competent driver, excepting the opinions of some of the witnesses formed from the manner in which the horses were managed as Mr. Kemp drove into Halstead's, and one of the plaintiffs' witnesses said that he could not form an opinion as to whether a man is a careful and prudent driver by seeing him drive once. But if it be conceded that he was incompetent, there was no attempt to show that Mr. McIlvain was, and, as we have already said, there is 45 L. R. A.

no evidence of negligence after they left Halstead's, where he commenced driving. We can therefore have no hesitation in reaching the conclusion that the court was right in granting the defendants' first prayer.

2. The plaintiffs did not offer any evidence as to the proneness of the horses to run, excepting what occurred at Halstead's and the testimony of Mr. Kuhlman, who spoke of an alleged admission by Mr. McIlvain which we will refer to later on. When Mr. Kemp was on the stand, however, he said that "on one occasion, not after they were broken horses, but when they were a pair of colts, not three years old (I had not had them in harness more than three times, I don't think), I started out from the place with them, my sister being with me, and we were crossing over a bridge and that shook the pole and the yoke strap broke and the pole dropped down and made the report of a pistol or a gun going off, naturally the colts took fright and ran; . . . that was between five and six years before the accident in question. After that I never had the slightest bit of trouble with them; they never showed any sign of fright or tried to run away up to the time of that accident." It is contended that their running then was some evidence of their proneness to run off; but, even if it be conceded that the mere fact that a horse has run away once may be some evidence of its disposition to run, if there be no explanation of the circumstances, the one occasion shown by the record is so fully explained that it is impossible to find, or even to infer, from that, that there was any tendency in them to run.

A colt that would not run under the circumstances described would be an exception. The testimony offered on the part of the defendants, which is uncontradicted, shows beyond all question that from that occasion until the day of the accident complained of they were gentle and easily managed. A sister of Mr. Kemp had driven them since she was fifteen years of age, and although when in the city she usually had a companion, which, to use her language, "was simply a matter of taste with me that I did not drive alone in the city," she did drive them alone, or with a lady companion in the country. One witness, apparently experienced in the use of horses, spoke of them as "perfectly gentle but spirited horses;" another, who had driven them, said "there was not the slightest indication of their trying to run away;" another, who had ridden behind them a number of times, said "they never showed any disposition whatever to run away, or any signs of viciousness of any kind;" and still another testified "they were perfectly quiet and gentle."

The record therefore not only fails to show any proneness in the horses to run, excepting on the one occasion spoken of when they were under three years of age, but there is abundant affirmative proof of a contrary disposition. If horses must be kept off the public highways because they ran away when

colts under such circumstances as those described, our streets and public roads would soon have to be given up to horseless vehicles, for no one would be safe in the use of horses if he must be held responsible for an accident simply because they ran away when colts under such conditions as those spoken of. We do not understand that any of the authorities go to such a dangerous length, and we will briefly consider some of those cited by the counsel for the respective parties to this case.

In *Arnold v. Norton*, 25 Conn. 92; *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717; *Loomis v. Terry*, 17 Wend. 496, 31 Am. Dec. 306; *Buckley v. Leonard*, 4 Denio, 500; and *Mann v. Weiland*, 81* Pa. 243, cited by the appellants,—the liability of the owners of dogs was under consideration, and although in some of them it was held that there is no rule which requires any particular number of instances of unprovoked biting to prove a mischievous disposition in a dog to bite mankind, and that one instance might be sufficient under some circumstances, they do not go to the extent of holding that one such attack by a dog would be sufficient evidence of such disposition if the facts disclosed that the dog was provoked or that the biting was under circumstances that would not indicate a mischievous propensity.

We will not stop to emphasize the fact that in all those cases dogs, and not horses, were being considered, or to comment on the distinction made in the authorities between dogs and horses. In *Cockerham v. Nixon*, 11 Ired. L. 269, which was a case of a bull injuring the plaintiff's horse, it was held that when the owner of an animal knows, or has good reason to believe, that he is likely to do mischief, he must take care of him, and that it makes no difference whether the ground of suspicion arises from one act or from repeated acts, but it was also said that the act done must, however, be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of.

In *Simson v. London General Omnibus Co.* L. R. 8 C. P. 390, the plaintiff was a passenger in the omnibus of the defendant, and the court held that there was sufficient evidence of negligence to justify the lower court in submitting the case to the jury. There the plaintiff was injured by the kick of one of the horses, but it was proved that the omnibus bore evidences of other kicks, and that no precaution had been taken by the use of a strap or otherwise against the possible consequences of a horse kicking, and no explanation was offered by the defendant. In *Benoit v. Troy & L. R. Co.* 154 N. Y. 223, the general principles governing the liability of the owner of domestic animals for personal injuries caused by them are discussed, and, after referring to injuries caused by kicking, biting, or other vicious propensities of such animals, which are known to the owner, and how such knowledge may be

brought home or imputed to him, the court said: "In the absence of such knowledge or notice an injury caused by such animal gives no right of action, but when the vicious habit or character of the animal becomes known to the owner, and he thereafter continues to keep the animal, he keeps it at his peril, and renders himself liable for any subsequent injury to another caused by its viciousness."

That court also held that there was error in the court below in submitting to the jury the fact that the horse had run away on a previous occasion as evidence of a propensity to run, and added that "we think the rule laid down by the court on the trial extends beyond reasonable limits the liability of owners of horses, and imposes a burden not sanctioned by any case which has come to our notice." In *O'Brien v. Miller*, 60 Conn. 214, it was held that the mere fact that a team was running away did not, as a matter of law, raise a presumption of negligence on the part of the driver. In *Unger v. Forty-second Street & G. Street Ferry R. Co.* 51 N. Y. 499, the court said that the explanation of the defendant's witnesses as to how the runaway happened, which was uncontradicted, sufficiently explained the transaction to acquit the defendant of negligence. See also *Holmes v. Mather*, L. R. 10 Exch. 261; *Manzoni v. Douglas*, L. R. 6 Q. B. Div. 145; *Cadwell v. Arnheim*. 152 N. Y. 184.

Other cases might be cited, but the above are sufficient to show the views that have generally been taken by the courts, and we know of no authority that would justify the court in permitting a jury to infer negligence simply because the defendant's horses ran away and an accident happened, without some evidence of the circumstances under which it occurred. A horse of ordinary spirit that will not run away under any circumstances would be a rare animal, and to hold that simply because one did run off on one occasion a jury would be justified in finding that he was vicious, wild, or prone to run would enable jurors to find verdicts on mere speculation and guesses, instead of evidence. We have already said enough to indicate that we do not think that the running off when these horses were colts, the cause of which was explained, can be fairly used as any evidence of a disposition or proneness to run off, and what occurred at Halstead's would likewise be no guide for the jury in passing on that question, as the testimony of the witnesses shows a cause for their action on that occasion.

3. The only other question we need consider is the effect of the evidence of Mr. Kuhlman—whether that requires the court to submit the case to the jury. He testified that a few days after the accident he met Mr. McIlvain on the street and talked with him about the accident; that McIlvain said the horses were vicious animals and that Kemp was afraid to drive them in from Halstead's and wanted to leave them there and send for a hostler, but that he, McIlvain, in-

sisted that they drive them in, and on cross-examination testified that McIlvain said: "We had no business driving the horses and he (the witness) thought he said: "We will take chances and drive these horses in."

Both of the defendants denied that such statements were made, but in passing upon these prayers we must accept his statement in connection with his other evidence as correct. He testified that he could not say that Mr. McIlvain admitted or indicated that they had ever had any previous trouble with the horses, and it is perfectly apparent that what was said as to their being vicious was in connection with the accident, which resulted, not only in injuring both of the plaintiffs, but Mr. Kemp, who was more seriously injured than they were. Considering the results, Mr. McIlvain might well have regretted that they had driven the horses into town, and might even have thought that they proved to be vicious on that occasion, but if he was a competent driver and the horses had always been gentle and easily managed prior to that time, and he knew of no previous attempt by them to run away, there was no reason why he should have hesitated to drive them into the city from Halstead's.

As we have seen, Mr. Kemp was suffering at the time from a pain in his side, and he had been sick for some time. His physical condition might therefore have made him timid about driving the horses after they showed some spirit at Halstead's, but if Mr. McIlvain was a competent driver, there was no reason why the appellees should be held responsible simply because they drove the

horses into the city instead of leaving them at Halstead's. Even if it be conceded that the horses were somewhat unruly, or even inclined to run as they went into Halstead's, under the circumstances we have stated, we are not prepared to say that the appellees rendered themselves liable for an accident that happened as this did, because they did not send for a hostler and let him take them into the city.

It could hardly be contended that it was the duty of the appellees to leave them at Halstead's on account of their behavior there. It would be carrying the responsibility of the owner of horses to an unwarranted extent to hold that if horses, which had previously been gentle and easily managed, showed signs of being unruly while being driven, he must discontinue that drive and not be permitted to take them home.

So if we place the construction upon the language testified to by this witness that would be most favorable to the appellants we do not think it can so far overcome the positive and uncontradicted evidence as to the disposition of the horses, the competency of Mr. McIlvain to handle them, and the circumstances attending the accident as to justify the court in submitting the case to the jury on these alleged admissions alone, the meaning of which is at least doubtful, and outside of them there was nothing which could properly cause the court to hesitate to grant the instructions given. We will therefore affirm the judgment.

Judgment affirmed, costs below and in this court to be paid by the appellants.

MICHIGAN SUPREME COURT.

Fanny E. DOXTATOR

v.

CHICAGO & WEST MICHIGAN RAILWAY
COMPANY, *Plff. in Err.*

(.....Mich.....)

A railroad company is not liable for failure to deliver to the representatives of a person killed in its service fragments necessarily amputated from his body because of an accident which resulted in his death because its employees summoned ambulance and surgeon, and its surgeon performed the amputation at the hospital to which he was removed by those in charge of the ambulance upon his request not to be taken home, where the fragments were cremated according to the custom of the hospital without the knowledge or direction of the company's surgeon.

(July 11, 1890.)

ERROR to the Superior Court of Grand Rapids to review a judgment in favor of plaintiff in an action brought to recover dam-

NOTE.—For replevin to obtain possession of a corpse, see *Keyes v. Konkel* (Mich.) 44 L. R. A. 242.

45 L. R. A.

ages for defendant's failure to turn over to plaintiff a portion of the remains of her husband, who was killed while in the service of defendant. *Reversed.*

The facts are stated in the opinion.

Mr. William Alden Smith, with **Mr. F. A. Nims**, for plaintiff in error:

Though the heir has a property in the monument and escutcheons of his ancestors, yet he has none in their body or ashes, nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains when dead and buried.

2 Bl. Com. chap. 28, *429.

While a dead body is not properly in the strict sense of the common law, yet the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect; and any violation of it will give rise to an action for damages.

8 Am. & Eng. Enc. Law, 2d ed. p. 834; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85; *Foley v. Phelps*, 1 App. Div. 551; *Burney v. Children's Hospital*, 169 Mass. 57, 38 L. R. A. 413.

The authority conferred upon the chief sur-

geon and other surgeons of the defendant railway company was not shown.

The court cannot presume the nature and extent of the authority of a railway surgeon. Therefore, the court will not presume that the railway surgeon had authority to employ an assistant.

Burke v. Chicago & W. M. R. Co. 114 Mich. 685.

The defendant company did not, nor did its surgeons, direct the disposal of the amputated limbs, nor in any manner ratify their disposition. Therefore, a verdict should have been directed for the defendant company in accordance with its request.

The defendant company is not liable, even if its surgeons did direct the cremation of the amputated limbs and shoes. Such action would have been beyond the scope of their authority.

Stevens v. Woodward, L. R. 6 Q. B. Div. 318; *Adams v. Cost*, 62 Md. 264, 50 Am. Rep. 211; *Haggerty v. Flint & P. M. R. Co.* 59 Mich. 366, 60 Am. Rep. 301; *Keating v. Michigan C. R. Co.* 97 Mich. 154; *Callahan v. Hyland*, 59 Ill. App. 347; *Thiele v. Newman*, 116 Cal. 571.

There is a strong moral obligation resting upon anyone engaged in a dangerous business to do what may be immediately necessary to save life or prevent an injury becoming irreparable when an accident happens to a person in his employ.

Marquette & O. R. Co. v. Taft, 28 Mich. 289.

The defendant company did not stand in the relation of a stranger to its injured servant, and in the great emergency which had suddenly occurred, the yard foreman, as the servant of the company highest in rank present, must necessarily act immediately to procure surgical assistance for the servant of the company who had his limbs crushed off by the car wheels.

Terre Haute & I. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752.

Messrs. McGarry & Belden, with *Messrs. Brown & Adams*, for defendant in error.

Montgomery, J., delivered the opinion of the court:

This case presents a question which has never had the attention of this court, and one which, in some of its aspects, has not been considered by any other court of last resort, so far as we are advised. The plaintiff sues to recover damages on account of having been deprived of the right to give the remains of her deceased husband a Christian burial, and alleges that she was deprived of this right by the wrongful act of the defendant. At the common law there was said to be no property in a dead body, and in one sense this may still be deemed an accurate technical statement; but it has been held in a number of well-considered American cases that the one whose duty it is to care for the body of the deceased is entitled to possession of the body, as it is when death comes, and that it is an actionable wrong for another to interfere 45 L. R. A.

with that right by withholding the body or mutilating it in any way. *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85; *Foley v. Phelps*, 1 App. Div. 551; *Burney v. Children's Hospital*, 169 Mass. 57, 38 L. R. A. 413; 8 Am. & Eng. Enc. Law, 2d ed. p. 834. This right is conceded. Another question, not discussed in the original brief of appellant, although adverted to in his supplemental brief, may be whether, under the facts as claimed by plaintiff, the right of action exists in the widow for the destruction of fragments amputated from the body of her husband during his lifetime, when the evidence discloses the fact that such destruction occurred during the lifetime of the husband. As this question was not at all discussed in the original brief of counsel, we pass it by, and direct our attention to the points raised; and for the understanding of these points a brief statement of the facts is essential: On the morning of June 2, 1897, Thomas A. Duxtator was working as a switchman with a gang of men in charge of John Dozeman, foreman of the West Side yards of the Chicago & West Michigan Railway Company. At about 6:30 A. M. Duxtator was run over by the cars and fatally injured. His injuries were extensive. His right leg was crushed from the ankle to the knee. The bone protruded, and the foot hung only by the muscular attachments. The left leg was crushed from the lower third up to about the middle third of the thigh, and the pelvis bone was also broken. Foreman Dozeman was the first to reach Mr. Duxtator, and he called witness Strickland to hold his head while Dozeman called the doctor and the ambulance. Dozeman called Dr. G. K. Johnson who was at that time chief surgeon for the Chicago & West Michigan Railway Company. He also notified police headquarters to send the ambulance at once, and then notified the company's agent at the Allen street freight house (Mr. Hatch), who also telephoned to the doctor. Duxtator requested that he should not be taken home, as the shock would kill his wife. He requested to be taken to a Catholic hospital. One witness testified that witness Strickland promised that he should be taken to a Catholic hospital, without naming which one. Strickland, however, testified that he did not remember whether Duxtator so requested or not. The custom of the railway company, as stated by Dr. Johnson, is to take the patient to whichever hospital he prefers. The ambulance arrived about twenty-five minutes after the accident had occurred. It was in charge of Patrolman John Scoby. While in the ambulance, Duxtator requested to be taken to a Catholic hospital. Patrolman Scoby thought it was nearer to Butterworth Hospital, and so took him to that place, accompanied by Switchman Strickland. Neither Duxtator nor Strickland raised any objection to his so doing. They reached the hospital at five minutes to seven in the morning. The hospital force called Dr. Lupinski, who, on the arrival of Dr. Wooster, turned the case over to the latter. Dr. Wooster had exclusive control

of the case, and was working under a general employment by the Chicago & West Michigan Railway Company. With the assistance of Dr. Lupinski and of Dr. Smith, the house physician of the hospital, he amputated the legs at about 8 o'clock in the morning. From the nature of the case, the doctors knew that the wound was necessarily fatal. The left leg was taken off near the thigh; the right leg, below the knee. Neither Dr. Lupinski nor Dr. Smith was employed by the railroad company, but Dr. Lupinski assisted in the operation without any special agreement, having been called by the hospital. One Clarence L. Brainard, the orderly of the hospital, attended upon the surgeons, and testified for the plaintiff that he burned the fragments about 9 or 10 o'clock in the morning. He testified that he asked, in the presence of Dr. Lupinski and Dr. Wooster, what he should do with the fragments; that Dr. Lupinski replied, and that he had no instructions from any other physician; that, when he asked Dr. Lupinski what to do with the fragments, Dr. Lupinski inquired what was usually done with such fragments, and, being told by the orderly that they were usually burned, directed the orderly to do as he had been accustomed to do. Dr. Wooster testified that he knew nothing of the disposition of the fragments, and had nothing to do with it. That he gave no instructions whatever regarding them, and did not know of their whereabouts or disposition.

The theory of the plaintiff is that, when the railroad company lifted Doxtator from the ground, it took upon its shoulders a duty, and that duty was to care for him while he should live, and at his death deliver his remains, and the whole of them, over to his wife for burial; that the company did not do this, but, instead, negligently allowed the cremation of the dismembered limbs, and is therefore liable to the widow in damages. It becomes important, therefore, to inquire just what duty the railroad company was under, and just how far it assumed control over the injured man. This question must, in the main, be determined as one of first impression, as no case analogous has been cited, and our research has not been more successful that that of the learned counsel on either side of the case, who are to be commended for the exhaustive examination which they have given the subject. When this accident occurred, the common instincts of humanity forbade that this injured man be left to lie where he had fallen. His fellow workmen or any stranger would be impelled to minister to him, and the first impulse would be to call a surgeon and an ambulance, and see that he was taken where he could be treated. The yard foreman performed this plain duty, by notifying Dr. Johnson, the surgeon of the road, and calling the ambulance from police headquarters. By doing so, neither the foreman nor the railroad company can be said

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to have become bailee, or to have assumed such a control over the injured man as to preclude the relatives from assuming charge of the ministrations to him. But by Doxtator's own request he was not taken to his home. The policeman in charge of the ambulance evidently did not look to the yard foreman or any other official for his instructions. It was at his suggestion, and without dissent from Doxtator or his fellow workman, Strickland, that he was taken to Butterworth Hospital, instead of to a Catholic hospital. On arriving at the hospital the hospital authorities took charge of him and called Dr. Lupinski. Had Dr. Wooster not appeared, could it be successfully contended that those connected with the railroad company had done more than humanity required, or had rendered the company liable for any further neglect of, or injury to, the unfortunate man? To admit such a contention would amount to punishing one for ministering to the comfort of a distressed fellow creature. Such cannot be held to be the obligation of those concerned in removing this unfortunate man to an appropriate place for treatment. They did precisely what they ought to have done, and are to be commended, rather than censured, for so doing. What, then, was the obligation assumed by Dr. Wooster? He found the patient in an appropriate hospital, with another surgeon in attendance, and, as he says, assumed charge of the case. Dr. Lupinski continued to assist. Did Dr. Wooster, by thus assuming charge of the case, take upon himself, as the agent of the railroad company, the duty of seeing to it that, when death ensued, the body should be delivered to the widow, or did his duty consist merely of performing such operations as the nature of the case required, leaving it to the attendants at the hospital to make such disposition of the parts amputated as custom warranted? We are of the opinion that the duty assumed by Dr. Wooster was the latter kind, merely, and that neither in purpose nor in fact did he assume to take charge of the dismembered parts. The assumption of the charge of the case was simply assuming charge of the operation, and the operation was performed under the conditions as Dr. Wooster found them. The patient was in a reputable hospital. Dr. Wooster had no knowledge of any direction as to the disposition of the amputated parts, and was not in fault in not assuming and guarding against an unwarranted disposition of them. Under the testimony, the defendant was entitled to a directed verdict.

Judgment will be reversed, and a new trial ordered.

Grant, Ch. J., did not sit.

The other Justices concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

President, etc., of DELAWARE & HUDSON
CANAL COMPANY

v.

Dorothea W. MAHLENBROCK, Admr.,
etc., of John H. W. Bose, Deceased, Plff.
in Err.

(.....N. J.....)

1. A sale of coal made on an order and guaranty sent by mail from one state to another is not within the corporation act of 1896, § 97, restricting the business of foreign corporations in that state.
2. A single transaction involving a purchase of coal on credit, with a guaranty by a third person, does not constitute "transacting any business" within the meaning of the New Jersey statute requiring certain acts of foreign corporations "before transacting any business in the state."

(June 26, 1899.)

ERROR to the Supreme Court to review a judgment in favor of defendant in an action upon a contract to guarantee payment of the price of coal sold by plaintiff to H. H. Apman & Company. *Affirmed.*

The facts are stated in the opinion.

Messrs. Queen & Tennant, for plaintiff in error:

Statutory provisions requiring foreign corporations to file papers before transacting business are constitutional; they do not come within the inhibition of the 2d section of the 4th article of the Constitution of the United States which provides that the "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Corporations are not citizens within the meaning of this section of the Constitution.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357.

The making of a single loan secured by mortgage by a corporation which had not complied with the conditions was within the prohibition in such a sense that an action to foreclose a mortgage could not be maintained in the domestic courts.

6 Thomp. Corp. § 7936; *Farrior v. New England Mortg. Security Co.* 88 Ala. 275; *Lasher v. Stimson*, 145 Pa. 35; *McCanna & F. Co. v. Citizens' Trust & Surety Co.* U. S. Cir. Ct. of App. 3d C. (not rep.).

The contract was made in New Jersey.

Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 479; *Dundee Mortg. & T. Invest. Co. v. Nixon*, 95 Ala. 321.

There was a proper question of fact for the jury to determine, whether the contract was or was not made in New Jersey, and the court erred in refusing to allow the jury to consider that question.

Columbia F. Ins. Co. v. Kinyon, 37 N. J.

NOTE.—On the question what constitutes dealing or carrying on business, see *note* to *State v. Ray* (N. C.) 14 L. R. A. 529. 45 L. R. A.

L. 33; *Stewart v. Northampton Mut. Live Stock Ins. Co.* 38 N. J. L. 436.

The law is a reasonable one, and must be construed in favor of residents of the state, and against foreign corporations which seek our trade and protection, and yet persist in noncompliance with our laws.

Tatem v. Wright, 23 N. J. L. 429.

Mr. Frank B. Colton, for defendant in error:

The evidence discloses nothing limiting the right of plaintiff, a foreign corporation, to bring this action and recover therein.

A foreign corporation may maintain personal actions in the courts of New Jersey, except as such right has been expressly limited by legislative enactment.

Bennington Iron Co. v. Rutherford, 18 N. J. L. 158.

The evidence fails to show that this action is within the prohibition contained in the act of March 14, 1895.

There is no proof of any other transaction by plaintiff. No part of that business was transacted in New Jersey. The contracts of sale were made in New York.

Murphy Varnish Co. v. Connell, 10 Misc. 553; *American Broom & Brush Co. v. Adickes*, 19 Misc. 36; *National Knitting Co. v. Bronner*, 20 Misc. 125; *Novelty Mfg. Co. v. Connell*, 88 Hun. 254; *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559; *Lamb v. Bowser*, 7 Biss. 315; *Hyde v. Goodnow*, 3 N. Y. 266.

The statute contemplates, not the doing of some single act of business, but some substantial part of the regular and customary business of the corporation.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137; *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 17; *Potter v. Bank of Ithaca*, 5 Hill, 490; *Campbell Printing-Press & Mfg. Co. v. Hering*, 139 Pa. 473.

Even if it be a "contract," as that word is used in the statute, it was not made by plaintiff. It was executed by Bose alone, and contains only a unilateral agreement by him. There is in it no promise or undertaking by plaintiff.

Tallapoosa Lumber Co. v. Holbert, 5 App. Div. 559; *Fuller & J. Mfg. Co. v. Foster*, 4 Dak. 329.

Actions by foreign corporations upon contracts made out of the state are not prohibited.

M. B. Faxon Co. v. Lovett Co. 60 N. J. L. 128.

The act of 1895 cannot be so construed as to exclude from the state a foreign corporation engaged in interstate commerce, or to limit or regulate the same. Such construction would render it unconstitutional.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *McCall v. California*, 136 U. S. 104, 34 L. ed. 392; *Murphy Varnish Co. v. Connell*, 10 Misc. 553.

Depue, J., delivered the opinion of the court:

The Delaware & Hudson Canal Company is a corporation created by the laws of Pennsylvania. Its principal office is at Rondout, New York, with a branch office in New York City, under the management of William S. Rodie, an agent. The company is engaged in the mining and sale of coal at Honesdale, Pennsylvania. The firm of H. H. Apman & Co. are coal dealers at Jersey City. Bose, in his lifetime, resided in Jersey City. The firm of H. H. Apman & Co. applied to an agent of the coal company to purchase coal on credit. Credit was refused unless satisfactory security for payment was furnished. Rodie, the plaintiff's agent, prepared a written guaranty, which was sent to Henry A. Apman, a member of the firm of H. H. Apman & Co. The guaranty was signed by Bose in Jersey City, the signature being obtained by John Apman, another member of the firm. An order for the coal was made out by the Apmans, and sent by mail from Jersey City to the company's address at Rondout. The coal was shipped by the plaintiff from Honesdale, Pennsylvania, consigned to Apman & Co. at Jersey City. The unpaid bill for the coal amounted to \$933.88. The suit is upon the guaranty. At the trial the learned judge directed a verdict for the plaintiff, and this writ of error was sued out by the defendant on exceptions to his instruction. The plaintiff has not filed in the office of the secretary of state the statement required of foreign corporations transacting business in this state by § 97 of the corporation act of 1896. P. L. 1896, p. 307; Dill, N. J. Corp. § 97. The defense was that, by force of § 98 of the act, the plaintiff was disabled from maintaining its action in this case. The contract on which the plaintiff agreed to sell the coal to Apman & Co. was conditional on the furnishing of satisfactory security. Until the guaranty came to and was accepted by the company, the contract between these parties was not concluded. It does not distinctly appear in the evidence in what manner the guaranty was sent to the plaintiff. The fair inference is that it was mailed to Rondout with the order for the coal. If that be so, the statute does not apply to this transaction. It was so decided by the supreme court in *M. B. Faxon Co. v. Lovett Co.* 60 N. J. L. 128.

The important question is whether, upon the proper construction of the statute, it would control in this case, if the guaranty had been made and delivered in this state, so that the contract between these parties would be a contract made by a foreign corporation within the state of New Jersey. The section of the act referred to provides that "every foreign corporation, except banking, insurance, ferry, and railroad corporations, before transacting any business in this state, shall file in the office of the secretary of state a copy of its charter or certificate of incorporation attested," etc., "and a statement attested," etc., "of its capital stock authorized and the amount actually issued, the character of the business which

it is to transact in this state, and designating its principal office in this state and an agent," etc., "upon whom process against such corporation may be served," etc.; "and upon the filing of such copy and statement the secretary of state shall issue to such corporation a certificate that it is authorized to transact business in this state and that the business is such as may be lawfully transacted by corporations of this state," etc. Section 100 provides that "every foreign corporation transacting any business in any manner whatsoever, directly or indirectly, in this state, without having first obtained authority therefor," etc., "shall for each offense forfeit to the state the sum of \$200, to be recovered with costs in an action prosecuted by the attorney general in the name of the state." Section 98 provides that "until such corporation so transacting business in this state shall have obtained said certificate of the secretary of state it shall not maintain any action in this state upon any contract made by it in this state." Section 101 provides that "when by the laws of any other state or nation any other or greater taxes, fines, penalties, license fees, or other obligations or requirements are imposed upon corporations of this state doing business in such state or nation," etc., "so long as such laws continue in force in such foreign state or nation the same taxes, fines, penalties, license fees, obligations, and requirements, of whatever kind, shall be imposed upon all corporations of such other state or nation doing business within this state." There was no proof in this case that the plaintiff had transacted any business in this state other than the transaction in question. The case turns upon the construction of the statute, and the meaning of the words "transacting any business."

In *Hoagland v. Segur*, which was an action on a covenant, in a contract for the sale of a "banking business," that the covenantor would "withdraw from the business of banking, and not engage in the same at any time within ten years," and in the clause liquidating the damages the words used were, "to abandon, abstain from, and not engage in, the business of banking," it was held that the term "business" did not denote a single act of receiving deposits, but the aggregation of acts which fairly constituted the occupation of a banker; that it was a word frequently used as synonymous with "occupation, and signified more than the doing of acts which are usually done by persons engaged in the pursuit of a particular calling. 38 N. J. L. 230-237. In *Stone v. United States Casualty Co.* the suit was on a policy of life insurance which contained a condition that "changing occupation, profession, or employment to a more hazardous exposure" should render the policy void. The court construed the words "changing occupation," etc., as meaning engaging in another employment as usual business. Chief Justice Beasley, in delivering the opinion of the court, said: "The language has respect to employments, and not to individ-

ual acts." 34 N. J. L. 371-375. Where the charter of a bank provided that its operations of discount and deposit should be carried on in the village of Ithaca and not elsewhere, and the cashier discounted a note at the city of New York for the purpose of securing a demand due the bank, it was held that the restriction in the charter related only to the customary and permanent business operations of the bank, and not to an isolated transaction, like the one in question. *Potter v. Bank of Ithaca*, 5 Hill, 491; *Suydam v. Morris Canal & Bkg. Co.* 6 Hill, 217. In *Cooper Mfg. Co. v. Ferguson* the Supreme Court of the United States, in construing a provision of the Constitution of Colorado that "no foreign corporation should do any business within this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process might be served," and an act of the legislature of the state to give effect to that clause of the Constitution, which provided that foreign corporations should, before they were authorized to do any business in the state, make and file a certificate similar to the certificate required by our act, held that the contract made by a corporation of Ohio in Colorado, to manufacture machinery in Ohio and deliver it in Ohio, did not constitute a carrying on of business in Colorado, and was not forbidden by its Constitution and law. In the opinion of the court, Mr. Justice Woods used this language: "Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent as required by the statute. The Constitution requires the foreign corporation to have one or more known places of business in the state before doing any business therein. This implies a purpose, at least, to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the state. To have known places of business, it must be carrying on, or intending to carry on, business. The statute passed to carry the provision of the Constitution into effect makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the state where the business of the corporation is to be carried on. . . . The making in Colorado of the one contract sued on in this case by which one party agreed to build and deliver in Ohio certain machinery, and the other party to pay for it, did not constitute a carrying on of business in Colorado." 113 U. S. 727-734, 23 L. ed. 1137-1139. The statute in New York [General Corporation Law, § 15] enacts that "no foreign stock corporation, other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it 45 L. R. A.

to do business in this state" with a section similar to our act prohibiting foreign corporations which have not complied with the statute from bringing suits in the state courts on any contract made in the state. The courts of New York, in construing this statute, have held that procuring in New York orders for goods by traveling agents of a foreign corporation, which orders are to be transmitted to the home office of the corporation for approval, after which the goods are to be shipped from the home office to the buyer in New York, did not constitute doing business within the meaning of the statute. *Murphy Varnish Co. v. Connell*, 10 Misc. 553; *Tallapoosa Lumber Co. v. Holbert*, 5 App. Div. 559; *American Broom & Brush Co. v. Addicks*, 19 Misc. 36; *National Knitting Co. v. Bronner*, 20 Misc. 125. Mr. Thompson says: "Many of the constitutional provisions and statutes under consideration prohibit foreign corporations from doing or carrying on business within the state, unless they have previously complied with the conditions therein named; and the question has frequently arisen under them, What constitutes a doing or carrying on of business within their meaning? The general conclusion of the courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens of another state, are not a doing or carrying on of business by a foreign corporation within the latter state; but that these prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents and engaging in the general prosecution of their ordinary business therein." This statement of the law is vouched for by the citation of many cases. 6 Thomp. Corp. § 7936. A collection of cases on this subject will be found in the note to 5 Am. & Eng. Enc. Law, p. 71, title *Business*, and in 8 Am. & Eng. Enc. Law, p. 346, under the title of "Foreign Corporations." The courts of Alabama construe the words in its Constitution, "doing any business in this state," as applying to a single act of business, if it be in the exercise of a corporate function, and that, therefore, the making of a single loan, secured by mortgage, by a corporation which had not complied with the conditions, was within the prohibition, and an action to foreclose the mortgage could not be maintained in the domestic courts. *Farrior v. New England Mortg. Security Co.* 88 Ala. 275; *Mullens v. American Freehold Land Mortg. Co.* 88 Ala. 280.

On a consideration of the entire legislation on this subject, the construction of our statute seems to be clear. The statute requires the filing by the corporation of a copy of its charter, and a statement of the amount of capital stock authorized and the amount actually issued, the character of the business which it is to transact in this state, and designating its principal office in this state. The remarks of Mr. Justice Woods in *Cooper Mfg. Co. v. Ferguson* apply directly to the language contained in this section. A statement of

the amount of capital stock authorized and the amount actually issued would be an appropriate requirement if the corporation were to engage in business in this state, but inapt so far as relates to a single isolated transaction. "The character of the business which it is to transact in this state" and the designation of its principal office in this state plainly imply the "engaging in business" in the sense in which that term was defined in *Hoagland v. Segur*. The purpose of the certificate issued by the secretary of state is to authorize the corporation "to transact business in this state," and that officer is required to certify that the business is such as may be lawfully transacted by corporations of this state. These several provisions, as applied to a single isolated transaction like the one in question, would be inappropriate. A construction which would require the plaintiff, proposing to make this sale of coal and accept a guaranty of payment, first to file a statement of the amount of its capital stock authorized, the amount actually issued, and the character of the business which it was to transact in this state, and to establish a principal

office in this state, would be unreasonable. The section of the act which imposes, under certain conditions, on foreign corporations "doing business within this state" the same taxes, fines, penalties, license fees, etc., imposed on corporations of this state doing business in the other state, sheds a light on the meaning of the words "doing business in this state," in the preceding section. It would scarcely be contended that the plaintiff, because of this single isolated transaction, would be liable to taxes and license fees, etc., which by the laws of Pennsylvania are exacted from New Jersey corporations doing business in that state. The section which provides that such a corporation shall not maintain any action in this state upon a contract made by it in this state must receive the same construction. The words of the section are "corporations so transacting business;" that is, corporations transacting business for which a certificate from the secretary of state is by the preceding section made necessary.

The instruction of the trial court was correct, and the judgment should be affirmed.

MINNESOTA SUPREME COURT.

A. E. JORDAHL, *Respt.*,
v.
W. T. BERRY *et al.*, *Appts.*

(72 Minn. 119.)

*A judgment by default in action by a physician against his patient to recover for professional services is not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such services.

(April 29, 1898.)

*Headnote by MITCHELL, J.

NOTE.—*Recovery by physician as bar to action for malpractice.*

There is a seeming conflict between the authorities upon the question whether the recovery of his fees by a physician in an action brought for that purpose is a bar to an action brought by the patient for malpractice. The New York cases generally hold that the recovery by the physician is a bar to the patient's action, is in the nature of an estoppel, and is governed by the principles of *res judicata*. They also base their conclusions upon the ground that the contract between the physician and patient is entire, and that performance thereof is necessary in order to enable him to recover, and that by not defending the patient admits the performance thereof on the physician's part.

The cases which hold the contrary doctrine base their opinions upon the ground that the question of malpractice had not been litigated in the action brought by the physician to recover his fees, as shown below.

It will be observed, upon examining the New York cases, that none of them are really cases in which the physician obtained a judgment by 45 L. R. A.

APPEAL by defendants from an order of the District Court for Rock County sustaining demurrers to the answers in a suit brought to recover damages for malpractice. *Affirmed.*

The facts are stated in the opinion.

Mr. A. J. Daley, for appellants:

To every issue tendered in the complaint in an action, the defendant is bound to interpose every matter of defense which he has; and a failure so to do is a waiver of it forever.

Bazille v. Murray, 40 Minn. 48; *Thompson v. Myrick*, 24 Minn. 4.

When the plaintiff failed to appear and de-

fault in the strict sense of the term. For in most of them the patient appeared and answered, in the first instance, although he subsequently withdrew his defense, and in one case he confessed judgment.

The cases which support the doctrine that the patient has a remedy although the physician may have recovered a judgment by default for his fees do so upon the ground that the patient's right of action is either one for breach of the implied contract imposed upon the physician by law, or for damages recoverable in an action on the case, and that he is not bound to defend the action brought by the physician to recover his fees.

The question whether a judgment by default in such a case would be conclusive against the patient may perhaps be a matter of some doubt, inasmuch as a default judgment, although conclusive by way of estoppel in respect of all such matter and facts as are well pleaded and properly raised and material to the case made by the declaration or other pleadings, is only conclusive as to such matters as are properly averred or charged in the complaint. See 2 Black, Judgm. § 697; 2 Freeman, Judgm. 4th ed. § 532.

fend the actions against him in justice's court, he forever precluded himself from a recovery in this action.

Northern Trust Co. v. Crystal Lake Cemetery Asso. 67 Minn. 131.

The plaintiff is estopped by the judgments against him in the actions brought by defendants, to recover compensation for services rendered in the same case.

Gates v. Preston, 41 N. Y. 113; *Blair v. Bartlett*, 75 N. Y. 150; *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570; 1 Herman, Estop. § 235; *Marriott v. Hampton*, 7 T. R. 289.

The adjudication, by a court of competent jurisdiction, that the services rendered were of some value, conclusively establishes, between the parties, that the defendants were not guilty of negligent and unskilful conduct in their employment.

New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202.

Van Fleet in his work on *Former Adjudication*, vol. 1, § 217, seems to support the theory that such a judgment is not *res judicata* in respect to a different subject-matter as to which the issue is not contested.

It might also be contended that a judgment by default is no bar to a counterclaim. See 1 Herman, Estoppel & Res Judicata, §§ 52, 53 *et seq.* And the patient in such a case would not be put to his election of remedies against the physician, in the absence of some statutory regulation requiring him to do so.

The New York cases would seem to be put upon the principle of *res judicata*, that is, that the question then raised between the parties has been once judicially decided between them or their privies in blood, law, or estate, and that the judgment thereon remains unreversed, and that the facts actually decided by an issue in any suit by any court that has jurisdiction cannot be again litigated between the same parties, and are evidence between them, and that conclusive for the purpose of terminating the litigation, as are also the facts alleged by one party and directly admitted by the other.

In the case of *Bellinger v. Craigue*, 31 Barb. 534, the court pointed out that the law implies a promise on the part of the surgeon or physician that he has ordinary skill, and that he will execute the business intrusted to him with ordinary care and skill, and if he fails in his duty he is guilty of default in his undertaking and cannot collect the pay for his services, but is liable in damages to the person who employed him; and further, that the contract was entire, and that performance was necessary in order to entitle him to recover; and it further pointed out that in cases of this nature the law would not on the trial presume that the physician was guilty or had neglected his duty, and made default in his undertaking, as a breach of duty or negligence or fraud must not be presumed; and it further contended that the burden of proof in such cases was cast upon the defendant to disprove the allegation of performance in such a complaint, and that if he neglected to offer any such proof the fact of performance was presumed, and necessarily must be so, in order to authorize the physician to recover for his services.

In *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 456, the court stated that it must be considered as settled in that state that a judgment in favor of a physician and surgeon for his professional services, rendered by a court of competent juris-

Mr. L. S. Nelson, for respondent:

The question of malpractice was not necessarily in the issue before the justice. The merits of the case, under the circumstances, could not necessarily be involved without an issue on the question of negligence, and, so far as the record or the pleadings show, evidence adduced before the judgment was for a different purpose. The effect of that judgment cannot be extended or enlarged by argument or implication to matters, so far as the records show, which were not actually heard and determined.

Ihmsen v. Ormsby, 32 Pa. 198.

As one cause of action cannot in itself alone, when merged in judgment, carry another and independent cause of action with it, a judgment for the plaintiff, without appeal, cannot extinguish a counter right of action by the defendant, however closely connected the two claims may be.

diction in an action in which the defendant appears and answers setting up a defense which he maintained at the trial, or in an action in which he appeared and signed and filed a written confession of judgment for the amount of the services, is a bar to an action by that defendant against that physician and surgeon for malpractice in rendering those services; and it cited and approved of *Bellinger v. Craigue*, 31 Barb. 534, and *Gates v. Preston*, 41 N. Y. 113.

In *Bellinger v. Craigue*, 31 Barb. 534, a patient claimed damages from a physician on account of alleged malpractice. The physician denied the allegations and answered specially alleging negligence on the part of the patient. After issue was joined the physician sued the patient before a justice of the peace for the value of the services rendered, and the patient denied the allegations in the complaint and also averred that the services were so unskilfully performed that they were of no value, but on the trial he was allowed to withdraw such answer and all claim and defense founded upon any want of care in the physician over the objection of the physician, who got a judgment for the value of the services. The physician's contention in the action for malpractice therefore was that the patient's right to recover damages was barred by the recovery in the justice's court. The court upheld his contention upon the ground that the judgment of a competent court was not only conclusive on all questions actually and formally litigated, but as to all questions within the issue, whether formally litigated or not.

In this case the court further looked upon the plaintiff's claim as barred for the reason that his demand was implied, and necessarily within the issue joined before the justice, and its determination was necessarily included in the judgment for the reason that a fact impliedly averred may be traversed in the same manner as if it were expressly averred.

So, in *Gates v. Preston*, 41 N. Y. 113, a similar action was brought against a physician, and, subsequent to the commencement thereof, and after answer by him, he commenced an action and recovered his fees upon a written confession of judgment signed by the patient in open court before a justice of the peace, who gave the physician judgment upon the patient's written consent to the entry thereof for the amount of his claim. It was held that such judgment barred the patient from recovering damages for malpractice, and that the fact that the judgment recovered by the physician was subsequent to

Bigelow, Estop. 2d ed. pp. 104, 105.

The only reasonable doctrine upon this question is that the plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated, in the defendant's action for services.

Resesque v. Byers, 52 Wis. 650, 38 Am. Rep. 775; *Whitesell v. Hill* (Iowa) 66 N. W. 894; *Lawson v. Conway*, 37 W. Va. 159, 18 L. R. A. 627, 38 Am. St. Rep. 17, and notes; 2 Black, Judgm. § 769; *O'Connor v. Varney*, 10 Gray, 231; *Bascom v. Manning*, 52 N. H. 132; *Barker v. Cleveland*, 19 Mich. 230.

If the plaintiff in this suit had set up the defense of malpractice in the action before the justice, an adjudication upon that issue would then have been a bar.

Howell v. Goodrich, 69 Ill. 556.

the commencement of the action for malpractice made no difference where such judgment was imposed as a defense by a supplemental answer.

In passing upon the point that the judgment recovered in the case of *Gates v. Preston*, 41 N. Y. 113, was one upon a written confession, the court pointed out that in such a case the right of action was by implication admitted, and that in such a case the express and direct admission of the right to recover and the consent to an entry of the judgment was an admission on the record of all the facts which the physician would have been bound to prove on a denial of the cause of action alleged by him in his complaint, and that, as the cause of action and the indebtedness of the patient were by the complaint made dependent on a full performance of the contract by the physician, the confession of the patient was equivalent as an admission on the record to that effect, and, being followed by the judgment of the court, estopped the parties from questioning that fact in any controversy upon the same agreement; and further, that in a suit by a physician for services, if the patient neglects to disprove the allegation of performance and a recovery passes in favor of the physician, the performance of the contract is implied.

Again, in *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455, which was a similar action against the physician for alleged malpractice, the defense was a prior action in a justice's court against the patient to recover compensation for the services, in which action the patient appeared and put in an answer, but on an adjournment appeared and withdrew it. The physician proceeded and made the requisite proof of his services and recovered a judgment, which was a bar in the action for malpractice.

In this case it was also claimed that the case was to be excepted from the doctrine of *res judicata*, and from the force of the previous New York decisions, as there was no issue joined, and kept alive in the court of a justice of the peace until the trial,—especially where the defendant had withdrawn his answer, and declined to litigate; but the court held that such fact would not avail him, and that the adjudication was conclusive of the facts alleged and proved as the basis of the prior proceeding.

The judgment recovered by the physician was also held conclusive in *Howell v. Goodrich*, 69 Ill. 556, which was an action against a physician for malpractice. In this case, however, the defense of malpractice had been set up in the former suit by the physician to recover his fees in which judgment was rendered in the physician's

Mitchell, J., delivered the opinion of the court:

This was an action to recover \$5,000 damages for malpractice by the defendants in the performance for plaintiff of professional services as physicians and surgeons. After the action was commenced and at issue, each of the defendants brought an action against the plaintiff, in justice's court, to recover the value of his services, alleged in one case to be some \$22, and in the other \$7. The present plaintiff neither answered nor appeared in those actions, and the present defendants, respectively, recovered judgment for the full amounts claimed. They then set up these judgments, by supplemental answers, as a bar or estoppel to plaintiff's recovery in this action. The plaintiff demurred on the ground that the answers did not state facts constituting a defense. From

clan's favor, the court finding that there was no malpractice.

It has been held that a judgment on the merits in a previous action against a surgeon for malpractice bars a defense of malpractice in an action by him for his fees. *Haynes v. Ordway*, 58 N. H. 167.

The case of *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308, was also one in which the action was brought against two physicians for malpractice. One of them claimed that he had recovered a judgment in a trial on the merits before a justice of the peace for services rendered in the same transaction, and the court upheld his plea.

In *Edwards v. Stewart*, 15 Barb. 67, action was brought for medical services, and the defense set up the recovery of a judgment by the defendant in an action for negligence and unskillfulness in the physician's treatment of the defendant, and the court allowed an exemplified copy of the judgment roll to be given in evidence to sustain such defense, as competent and conclusive upon the question of negligence.

In this case the court pointed out that the matters in issue in the two actions were the same, namely, the character and value of the services rendered by the physician in the treatment of the defendant, and that in an action brought by the patient evidence that the treatment by the physician was skillful, proper, and careful would have defeated the action; and so in an action brought by the physician evidence of negligence and unskillful treatment of a patient, rendering the services valueless, would protect the patient from a recovery. The court also pointed out that although the objects of the action were different, yet, by way of evidence, the former judgment was conclusive upon the fact that the services of the physician in his attendance upon and treatment of the defendant were unskillfully and negligently performed and were of no value to the defendant, that being a matter directly in issue.

Some of the courts, however, hold a different doctrine, at least, in cases where the judgment recovered by the physician has been one by default, as in the principal case.

Thus, in *Resesque v. Byers*, 52 Wis. 650, 38 Am. Rep. 775, which was an action for damages for malpractice, the defendant set up in bar a judgment recovered by him for the same services in a justice's court upon default, but the court held such judgment did not bar the plaintiff's right of action for damages for malpractice

an order sustaining the demurrers, the defendants appealed.

While the doctrine of estoppel by a former adjudication is as old as the law, few questions have given rise of late years to more discussion and conflict of opinion than the applicability of the doctrine to a state of facts the same or similar to that presented by this case. In *Bellinger v. Craigus*, 31 Barb. 534, *Gates v. Preston*, 41 N. Y. 113, and *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455, it was held that a judgment in justice's court in favor of a surgeon for professional services was a bar to any action against him for malpractice in the performance of such services. In the first and last of these cases the defendants appeared and answered, but

afterwards withdrew their answers. In the other the defendant did not answer, but consented in writing to the entry of the judgment. We do not refer to this as distinguishing in principle those cases from the present, but it may have had some influence upon their decision. See *Bascom v. Manning*, 52 N. H. 132. Neither do we lay any stress on the fact that an action for services is brought in justice's court, except so far as it illustrates the inconvenience and practical injustice of what we may call the New York doctrine. In *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570, the court applied the same rule to a state of facts not differing in principle. A directly opposite conclusion was arrived at upon the same state of facts in *Resse-*

upon the ground that the question had not been litigated in the action before the justice.

The same conclusion was arrived at by the court in the case of *Sykes v. Bonner*, 1 Cln. Sup. Ct. Rep. 464, where a judgment had been rendered against a physician for malpractice. After a new trial was granted the physician brought suit for his fees and obtained a judgment by default, which he pleaded as a defense upon the second trial in the suit for malpractice. The court held that such plea was no bar in that action as the judgment which he had obtained for his fees was by default.

The line of distinction between the cases would therefore seem to lie between those in which the judgment recovered by the physician was one upon the merits upon a trial, and those in which the judgment has been rendered by default on the patient's part; and this is further shown and admitted by the court in *Lawson v. Conaway*, 37 W. Va. 150, 18 L. R. A. 627, wherein it was held that if a physician sued for his services, and there was no appearance by the patient who was defendant in the suit, recovery by the former did not estop the latter from bringing a cross action for malpractice; but if he appear, unless the record show that it was not to defend, but solely to disclaim the waiver to his own right, he is estopped by the recovery.

In this case the court pointed out that the right to sue for malpractice was both a defense and a subject for cross action, and if used for either purpose it destroyed the vitality of the claim if sought to be used in an independent action; and that if the patient appeared in a suit by the physician, he was bound to make all the defenses he had, and hence he would be estopped by the fact that he had a defense of malpractice of which he failed to defend himself, but if he had not appeared then the question of malpractice was not adjudicated, and he would be at liberty to assert his claim by an independent action, and that the patient had not impaired his right of action by neglecting or refusing to appear to the suit against him.

It is also supported by the above case of *Resseque v. Byers*, wherein the court pointed out that if the patient in that suit had set up the defense of malpractice in the action before the justice an adjudication upon that issue would have been a bar.

In *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308, the court also upheld the distinction recognized in the Wisconsin case of *Resseque v. Byers*, between cases in which the judgment has been rendered by default, and those in which the court has given judgment for a trial of the issue upon the merits, and held that if the action in which the physician recovered his serv-

ices had been undefended the judgment recovered in it could be no defense in an action by the patient for malpractice.

Yet in *Resseque v. Byers* the court would seem to have based its opinion upon the fact that that court has held that a judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it, and that in such a case as the one then before the court the issue in the action was not necessarily involved in the justice's suit, and that the patient might maintain it notwithstanding the physician had recovered judgment for his services, as the claim for damages constituted a separate and independent cause of action which could be enforced without disturbing any matter litigated in the claim for services, and the court further based its opinion upon the ground that the patient was not compelled to make the defense before the justice that the physician's services were of no value in order to save his rights, as he had his election either to recoup his damages *pro tanto*, in the justice's court, or go for his entire claim in another court; and the court further pointed out that if the patient were compelled to make his defense in the justice's court that the professional services were of no value and that he had been injured by the defendant's negligence, then it would follow that he must either split up his demand so that there might be two suits instead of one upon it, or content himself with merely dividing the claim for services or limiting his judgment to \$200, the extent of the jurisdiction in the justice's court, and contended that such rule would lead to inconvenient consequences.

In *Whitesell v. Hill* (Iowa) 66 N. W. 894, which was an action against a physician for malpractice in which the physician pleaded a counterclaim for services rendered, and in which the patient recovered a verdict for \$1, it was held that the mere fact that the physician was guilty of negligence in the treatment, and that such negligence had resulted in damages to the patient, did not necessarily preclude the physician from recovering all compensation for his services, as the right to recover depended upon the amount of the damage suffered because of his negligence, as no penalty beyond the amount of the actual damage sustained was to be visited upon him because of his negligence or want of skill. Although this case was not one in which the physician had previously sued, yet the court pointed out that its conclusions were based upon, and found support in, the case of *Resseque v. Byers*, 52 Wis. 650, 38 Am. Rep. 775, and the authorities therein cited.

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quis v. Byers, 52 Wis. 650, 38 Am. Rep. 775; *Lawson v. Conway*, 37 W. Va. 159; 18 L. R. A. 627; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; and *Sykes v. Bonner*, 1 Cin. Sup. Ct. Rep. 464,—in most of which cases the courts reviewed the New York cases, and refused to follow them. This conflict of opinion among the courts gave rise to an extended and somewhat energetic dispute among text-writers. Mr. Bigelow discusses the subject at some length, and earnestly insists that the New York doctrine is wrong. Bigelow, *Estoppel*, 5th ed. pp. 174 *et seq.* Mr. Van Fleet takes the same side of the question. Van Fleet, *Former Adjudication*, §§ 168 *et seq.* Mr. Black, while not discussing the matter at any great length, indorses the doctrine opposed to that of New York, as being much better supported by legal reason, and the best considerations of convenience and justice. 2 Black, *Judgm.* § 769. Mr. Browne, in his note to *Reesequie v. Byers*, 38 Am. Rep. 778 (52 Wis. 650), says of the New York doctrine that, while unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice; that such estoppels are odious at best, and are founded on a technicality, and probably promote more injustice than they prevent. On the other side, Mr. Herman urges with great earnestness that the New York doctrine is sound, and that the courts which have come to an opposite conclusion violate every principle upon which the doctrine of *res judicata* is founded. Herman, *Estoppel & Res Judicata*, §§ 231 *et seq.* We do not find that Mr. Freeman, in his work on Judgments, anywhere discusses this precise question; but in view of the fact that, in support of certain general propositions laid down in his text, he cites the New York cases without any intimation of disapproval, it may perhaps be inferred that he approves of their doctrine. See Freeman, *Judgm.* § 282. On this state of the authorities, we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient, and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea.

The foundation principle upon which the doctrine of *res judicata* rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties, and those in privity with them in law or estate. Rightly understood, no doctrine of the law is more in accord with justice and public policy. The difficulty which has always confronted the courts is to determine the extent of the application of that doctrine. Where an issue has been actually litigated and determined on its merits there can be no doubt, upon either reason or authority, that the judgment is, as between the parties and

their privies, conclusive in relation to that point in any other suit, though the purpose and subject-matter of the two suits be different. The difficulty is to determine what points were in issue and determined by the judgment, or, rather, what issues were necessarily involved in the judgment, although not directly and expressly made and litigated. The American authorities seem to have generally gone somewhat further in applying the doctrine of *res judicata* in that respect than the English courts, whose general tendency is to confine the estoppel of a judgment to matters actually disputed. Looking at the subject from a practical standpoint, there is certainly great danger of working injustice, unless great caution is used, in holding that a judgment is an estoppel upon a certain point, on the ground that it was necessarily involved in the judgment, although the issue was not expressly tendered and litigated. Frequently one learned in the law can reason out, to his satisfaction, that a particular point was necessarily involved in a judgment, when such a thing would never occur to the ordinary layman. The present case is an illustration of the fact. Whatever conclusion hard logic would require, everyone knows that, as a matter of fact, the question of defendants' malpractice was not determined in their suits for services, and that the judgments were in fact for the value of the services, irrespective of, and disconnected from, any claim for malpractice. The inconvenience of the New York rule, and its liability to work injustice, is further illustrated by the present case. It furnishes an opportunity to create an estoppel by what may not unfairly be called a snap judgment. It is perhaps not uncharitable to surmise that this may have been the very object of defendants in bringing their actions in justice court. But, this aside, if plaintiff had appeared and defended those actions, he would have been put to the alternative of alleging the malpractice as a mere defense, or of setting it up as a cross claim. In either case the judgment would be a bar or estoppel on that issue. If he had adopted the latter course, he could only have recovered \$100, the limit of the justice's jurisdiction, and could never have recovered any more in another suit, because he would not be allowed to split a single cause of action. On the other hand, had he set up the malpractice merely as a defense, and the claims of the defendants for services were less than \$15, the issue, involving a claim of \$5,000, would have been conclusively determined by the judgment of the justice, from which neither party could appeal on the facts. We concede that such considerations are not, in themselves, of any force, except as illustrating the inconvenience of such a rule; but where it is open to the court, upon principle, to choose between two rules, they are entitled to weight. After starting out with the conceded proposition that a judgment is conclusive of every fact necessary to uphold it, whether the final determination is the result of litigation, or a default of one of the par-

ties, the reasoning of those who advocate the New York doctrine may be all summed up as follows: If the services were of value, they could not have been useless; and, if of use, they could not have been harmful; and, if not harmful, there could not have been malpractice in the performance of them; therefore a judgment that the services were of value necessarily involved a determination that they were properly performed; and that such an adjudication is necessarily inconsistent with the existence of a claim by the patient for damages for malpractice in their performance. See *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455, and *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570. We cannot avoid feeling that this line of reasoning is more technical and theoretical than practical. And, even if technically sound, the doctrine of many of the adjudicated cases certainly does not conform to it, as is illustrated in numerous suits between vendor and vendee and employer and employee. The decisions are too numerous to require citation, to the effect that in the case of a sale of personal property, with a warranty of its quality, a judgment in favor of the vendor for the purchase money (the breach of warranty not having been interposed by way of defense or counterclaim) is no bar to an action by the vendor for damages for breach of the warranty. We fail to see why the reasoning adopted in favor of the New York doctrine is not equally applicable to such a case; for, if the property was not as warranted, the contract was broken, and the vendor was never entitled to the full purchase price. It is no sufficient answer to say that the warranty was itself a contract collateral to the contract of sale. There is but one contract, and the warranty is one of its terms, and not a separate and independent contract. *Thompson v. Libby*, 34 Minn. 374. There are also numerous cases holding that a recovery by an employee on a complaint for services rendered will not estop the defendant employer from recovering damages sustained by him through the negligent or unskilful performance of such services; such negligent acts not having been set up or litigated in the action for the services. The following are a few of the many cases that might be cited to that effect: *Mondel v. Steel*, 8 Mees. & W. 858; *Rigge v. Burbidge*, 15 Mees. & W. 598; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Davenport v. Hubbard*, 46 Vt. 200, 14 Am. Rep. 620; *Minnahugh v. Partlin*, 67 Mich. 391; *Robinson v. Crowninshield*, 1 N. H. 76. Mr. Freeman 45 L. R. A.

man himself lays down this doctrine, and cites some of those cases in its support. *Freeman*, Judgm. § 282. In *Schwinger v. Raymond*, 83 N. Y. 192, 38 Am. Rep. 415, the New York court of appeals held the same thing. It is true, the court attempted to distinguish that case from *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570, on the ground that in the latter the carrier had never performed his contract by transporting and delivering the goods, which were wholly destroyed *en route*, while in the former the carrier had performed by transporting and delivering the goods, which were only damaged *en route*. But it is respectfully suggested that the distinction is untenable on principle. In both cases the contract was to safely carry and deliver the property, and in neither was the contract performed. The difference in breach was one of degree merely. The reasoning adopted in support of the New York doctrine is equally applicable to all these cases; for it could be argued that an adjudication that the employee was entitled to recover for his services necessarily implied that he had performed them properly, and according to the contract, which would be inconsistent with the existence of a claim in favor of the employer for damages for the improper or negligent performance of the services. The reasoning usually adopted in opposition to the New York doctrine is substantially as follows: That negligence or want of skill in the performance of services, resulting in damages to the employer, creates an affirmative cause of action in his favor, the moment the negligent or unskilful act is committed; that this cause of action, like every other one, carries with it the right of the party to sue on it and put it into judgment in his own way; that one cause of action cannot, in and of itself, when merged in judgment, carry with it another cause of action, however closely the two may be connected; that, where a defendant has a cross-claim, he may set it up as a defense or counterclaim, but is not bound to do so, although the two causes of action grow out of the same contract. It would be impracticable, as well as unsafe, to define the precise limits of this doctrine, or to lay down any rule of universal application; but, as applied to the present case (which was one in tort, arising on contract), and others strictly analogous, we have concluded that this doctrine is permissible on principle, and much the safer, more convenient, and more equitable in practice.

Order affirmed.

NEW YORK COURT OF APPEALS.

BANK OF MONONGAHELA VALLEY,
Appt.,
v.
Abijah WESTON et al., Impleaded, etc.,
Respts.

(159 N. Y. 201.)

1. On review of a verdict directed for the defendant after plaintiff asked to go to the jury all the facts warranted by the evidence must be assumed as settled in favor of the plaintiff.
2. Implied authority of a partner to make accommodation indorsements in the name of his firm exists where for about ten years the other members of the firm knew that he was using the firm name for the accommodation of friends, and took no effective steps to prevent it, but merely remonstrated with him in private, accepting his promise to stop the practice, which they had reason to believe he did not intend to keep, and knowing that he knew they did not expect him to keep it.
3. Mere notice to two prominent commercial agencies of the dissolution of a partnership will not bind a person who is not a subscriber of either of those agencies, and who subsequently takes negotiable paper indorsed by one partner in the name of the firm, without knowledge of the dissolution.

(June 6, 1899.)

APPPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, overruling exceptions ordered to be heard before it in the first instance which were taken by plaintiff during the trial in the Cattaraugus County Circuit of an action brought to hold defendant liable as an indorser on a promissory note in which a verdict was directed in favor of defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. Cary, Rumsey, & Hastings,
 for appellant:

The \$2,500 note being a valid and subsisting obligation furnishes a good consideration to that extent for the \$5,000, free from all facts which would tend in any way to affect its validity, and the plaintiff is entitled to recover to that extent without regard to other questions involved in the case.

American Exch. Nat. Bank v. New York Belting & Pkg. Co. 148 N. Y. 698.

Successive renewal notes are simply extensions from day to day of the time of payment, and when there is no change in the parties to the obligation no note in the series is a payment of the preceding one.

Jagger Iron Co. v. Walker, 76 N. Y. 521.

NOTE.—The above is an unusual case of what the court deems such negligence as to amount to a ratification of unauthorized accommodation indorsements by a partner.

For an estoppel to deny a signature which is in fact forged on commercial paper, see note to *Traders' Nat. Bank v. Rogers* (Mass.) 36 L. R. A. 539.

45 L. R. A.

Presentation of a renewal note is a waiver by the indorser of presentation and payment of the original note as because of the receipt of the renewal note the holder of the original note was induced to omit these necessary steps to charge the indorsers.

Leary v. Miller, 61 N. Y. 488; *Cady v. Bradshaw,* 116 N. Y. 188, 5 L. R. A. 557; *National Hudson River Bank v. Reynolds,* 57 Hun, 307.

Although the \$5,000 note was discounted after it is alleged the partnership was dissolved, in absence of notice of such dissolution to the plaintiff, the discount of the \$5,000 became valid to the extent of the \$2,500 valid note, which was merged in it, independent of the fact that the balance of the note was affected by the notice growing out of its presentation by the maker.

17 Am. & Eng. Enc. Law, p. 1035.

In order to exonerate members of a firm from liability on a promissory note after its dissolution, made by one of the partners for the accommodation of a third person, and taken in good faith for value by one not a dealer with the firm, but having knowledge of its prior existence and not of its dissolution, notice of its dissolution should have been published by advertisement in a newspaper.

City Bank v. McChesney, 20 N. Y. 240; *Elmira Iron & S. Rolling Mill Co. v. Harris,* 124 N. Y. 280; *Austin v. Holland,* 69 N. Y. 571, 25 Am. Rep. 246.

There must be a notice published in a newspaper at the location of the firm in order to give constructive notice of its dissolution.

Vernon v. Manhattan Co. 17 Wend. 525; *City Bank v. McChesney,* 20 N. Y. 240; *National Bank v. Norton,* 1 Hill, 572; *Holdans v. Butterworth,* 5 Bosw. 1; *Buffalo City Bank v. Howard,* 35 N. Y. 500.

A note made before dissolution, and put in circulation after, is good in the hands of a bona fide holder against the firm.

1 Dan. Neg. Inst. 388.

Each partner is the general agent of his copartner, and is vested with general authority as such agent.

The omission of a principal, when advised of an unauthorized act of one assuming to be his agent, to repudiate it, amounts to a ratification as to third persons.

Messenger v. Fourth Nat. Bank, 6 Daly, 190; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.* 90 N. Y. 613; *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 199, 60 Am. Rep. 440; *Brookhaven v. Smith,* 118 N. Y. 634, 7 L. R. A. 755; *Griswold v. Haven,* 25 N. Y. 600, 82 Am. Dec. 380; *New York & N. H. R. Co. v. Schuyler,* 34 N. Y. 30.

All partners must be held to have notice of the acts of any partner in connection with their business, as in the discharge of their duty they ought to have obtained.

Story, Partn. § 168.

Defendants were fearful of injuring the credit of their brother, or relied on him to take care of the paper thus being put in circulation, instead of taking any effectual steps to stop it. This is a direct violation of the duty they owe to the public, and contravenes the well-established rule of law or equity that he who employs an agent shall lose by his fraudulent or illegal act in preference to an innocent third person.

North River Bank v. Aymar, 3 Hill, 262; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

Mr. J. H. Waring, for respondents:

The indorsement of the notes in suit was never binding on the respondents' testator.

There was no such firm as Weston Brothers at the time the indorsements were made.

The defendant neither authorized nor assented to the indorsements; they are a common-law forgery which is classified as a cheat, and defined as the false making with intent to defraud of any right which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. They involved every element of that offense.

1 Bishop, Crim. Law, § 592; 2 Bishop, Crim. Law, § 523; *People v. Fitch*, 1 Wend. 198, 19 Am. Dec. 477; *People v. Cady*, 6 Hill, 490.

The burden was on the plaintiff to show that it was a bona fide holder, even if the note had not been a forgery, and that it failed to do.

Foot v. Sabin, 19 Johns. 154, 10 Am. Dec. 208; *Laverty v. Burr*, 1 Wend. 529; *Sweetser v. French*, 2 Cush. 309, 48 Am. Dec. 666.

William W. Weston's authority to indorse notes in the name of his firm for any purpose ceased as soon as the partnership was dissolved.

Sanford v. Mickles, 4 Johns. 224; *National Bank v. Norton*, 1 Hill, 572; *Mitchell v. Ostrom*, 2 Hill, 520; *Lusk v. Smith*, 8 Barb. 570.

The indorsement of the notes by William W. was an attempt on his part to pledge the credit and responsibility of his two brothers without their consent, and would have been a fraud upon them even if done while the firm was in existence.

Foot v. Sabin, 19 Johns. 154, 10 Am. Dec. 208; *Gansevoort v. Williams*, 14 Wend. 133; *Smith v. Weston*, 81 Hun, 87.

No matter whether the indorsing of the notes is characterized as a fraud or forgery, so far as the defendant is concerned they were illegally and fraudulently indorsed and discounted.

Joy v. Diefendorf, 130 N. Y. 6; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L. R. A. 676; *First Nat. Bank v. Green*, 43 N. Y. 298; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *Nickerson v. Ruger*, 76 N. Y. 279.

The undisputed evidence shows the plaintiff took the notes charged with full notice of the accommodation character of their indorsements.

Foot v. Sabin, 19 Johns. 154, 10 Am. Dec. 208; *Gansevoort v. Williams*, 14 Wend. 133; 45 L. R. A.

Joyce v. Williams, 14 Wend. 141; *Stall v. Catskill Bank*, 18 Wend. 466; *Elliott v. Dudley*, 19 Barb. 326; *Bank of Rochester v. Bowen*, 7 Wend. 159; *Fielden v. Lahens*, 6 Abb. Pr. N. S. 341; *Union Nat. Bank v. Underhill*, 21 Hun, 178; *Atlantic State Bank v. Savery*, 82 N. Y. 291.

The taking of the notes by the plaintiff directly from the maker was notice to it that their indorsement was for the maker's accommodation and without consideration.

National Park Bank v. German-American Mut. Warehousing & S. Co. 116 N. Y. 281, 5 L. R. A. 673; *Fielden v. Lahens*, 6 Abb. Pr. N. S. 341; *Stall v. Catskill Bank*, 18 Wend. 466; *Gansevoort v. Williams*, 14 Wend. 133; *Bank of Vergennes v. Cameron*, 7 Barb. 143.

The plaintiff did not discount either of the notes in the usual course of business, which alone deprives him of the character of a bona fide holder.

Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L. R. A. 676; *Hall v. Wilson*, 16 Barb. 548; *Keutgen v. Parks*, 2 Sandf. 60; *Ramdel v. Morgan*, 16 Wend. 574.

The defendants were not estopped from denying their brother's authority.

Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406.

It is of no consequence whether the plaintiff had notice of the dissolution of the firm or not.

It did not become a previous dealer, so as to entitle it to actual notice, by discounting for Curtis a series of notes made by him and indorsed for his accommodation by William W. in the firm name, without authority from the latter's brothers.

City Bank v. McChesney, 20 N. Y. 240; *Whitman v. Leonard*, 3 Pick. 176; *Story*, Partn. § 334.

Any way of making the fact of dissolution public and notorious is sufficient.

Ketcham v. Clark, 6 Johns. 144, 5 Am. Dec. 197; *National Shoe & Leather Bank v. Herz*, 89 N. Y. 629; *Holt v. Allenbrand*, 52 Hun, 217; *Coddington v. Hunt*, 6 Hill, 595.

Vann, J., delivered the opinion of the court:

This action was brought upon two promissory notes, each made by Edwin F. Curtis payable to the order of Weston Bros. at the Bank of the Monongahela Valley, Morgantown, West Virginia, indorsed by Weston Bros. as first indorsers and by William W. Weston as second indorser. The first note, dated at Olean, New York, December 15, 1892, was for \$6,500, and ran four months, while the second, dated at the same place March 31, 1893, was for \$5,000, at thirty days. The defense pleaded by Abijah and Oren Weston, who alone defended, was that the indorsement of the name of their firm was made, after the dissolution thereof, by William W. Weston, the third member of the firm as it was formerly constituted, fraudulently, for the accommodation of the maker, and without the knowledge of the other members, and that the plaintiff took the notes with knowledge of these facts. The note for

\$0.500 was discounted by the plaintiff on the 22d of December, 1892, and the proceeds were used to pay a note dated April 7, 1892, made by Curtis and indorsed by Weston Bros., for \$1,760.28; also a note for \$2,000, made and indorsed the same way, which became due on the 11th of February, 1892; and the balance was paid in cash. The other note in suit was given in renewal of two notes, dated June 4, and November 19, 1891, for \$2,500 each, both made and indorsed in the same way, and carried along until they formed a part of the consideration of said note for \$5,000. The note of June 4, 1891, for \$2,500, was the first of the series discounted by the plaintiff. It was sent to the plaintiff by the cashier of a bank in Olean, and before the same was discounted the cashier of the plaintiff wrote to him, stating that the parties were strangers, and asking if he regarded "the note as all O. K." The answer of the cashier at Olean was as follows: "We consider Weston Brothers good beyond question. They are probably worth from one to two millions of dollars." Thereupon the note was discounted by the plaintiff, and the proceeds remitted to the bank at Olean. None of these notes in fact passed through the hands of Weston Bros. in the course of their business, nor did the firm have any benefit from the discount thereof. They were indorsed in the name of the firm by William W. Weston, one of the members, for the accommodation of the maker.

The firm of Weston Bros., composed of Abijah, Orren, and William W. Weston, was organized about 1853, and did a large and prosperous lumbering business at Weston's Mills, 3 miles from Olean, until it was dissolved, in January, 1892. It was managed by William W. Weston, the resident partner, the residence of Abijah Weston being at Painted Post, about 100 miles distant, and of Orren Weston, at Tonawanda, over 80 miles distant. William signed checks, indorsed notes, and used the firm name in the transaction of the business of the firm, and as early as 1882 he began to use the firm name in indorsing for his friends. He did not simply indorse at rare intervals, but made it a practice, and continued it for ten years, until the dissolution of the firm, and even for a year or two after that. The other members knew that William was occasionally using the firm name in this way, although they did not know to what extent. They learned of it in various ways,—sometimes by public report and at others through the inquiry of some bank or individual to whom an accommodation note thus indorsed had been offered for sale. Their suspicions were aroused from seeing "these men around the office" for whom William was indorsing. They were accustomed to remonstrate with William, and tell him he must not do it any more, and in response to letters of inquiry from four different banks Abijah wrote, stating that William had no right to use the firm name in that way, and that "they must not use the paper thinking they could hold me." He also wrote to individuals to the

same effect, but still William kept on indorsing, and the other members, Abijah being the most prominent and anxious upon the subject, kept hearing of it. He used to go to Weston's Mills several times a year, mainly for the purpose of expostulating with William about this practice. He testified that he "advised him [William] to take security for these indorsements, but I do not know whether he did or not." The bookkeeper, William's son, swore he told Abijah that he feared the amount was larger than his father would admit, and that every time Abijah came there "the talk was on this subject, in 1888, 1889, 1890, and 1891. Abijah would say: 'You must not do it. You will injure my credit.'" Abijah, who stayed at William's house whenever he came to Weston's Mills, asked him how much paper was out, and who the makers were, etc., but William was reticent upon the subject, and volunteered no information. At one time the partners learned that one bank in Olean held paper of this kind to the amount of \$70,000, but, upon confronting William with the fact, he insisted that there was not more than \$35,000. They made no inquiry at the bank, or of persons outside of their own office. Abijah threatened periodically to dissolve the firm, or to post William as acting without authority in making these indorsements, unless he would stop; and he always promised to stop, but never kept his promise. About the 1st of April, 1891, he was asked by Abijah how long it would take to get rid of the paper that was then out, about \$40,000 in amount, and he said, "Six months;" whereupon Abijah told him that he would give him that period to get rid of it, but in the meantime he must not indorse any more. Orren, in testifying to this conversation, did not state that Abijah told William he must not indorse any more. William, however, kept on indorsing, and Abijah kept learning of it and remonstrating, but no notice was given to the public, and no effective step was taken to restrain William from making these accommodation indorsements right along to the amount of many thousands of dollars. Nothing was done by the other members of the firm except to expostulate with William, and accept his promises not to do so any more, even after they knew he had systematically violated previous promises to the same effect. On the 27th of February, 1890, Abijah wrote to William, and, after stating that he inclosed a letter that he had received, said: "I am perfectly astonished to receive such letters. I cannot understand what it means. I had rather a man would steal my money than my credit. I feel proud of my credit, but it appears you do not care. It is so strange you should persist in doing so after I have forbid you doing it, after all I have done for you, and am still willing to do; but I tell you for the last time I won't stand it. I can stop it and must if you persist in it. How would it look to be posted forbidding you signing paper, and how I would hate to do it, but I must protect myself." This

had no effect, and nearly a year later, on the 26th of January, 1891, he wrote him again, saying: "You do not say you will stop using my name. If you will promise never to put my name on paper outside of our business again, I will take your word once more. If you will not promise, then I must take means to stop it. Now, Wallace, think how it will look for me to have to take any legal means. I can't hardly think of it, but to save myself it must be done, and at the same time save you, and save your son from worrying about it." No inquiry was made at any bank, not even at the one in Olean, where the firm did its banking business, to learn how much of this paper was held by them, and no notice was given of any kind. Finally the brothers began to be sued on this paper and on the 4th of January, 1892, the firm was dissolved, "in order to prevent this thing going on any further," and a corporation was organized to carry on the same business, but no public notice of the dissolution was given through the press or otherwise. It was the custom of the bookkeeper to inclose with his business correspondence for the firm, and the corporation that succeeded it, a printed slip, stating that the firm had been dissolved; but these notices were not sent out generally, or otherwise than as stated. No notice was sent to the plaintiff. It also appeared that they sent reports to two commercial agencies, but the plaintiff was not a subscriber to either, and had no knowledge of the dissolution in any way when it discounted the notes in suit. Notwithstanding the dissolution, William continued to indorse after that event the same as before. Other facts similar in character to those stated were proved. A large amount of this accommodation paper was put in evidence, as well as ten judgment rolls, representing judgments recovered by default against the firm after a personal service on each member thereof, upon paper indorsed in this way. When both parties rested, the court, on motion of the defendants, directed a verdict in their favor, although the plaintiff asked to go to the jury upon the whole case. An order having been made that the plaintiff's exceptions should be heard in the first instance by the appellate division, that court overruled the exceptions and dismissed the complaint.

As a verdict was directed for the defendants, although the plaintiff asked to go to the jury, all the facts warranted by the evidence must be assumed as settled in favor of the plaintiff for the purpose of this appeal. *First Nat. Bank v. Dana*, 79 N. Y. 108; *Stone v. Flower*, 47 N. Y. 566.

When a promissory note is presented by the maker, the purchaser has notice that the indorsements were not made in the ordinary course of business, because in that event the maker would not have it in his possession. The note of June 4, 1891, for \$2,500, was not presented by the maker, and hence it was taken without notice to put the plaintiff on inquiry as to the regularity or binding force of the indorsement. It was received from a

bank, and not from any party prior in order of liability or possession to the indorser, and was not accepted until after due inquiry whether it was all right, which elicited only favorable information. The plaintiff could have recovered upon that note, and hence it constituted a good consideration *pro tanto* for the note for \$5,000, of which it became a part. The claim of the defendants that it was not protested is not borne out by the record, which expressly shows presentment and protest in the usual way. Moreover, the successive renewals extended the time of payment, as there was no change in the parties to the note, and hence no presumption of the payment of any of the series. *Jagger Iron Co. v. Walker*, 76 N. Y. 521.

The plaintiff was put upon inquiry as to the other notes as they were presented by the maker. The remainder of its claim therefore depends upon the implied authority of William to make accommodation indorsements in the name of his firm. According to the evidence, we think this was a question of fact, as we have already held in *Smith v. Weston*, 159 N. Y. 194, a companion to the case in hand, and argued in connection therewith. The testimony, which came mainly from Abijah and Orren Weston, who were interested witnesses, presented a singular state of facts, as the jury might have found. For about ten years two members of the firm of Weston Bros. knew that the third was constantly using the firm name for the accommodation of friends. Having the power to prevent it, they took no effective steps to do so, but let the public run the risk of loss through his indorsing in the name of the firm. They repeatedly remonstrated with him in private, and he always promised to stop, but never kept his promise, and they had reason to believe, not only that he did not intend to keep it, but that he knew they did not expect him to keep it. If, upon the first discovery, they had warned him, and he had not only promised, but had also lived up to his promise, no question of fact would have arisen. Perhaps there might be more latitude than this without presenting a question of fact, but a systematic and persistent course of conduct, known to the defendants, calls in question their good faith. They had no right to assume that William would do otherwise in the future than he had in the past. If a son should forge his father's name, to his knowledge, for a series of years, mere private expostulation would not save the father from liability. It would be necessary for him to take some public action for the protection of innocent persons. *Weed v. Carpenter*, 4 Wend. 219, 10 Wend. 404. If Abijah and Orren Weston, knowing that the public was liable to be injured, preferred that William should keep on indorsing, rather than disgrace him by exposure, they must take the consequences for the sanctity of commercial paper and respect for the rights of third persons will not permit the business community to be imposed upon by their negligence if a jury finds, under all the circumstances, that the negligence

was so persistent as to amount to ratification. Failing to stop him, or to give notice of any kind, after repated offenses, is evidence of acquiescence in and ratification of his course. They cannot rest on their objections and his promises under the facts disclosed, without subjecting their good faith to the scrutiny of a jury. Resistance may be so feeble as to be evidence of acquiescence, and persistent acquiescence is evidence of implied consent. They knew that it did no good to talk to him upon the subject, and that outside parties were liable to be victimized by their failure to act. If they had not given him six months' time in the spring of 1891, the plaintiff could not have acquired the paper in suit. If they meant what they said, why did they not act accordingly? Did not mere remonstrance finally become submission? Did they not encourage him to continue? Did not both his course and theirs lead him to understand that if he continued to do in the future what he had repeatedly done in the past, to their knowledge, it would meet with the same treatment only in the future that it had in the past? When they threatened dissolution or exposure if he indorsed without authority again, why did they not keep their word if they were sincere? Why did they have the same stereotyped conversation every few months for year after year, accept the same promise and condone its violation, with unvarying regularity, if they were acting in good faith? Did they prefer that innocent persons should suffer loss rather than hurt their brother's feelings? Did they keep silent when it was their duty to speak? Were they making evidence to protect themselves if William finally went too far, and they concluded to repudiate? Was their story, as a whole, probable, and was the jury bound to believe it? These inquiries, which bear upon the main question of good faith, acquiescence, and ratification, were for the consideration of the jury, and we think the trial court erred in not submitting the case to them for consideration. Juries have a right to look between the lines of the evidence, and infer what a man's intention was from his conduct, beyond the positive testimony in a case.

It is, however, insisted that, as the indorsements in question were made after the dissolution, they were the acts of William only, and did not bind the firm, because he had ceased to be its agent. A partnership continues, notwithstanding formal dissolution, as to third persons acting in good faith, who have had neither actual nor constructive notice that the firm has been dissolved. The rule is that as to all persons who have had actual dealings with the firm, actual notice of the dissolution must be given. *Vernon v. Manhattan Co.* 17 Wend. 524. Affirmed in 22 Wend. 183; *National Bank v. Norton*, 1 Hill, 572; *Buffalo City Bank v. Howard*, 35 N. Y. 500. As to all who have had no dealings with the firm, but knew of its existence though not of its dissolution, it is necessary that notice should be published by advertise-

ment in a newspaper. *City Bank v. McClesney*, 20 N. Y. 240; *Austin v. Holland*, 69 N. Y. 571, 25 Am. Rep. 246; *National Shoe & Leather Bank v. Herz*, 89 N. Y. 629; *Elmira Iron & S. Rolling Mill Co. v. Harris*, 124 N. Y. 280. It may be that general notice of dissolution, as distinguished from particular notice, can be given in other ways, but we are of the opinion that mere notice to two prominent commercial agencies, the plaintiff not being a subscriber of either, is insufficient, because such agencies circulate the information contained in their books and reports among their customers only, who are required to treat it as confidential in character.

Without prolonging the discussion, we think that the judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Horace H. STODDARD, Assignee, etc., of
Soldiers' World's Fair Hotel Association,
Appt.,

v.

Chauncey H. LUM et al., Respts.

(159 N. Y. 265.)

1. An action against all the domestic shareholders of an Illinois corporation, to recover the unpaid balance of their subscriptions to the stock, or such *pro rata* share thereof as is necessary to pay the debts of the company, may be brought in New York by the Illinois assignee for creditors, since the cause of action is a contract liability which has for its foundation the principles of the common law, and does not depend upon Ill. Rev. Stat. chap. 82, § 25, which provides for such a suit in equity against all delinquent stockholders.
2. A general assignee for the benefit of creditors of an insolvent corporation, being vested with the legal title to its property, and having the power to reduce its assets to possession, is permitted by public policy and state comity to sue in another state to collect unpaid stock subscriptions.

(June 6, 1899.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Special Term for Orleans County which overruled demurrers to the complaint in an action brought to enforce defendants' subscription to the stock of an insolvent corporation. *Reversed.*

The facts are stated in the opinion.

Mr. W. C. Ramsdale, for appellant:

The plaintiff has legal capacity to sue in the courts of this state.

NOTE.—As to the enforceability of a stockholder's liability outside of the jurisdiction in which the corporation is created, see note to *Cushing v. Perot* (Pa.) 34 L. R. A. 737; also *Ferguson v. Sherman* (Cal.) 37 L. R. A. 682; *Hancock Nat. Bank v. Ellis* (Mass.) 42 L. R. A. 396; and *Bell v. Farwell* (Ill.) 42 L. R. A. 804.

The right of a corporation to make an assignment exists inherently in all corporations unless expressly forbidden.

Warren v. First Nat. Bank, 149 Ill. 29, 25 L. R. A. 746; *Franzen v. Zimmer*, 90 Hun, 103; *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548.

For the purpose of calling in assets and enforcing payment of the calls, the assignee, subject to the superintendence and direction of the court which has charge of the administration, stands in the place previously occupied by the directors of the corporation.

3 *Thomp. Corp.* §§ 3551, 3552.

A foreign receiver can sue to enforce unpaid subscriptions to stock.

Dayton v. Borst, 7 Bosw. 115, 31 N. Y. 435; *Patterson v. Lynde*, 112 Ill. 206; *Pugh v. Hurtt*, 52 How. Pr. 22; *Savings Asso. v. O'Brien*, 51 Hun, 45; 3 *Thomp. Corp.* §§ 3549 et seq.

A receiver or other trustee appointed in another state will be permitted, on the principle of comity, to bring an action in the domestic forum for the purpose of collecting the assets of the insolvent for distribution in accordance with the laws of the jurisdiction within which the trustee has been appointed when so to do will not contravene the rights of the citizens of the state in which the action is brought.

Baldwin v. Hosmer, 101 Mich. 119, 25 L. R. A. 739; *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37; *Franzen v. Zimmer*, 90 Hun, 103; *High, Receivers*, 2d ed. § 211; *Manlove v. Burger*, 38 Ind. 211; *Frank v. Morrison*, 58 Md. 423; *Cooke v. Orange*, 48 Conn. 401.

The Illinois statute does not prescribe an exclusive special and peculiar remedy which can be availed of only in that state.

Where there is a two-fold remedy prescribed by the statute,—one special and peculiar and the other not,—the one that is not special and peculiar may be made available in a sister state.

Ferguson v. Sherman, 116 Cal. 169, 37 L. R. A. 622.

The words in § 8—"to be collected in the manner herein provided"—refer to the whole chapter, and not merely to that section, and the stockholder's liability may be enforced by suit in equity, brought by or on behalf of all the creditors, as well as by action at law and garnishment proceedings.

Curran v. Bradner, S. & Co. 27 Ill. App. 582; *Robertson v. Noeninger*, 20 Ill. App. 227.

The nature of the obligation is contractual; the stockholders sought to be made liable agreed to pay, but have not paid, for their stock in full.

This makes the stockholders' liability primary and contractual, and their liability is that, or similar to that, of partners engaged in a joint enterprise.

National Bank v. Dillingham, 147 N. Y. 603; *Marshall v. Sherman*, 145 N. Y. 9, 34 L. R. A. 757; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 42 L. R. A. 396.
45 L. R. A.

The liability of a shareholder to pay what is unpaid in respect of his share is an obligation founded in contract and not depending upon statutes.

3 *Thomp. Corp.* §§ 3047, 3566; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 624.

The courts of this state ought to entertain such an action as this in which complete and substantial justice can be done to all, and no injustice will be done to any.

Marshall v. Sherman, 148 N. Y. 9, 34 L. R. A. 757; *Griffith v. Mangam*, 10 Jones & S. 309; *Great Western Teley. Co. v. Purdy*, 162 U. S. 339, 40 L. ed. 991; *Mutual F. Ins. Co. v. Phoenix Furniture Co.* 108 Mich. 170, 34 L. R. A. 694; *Lehman v. Glenn*, 87 Ala. 618; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184.

Messrs. Pitts & Sherwood and Signor & Wage, for respondents:

In order to grant the relief demanded in the complaint it will be necessary to bring in all creditors, establish their claims, and also determine which of all the stockholders in this and other states are solvent and how much of their subscriptions remain unpaid, in order to determine whether these defendants are liable for the whole amount of their unpaid subscriptions.

Such an action could only be maintained in the state where the corporation was located, as the laws of Illinois provided a special and peculiar remedy which can be enforced only in that state.

Barnes v. Wheaton, 80 Hun, 8; *Russell v. Pacific R. Co.* 113 Cal. 258, 34 L. R. A. 747; *Pease v. Underwriters' Union*, 1 Ill. App. 287; *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429; *Patterson v. Lynde*, 112 Ill. 196; *Ferguson v. Sherman*, 116 Cal. 169, 37 L. R. A. 622.

The construction placed on this statute by the courts of Illinois will be followed.

Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; *Savings Asso. v. O'Brien*, 51 Hun, 45.

The courts of the state of Illinois have held that creditors in that state can pursue their remedy against the corporation only under §§ 8 and 25 of the statute under consideration.

Curran v. Bradner, S. & Co. 27 Ill. App. 582.

A right of action against the stockholders of a corporation does not exist at common law, and ordinarily exists only by virtue of some statutory enactment.

Marshall v. Sherman, 148 N. Y. 9, 34 L. R. A. 757; *Patterson v. Lynde*, 112 Ill. 205.

The correct manner of proceeding was indicated in—

Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184; *Glenn v. Liggett*, 135 U. S. 533, 34 L. ed. 264.

Bartlett, J., delivered the opinion of the court:

This action is brought by the plaintiff, as the general assignee for the benefit of cred-

itors of the Soldiers' World's Fair Hotel Association, a corporation organized under the laws of the state of Illinois, with a capital stock of \$200,000, divided into 2,000 shares, of \$100 each. The following facts, among others, appear in the complaint: The corporation became financially involved early in its history, and on the 5th day of May, 1893, executed to the plaintiff a general assignment for the benefit of creditors. At the September, 1893, term of the Cook county court, having jurisdiction of general assignment matters, it was found that the corporation was indebted in the total sum of \$9,973.19; that the amount realized from the tangible assets was only \$795.19, and that the assets of the corporation had been exhausted; that the stockholders were still indebted in the sum of \$36,407.15 on their stock; that it was necessary that each stockholder should be required to pay his *pro rata* share of the debts and liabilities. It was then averred that these findings of the court were in fact true. The court, by order, directed the plaintiff, as assignee, to bring suit in behalf of all the creditors of the corporation against all the stockholders who had not yet paid the entire face of the stock. It is further alleged that plaintiff, in compliance with this order, brought an action in the superior court of Cook county against the stockholders for the purpose mentioned; that up to the time of filing this complaint the suit in Illinois had realized only \$1,759.54, and that the necessary disbursements left a balance of \$326.50; that at the time the decree was entered in the Illinois suit the liabilities of the corporation amounted to \$11,670.21, and that it was necessary to recover this sum from the stockholders in order to pay the debts of the company; that only two stockholders in the state of Illinois proved to be solvent, and that from them only \$1,039.18 was collected; that there is still unpaid to the creditors of the corporation the sum of \$10,432.70. The complaint then sets forth the names of some fifteen or more stockholders residing in the state of New York, and made defendants in this action. It is further averred that some of the New York stockholders are solvent and some are not, but which of them are or which are not is unknown to plaintiff; that all of the stockholders residing outside of the states of Illinois and New York are insolvent. It is also alleged that plaintiff made a report to the Cook county court, and upon the same the court ordered that he institute a suit in the state of New York against the stockholders of the corporation residing there, to recover the amount justly due from them; that the plaintiff represents 115 of the creditors of the corporation, and this suit is brought on their behalf. It is then alleged that in the suit in the superior court of Cook county the execution of one creditor on a judgment against the corporation was returned wholly unsatisfied before the institution of that action; that the corporation has ceased doing business, being insolvent; that, under the laws of the state of Illinois,

a domestic corporation of that state may make a general assignment for the benefit of its creditors, and that the assignee thereunder may maintain any suit or action that the insolvent debtor making the assignment could have maintained if such assignment had not been made. There is annexed to the complaint a schedule marked "C," which contains portions of the statutes of the state of Illinois dealing with the liabilities of stockholders of corporations organized under the laws of that state. It is asked in the prayer for relief that the court determine the amount of the liabilities of each defendant resident in the state of New York, by reason of the premises, and prays the appointment of a receiver in this state to aid him in the carrying out of the decree of the court.

The complaint was demurred to on three grounds: That it appears upon the face of the complaint the court has no jurisdiction of the subject-matter of the action; that the complaint does not state facts sufficient to constitute a cause of action; that plaintiff has no legal capacity to sue. The demurrer was overruled at special term, the trial judge holding that the action was well brought. The appellate division reversed this interlocutory judgment with a divided court, two of the learned justices dissenting.

The point presented by the demurrer is a very narrow one, and is in substance this: That an action against these stockholders to recover a balance due on their subscriptions, or such *pro rata* share of it as is necessary to pay the indebtedness of the company, can only be maintained in the state of Illinois, where the corporation is located, as the laws of Illinois provide a special and peculiar remedy, which can be enforced only in that state. Chapter 32 of the Revised Statutes of the state of Illinois contains the provisions involved in this controversy. Section 8, among other things, enacts that "each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. . . . Whenever any action is brought to recover any indebtedness against a corporation, it shall be competent to proceed against any one or more stockholders at the same time, to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment." This is clearly an exclusive remedy, available only in the state of Illinois. We then come to § 25 of this chapter, which is to be read in connection with the fact that a corporation may make a general assignment for the benefit of its creditors in the state of Illinois. This section provides, among other things, that if a corporation "shall dissolve or cease doing business leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way for the debt of the corporation, by joining the corporation in such suit, and each stockholder may be required to pay his *pro rata* share of such debts or

liabilities to the extent of the unpaid portion of his stock after exhausting the assets of such corporation. And if any stockholder shall not have property enough to satisfy his portion of such debts or liabilities, then the amount shall be divided equally among all the remaining solvent stockholders." The balance of § 25 provides for the winding up of a corporation by a court of equity, and the appointment of a receiver, etc. This portion of the statute is not involved in the present action.

It will thus be seen that the plaintiff in the case at bar, clothed with the ample powers of a general assignee for the benefit of creditors, is duly authorized by the first portion of this section to proceed against stockholders and all persons liable in any way for the debts of a corporation in the interest of the creditors, the corporation having ceased to do business and leaving debts unpaid. This provision of the statute evidently authorizes the general assignee to bring an omnibus suit in the state of Illinois in the interest of creditors against stockholders and others in any way liable to contribute to the payment of the corporate debts. The statutory limitation of recovery against a stockholder to his *pro rata* share of the debts, if it be less than the amount unpaid upon his stock subscription, is merely stating the rule in equity when marshaling the assets. If a stockholder of an insolvent corporation owed a balance on his stock subscription of \$5,000, and it was made to appear that \$3,000 was his *pro rata* share of the indebtedness, judgment could only go against him for the latter amount. The liability now sought to be enforced does not rest upon the provisions of the statute cited, but is wholly contractual, and has for its foundation the principles of the common law. We do not approve the position of appellant as set forth in the complaint and his brief, that he depends to any extent upon the Illinois statute cited in order to maintain this action. The provisions of § 25 of the Illinois statute, above quoted, may be regarded, so far as this action is concerned, as enacting the existing rule of the common law as to the right of a creditor, or his representative, in case of insolvency, to enforce outstanding contracts, and also as putting into statutory form those equitable principles applicable to a stockholder whose unpaid subscription exceeds the *pro rata* amount due from him in paying the debts of the corporation. The fact that the corporation and its general assignee for the benefit of its creditors are the creatures of the statute does not qualify the rule as stated. A corporation is a legal entity, with the unlimited right to sue and be sued, within the lines of its charter powers. An examination of the principles underlying this action and those cases that are supposed to condemn it will lead to a clearer apprehension of the present situation.

The demurrer to the complaint admits that these defendants, residents of this state, are original subscribers to the stock of this Illinois corporation, and that they are still in-

debted for balance due on the subscription. This is a contract liability pure and simple, and one that the corporation, if solvent, could have enforced in the courts of this state. This cause of action, in the event of corporate insolvency, vests in the general assignee for the benefit of creditors, or in a receiver duly appointed. It has been held that a right of action to enforce a personal liability of the stockholders for the debts of a corporation, given and created only by the statutes of the state of the corporation's domicile, is not enforceable in another state, where the stockholder resides, upon any obligation of comity; but it has frequently been adjudged that the contract obligation assumed by subscribing to the stock of a corporation can be thus enforced. *Dayton v. Borst*, 31 N. Y. 435, and cases cited. Subscribers to the stock of a corporation incur a debt which may be enforced by any common-law or equitable remedy. *Mann v. Cooke*, 20 Conn. 178. The capital stock of a corporation is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. The creditors have a lien upon it in equity. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220. At pages 60, 61, L. ed. 222, of case last cited, the United States Supreme Court says, in speaking of unpaid stock subscriptions: "Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation,"—citing many cases. It would speak ill for state comity if a citizen of New York could go to Illinois, and in good faith subscribe to the capital stock of a corporation, and later repudiate his obligation to pay a balance due on the subscription, and yet not be liable to an action at law or a suit in equity in our own courts, in the name of the corporation, to compel him to perform his contract. Fortunately for state comity and commercial integrity, no such rule of law exists, and a creditor whose rights rest in contract may pursue his debtor into the courts of the latter's domicile.

Several cases are cited as holding that this action is not maintainable, but they are all clearly distinguishable. In *Marshall v. Sherman*, 148 N. Y. 9, 34 L. R. A. 757, a creditor of a Kansas banking corporation brought an action at law against a single stockholder, residing in this state, to enforce a liability of defendant to plaintiff created by the Constitution and statutes of Kansas, which imposed upon the stockholder a liability for the debts of the company, in addition to his unpaid subscription, in an amount equal to the stock owned by him. Judge O'Brien, in an exhaustive opinion, dealt with this general question, expressing

the unanimous opinion of the court that the liability sought to be enforced was statutory, and not contractual, and could only be enforced in the domicile of the corporation. It was also intimated that, if the action was maintainable under any circumstances, it could not be instituted at law by a single creditor against a single stockholder, but the proper remedy would be a suit in equity on behalf of all the creditors against all the stockholders. In *Barnes v. Wheaton*, 80 Hun, 8, in which Mr. Justice Martin, now a member of this court, wrote a carefully considered opinion, there is nothing that militates against the maintenance of this action. That action was brought by the plaintiff, for the benefit of himself and the creditors of an Ohio corporation, to ascertain the *pro rata* share of the indebtedness of the corporation for which the defendant was severally liable, and judgment was prayed for the amount. The defendant's liability was not contractual, but imposed by the Constitution of Ohio, which provided that a stockholder should be liable over and above the stock owned by him, and any amount unpaid thereon, in a further sum, at least equal in amount to such stock. It was held that this liability could only be enforced in the courts of Ohio in an action conforming to the provisions of the statute enacted to carry out the constitutional provision creating it. In *Cleveland, L. & W. R. Co. v. Kent*, 87 Hun, 329, the action was brought by the creditor of a corporation to enforce against two New York stockholders the constitutional and statutory liability existing in the state of Ohio, as pointed out above in *Barnes v. Wheaton*, 80 Hun, 8. The complaint was dismissed upon demurrer, and the judgment affirmed on appeal.

Returning to the case at bar, we have, in brief, this situation presented under the demurrer to the complaint: This action is brought on behalf of all the creditors of the corporation, who number 115 or more, and is against all the original stockholders in this state, they being the only ones now liable, as all stockholders residing in states other than Illinois and New York are insolvent. The legal remedy has been exhausted against the Illinois stockholders, except that a portion of the amount due from one defendant may be collected. Some of the New York stockholders are solvent and some are not, but which of them are and which are not is unknown to the plaintiff. The present indebtedness of the corporation, after crediting all amounts collected from stockholders, has been ascertained in the Illinois proceedings. Under the law of Illinois, a domestic corporation may make an assignment for the benefit of its creditors, and the assignee thereunder may maintain any suit or action that the insolvent company making the assignment could have maintained if such assignment had not been made.

The sole question to be determined by us at this time is whether this action can be
45 L. R. A.

maintained, and we are not concerned with the practical difficulties that plaintiff may encounter in establishing to the satisfaction of the trial court the just *pro rata* share of the defendant stockholders in the payment of the indebtedness of this insolvent corporation. We are of opinion that this action is clearly maintainable, upon principle and on authority. A subscription to the stock of a corporation creates a debt enforceable, at law or in equity, by the corporation or its legal representative. *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Mann v. Pentz*, 2 Sandf. Ch. 257; *Herkimer Mfg. & Hydraulic Co. v. Small*, 2 Hill, 127; *Troy Turnp. & R. Co. v. McChesney*, 21 Wend. 296; *Mann v. Cooke*, 20 Conn. 178; *Hartford & N. H. R. Co. v. Kennedy*, 12 Conn. 499; *Hartford & N. H. R. Co. v. Boorman*, 12 Conn. 530; *Ward v. Griswoldville Mfg. Co.* 16 Conn. 593. The receivers and assignees of individuals and corporations domiciled in another state are permitted, under interstate comity, to enforce the contracts of such individuals and corporations in the state of the debtor's residence. In *Dayton v. Borst*, 31 N. Y. 435, this court held the capital stock of a New Jersey bank a trust fund for the security of its creditors, and permitted the receiver of the bank, appointed in New Jersey, to recover of a New York defendant the amount remaining unpaid of his subscription to the capital stock. In *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298, it was held that the assignee of a foreign executor may maintain an action in the courts of this state upon a chose transferred to the assignee by the executor; also that the title of the foreign executor to the assets of the estate is perfect, though conferred by the law of the domicile. Judge Denio says, at page 43: "Foreign corporations may become parties to contracts in this state, and may sue or be sued in our courts on contracts made here or within the jurisdiction which created them." In *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.* 123 N. Y. 37, it was held that a foreign testamentary trustee, having title to the trust estate, may recover any portion thereof that has been converted, or damages for the conversion, without having the will admitted to probate here. Judge Earl pointed out that the trustee stood on his legal title, and his position was to be distinguished from that of foreign executors or administrators, who cannot sue here for reasons of public policy, as the courts will not aid them in the removal of the assets from this state, to the possible prejudice of domestic creditors. In the very recent case of *Mabon v. Ongley Electric Co.* 156 N. Y. 196, this court held, Judge Vann writing the opinion, that while a foreign receiver of a foreign corporation cannot maintain an action in this state against the corporation as sole defendant, for the sole purpose of procuring the appointment in this state of an ancillary receiver, notes and accounts may be collected by the usual proceedings in our courts, which regard a foreign receiver as

representing the original owner, and open their doors to him as they do to a domestic receiver. The learned judge cites, at page 201, *Barth v. Backus*, 140 N. Y. 230, 23 L. R. A. 47; *Vanderpoel v. Garman*, 140 N. Y. 563, 24 L. R. A. 548; and many other cases sustaining the point now considered. In *Mann v. Cooke*, 20 Conn. 178, a New York receiver of an insolvent corporation was permitted to sue in Connecticut for balance due on a stock subscription. In *Cooke v. Orange*, 48 Conn. 401, the receiver of an insolvent New Jersey corporation was allowed to complete the contract of a manufacturing corporation he represented with the town defendant, and afterwards to sue for work and materials in the courts of Connecticut; also to attack the garnishee process sued out by the creditors of the local defendant. *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Blake Crusher Co. v. New Haven*, 46 Conn. 473. The case at bar is not to be distinguished in principle, from the authorities cited. The plaintiff, as the general assignee for the benefit of creditors of an insolvent corporation, is vested with the legal title of all its property, and the power to reduce its assets to possession, and his title is perfect, though conferred by the law of the domicile. *Petersen v. Chemical Bank*, 32 N. Y. 21, 88 Am. Dec. 298. If, as in *Dayton v. Borst*, 31 N. Y. 435, the receiver of a bank in New Jersey was allowed to come into our court and recover the amount remaining unpaid of a stock subscription, why should not this plaintiff, as a general assignee, be permitted to institute a similar action? Can it be said that there is any legal distinction to be drawn between a receiver created by the order of a foreign court and a general assignee created by a foreign legislature? The plaintiff does not come here seeking to remove assets from this state to the possible prejudice of domestic creditors, but asks that he be permitted to enforce against our own citizens the performance of contracts into which they have entered in another jurisdiction. Public policy and state comity both require that this request should be granted.

The judgment appealed from should be reversed, that of special term affirmed, with costs, and the question certified answered as follows: The first question is answered in the negative; the second question is answered in the affirmative; the third question is answered in the negative.

All concur, except **Gray** and **Martin, JJ.**, not voting.
45 L. R. A.

Hudson G. BUSH, *Respt.*,
v.

BOARD OF SUPERVISORS OF ORANGE
COUNTY *et al.*, *Appts.*

(159 N. Y. 212.)

1. The legislature cannot authorize taxation for the purpose of making gifts or paying gratuities to private individuals, as this would constitute a taking of private property for a private and not for a public use.
2. A statute authorizing counties to raise by ordinary taxation money to be paid to drafted men or their heirs on account of services in the Civil War, or the payment of commutation money in lieu thereof, is in violation of Const. art. 8, § 11, prohibiting gifts by counties or municipalities of any money or property to or in aid of any individual, association, or corporation.

(June 6, 1899.)

APPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Special Term for Orange County in favor of plaintiff in an action brought to enjoin the levy of a tax to make payments provided for by the drafted men's act. *Affirmed.*

The facts are stated in the opinion.

Messrs. F. R. Gilbert and **William Hull**, with **Messrs. Taylor & Gardner**, for appellants:

The legislature in this state prior to the passage of the act of 1892 by numerous acts has recognized the fact that money paid by drafted men is money so far paid in the interest of the public and for the public benefit that it should be refunded to the individuals so paying.

By the act, chapter 29 of the Laws of 1865, the legislature recognized an obligation which the people were under to refund to a certain extent the money, or adjust the claim which a drafted man had upon the

NOTE.—On the question as to what are public purposes for which taxes may be collected and used, see *note* to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474; also *Henderson v. London & L. Ins. Co.* (Ind.) 20 L. R. A. 827; *Baltimore & E. S. R. Co. v. Spring* (Md.) 27 L. R. A. 72; *Hayes v. Douglas County* (Wis.) 31 L. R. A. 215; *Shelby County v. Tennessee Centennial Exposition Co.* (Tenn.) 33 L. R. A. 717; *Reelfoot Lake Levee Dist. v. Dawson* (Tenn.) 34 L. R. A. 725; and *State, Douglas County, v. Cornell* (Neb.) 39 L. R. A. 513.

public, whether he served himself in the army or furnished a substitute.

Taber v. Erie County Supers. 131 N. Y. 438.

By numerous acts the legislature has recognized this obligation.

People, Lowell, v. Westford Auditors, 53 Barb. 555, 38 How. Pr. 23.

The justice of the claim of the drafted men is supported by the fact that their localities received credit upon subsequent calls for the years of service which these men furnished.

Taber v. Erie County Supers. 131 N. Y. 438.

That credit which they furnished without any aid or assistance from the public went to relieve the rest of the people.

Refunding is an equity, not a gift.

A constant and uniform construction of constitutional provisions by every department of the state government for a long period of years will have great, if not controlling, weight upon the interpreting of legislative acts above referred to.

The legislature and every department in the state have recognized the justice and validity of acts providing for the payment of claims of this character.

People v. Home Ins. Co. 92 N. Y. 337; *Hills v. Peekskill Sav. Bank,* 101 N. Y. 497; *Guilford v. Chenango County Supers.* 13 N. Y. 143; *Genet v. Brooklyn,* 99 N. Y. 306.

Though a contract for reasons of policy may be so far void that an action cannot be sustained on it, if a moral obligation exists or remains it would be going very far to say that the legislature may not give a legal sanction to that obligation on account of some vested constitutional restriction.

Cooley, Const. Lim. 6th ed. 599.

A total lack of public interest or indebtedness must be established to make refunding a gift.

Brodhead v. Milwaukee, 19 Wis. 634, 88 Am. Dec. 711; *Speer v. Blairsville School Directors,* 50 Pa. 150; *Booth v. Woodbury,* 32 Conn. 118; *People, Perkins, v. Hawkins,* 46 N. Y. 9.

Filling quotas is a public purpose, and held constitutional.

Speer v. Blairsville School Directors, 50 Pa. 150; *Weister v. Hade,* 52 Pa. 474; *Coffman v. Keightley,* 24 Ind. 509; *Lowell v. Oliver,* 8 Allen, 247; *Comer v. Folsom,* 13 Minn. 218; *State, Ruckman, v. Demarest,* 32 N. J. L. 528; *Taylor v. Thompson,* 42 Ill. 9; *Stebbins v. Leaman,* 47 Ill. 352; *Barbour v. Camden,* 51 Me. 608.

Where subsequent legislation made valid an act to pay drafted men the legislation was sustained. Where legislation had not made the act valid other action in that line is not sustained, as towns had no right to act without legislative authority.

Hart v. Holden, 55 Me. 572; *Brodhead v. Milwaukee,* 19 Wis. 625, 88 Am. Dec. 711; *Baldwin v. North Branford,* 32 Conn. 47; *Booth v. Woodbury,* 32 Conn. 118; *Waldo v. Portland,* 33 Conn. 363; *Butler v. Putney,* 43 Vt. 481; *Laughton v. Putney,* 43 Vt. 485; *Coz v. Mount Tabor,* 41 Vt. 28; *Crowell v. Hopkinton,* 45 N. H. 9; *People, Lowell, v.* 45 L. R. A.

Westford Auditors, 53 Barb. 555; *Guilford v. Chenango County Supers.* 13 N. Y. 143; *Brewster v. Syracuse,* 19 N. Y. 116.

Legislature has power to legislate retroactively.

Weister v. Hade, 52 Pa. 474; *Lowell v. Oliver,* 8 Allen, 247; *Barbour v. Camden,* 51 Me. 608; *Hart v. Holden,* 55 Me. 572; *Brodhead v. Milwaukee,* 19 Wis. 625, 88 Am. Dec. 711; *Waldo v. Portland,* 33 Conn. 363; *Butler v. Putney,* 43 Vt. 481; *Coz v. Mount Tabor,* 41 Vt. 28; *Laughton v. Putney,* 43 Vt. 485; *People, Lowell, v. Westford Auditors,* 53 Barb. 555.

Gratitude will sustain the payment of a claim.

Brodhead v. Milwaukee, 19 Wis. 625, 88 Am. Dec. 711; *Guilford v. Chenango County Supers.* 13 N. Y. 143.

The legislature has power to make provision for the payment of just and equitable claims.

The law is to be presumed constitutional.

Speer v. Blairsville School Directors, 50 Pa. 150; *Weister v. Hade,* 52 Pa. 474; *Coffman v. Keightley,* 24 Ind. 509; *Fletcher v. Peck,* 6 Cranch, 87, 3 L. ed. 162; *Gloucester Ins. Co. v. Younger,* 2 Curt. C. C. 328; *Cooley, Const. Lim.* 6th ed. 220, 279; *Gilbert Elev. R. Co. v. Anderson,* 3 Abb. N. C. 434; *Re New York Elev. R. Co.* 70 N. Y. 327; *People, Burrows, v. Orange County Supers.* 17 N. Y. 235; *Ex parte M'Collum,* 1 Cow. 550; *People, Sinkler, v. Terry,* 108 N. Y. 1; *People, Carter, v. Rice,* 135 N. Y. 473, 16 L. R. A. 830; *People, Williams, v. Dayton,* 55 N. Y. 367.

Messrs. William D. Guthrie and Carl A. De Gersdorff, for respondent:

It was the personal duty of drafted men as citizens of the United States to render military service. No valid tax can be laid upon the plaintiff's property to reimburse any drafted man, who, without any promise from town or state and solely in order to avoid performing military duty, paid for a substitute and thereby received immunity from military service.

Those drafted men who sent substitutes did so, not for the public benefit, but to procure personal immunity from a legal duty to the government, which duty they were unable to perform or shrank from performing. They received the only equivalent which they expected or deserved, in the enjoyment of such immunity.

The levy of such a tax as the law of 1892 authorizes is an abuse of the power of taxation, and unconstitutional.

Cooley, Const. Lim. 6th ed. 280; *Cooley, Taxn.* 2d ed. 137; *People, Peake, v. Columbia County Supers.* 43 N. Y. 130; *Freeland v. Hastings,* 10 Allen, 570; *Mead v. Acton,* 139 Mass. 341; *Perkins v. Milford,* 59 Me. 315; *Moulton v. Raymond,* 60 Me. 121; *Kelly v. Marshall,* 69 Pa. 319; *Ferguson v. Landram,* 1 Bush, 548; *Johnson v. Campbell,* 49 Ill. 316; *Washington County v. Berwick,* 56 Pa. 466; *Susquehanna Depot v. Barry,* 61 Pa. 317; *Amity Twp. v. Reed,* 62 Pa. 442; *Miller v. Grandy,* 13 Mich. 540; *Frey v.*

Fond du Lac, 24 Wis. 204; *Opinion of Justices*, 52 Me. 595 Appx.; *Thompson v. Pittston*, 59 Me. 545; *Comins v. Eddington*, 64 Me. 65; *Mercer v. Floyd*, 24 Misc. 164; *Crowell v. Hopkinton*, 45 N. H. 9; *Bowles v. Landaff*, 59 N. H. 164.

The power of taxation vested in the legislature can only be exercised for a public purpose, and taxation for the payment of gratuities to individuals is unconstitutional and void.

Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Spencer v. Merchant*, 100 N. Y. 585; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *William Deering & Co. v. Peterson* (Minn.) 77 N. W. 568; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Guilford v. Chenango County Supers.* 13 N. Y. 143; *Brewster v. Syracuse*, 19 N. Y. 116; *Baldwin v. New York*, 2 Keyes, 387; *Weisner v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Re Jacobs*, 89 N. Y. 98, 50 Am. Rep. 636; *Re Burns*, 155 N. Y. 23; *Marion Twp. Bd. of Edu. v. State*, 51 Ohio St. 531, 25 L. R. A. 770.

The act of 1892 is unconstitutional and void because in conflict with art. 8, § 10, of the state Constitution, as follows:

"Sec. 10. No county, city, town, or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, or corporation. . . . This section shall not prevent such county, city, town, or village from making such provision for the aid or support of its poor as may be authorized by law."

White v. Inebriates' Home, 141 N. Y. 123; *Sun Printing & Pub. Asso. v. New York*, 152 N. Y. 257, 37 L. R. A. 788; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *People, Burby, v. Howland*, 155 N. Y. 270, 41 L. R. A. 838; *Falconer v. Buffalo & J. R. Co.* 69 N. Y. 491; *People, Hetfield, v. Fort Edward Trustees*, 70 N. Y. 28.

The act of 1892, unconstitutional in itself, cannot be upheld by equities in individual cases or by reference to chapter 29, Laws of 1865, and payments made thereunder to the counties or towns of the state.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; *Coxe v. State*, 144 N. Y. 396; *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 160, 38 L. ed. 398; *Colon v. Lisk*, 153 N. Y. 188; *Re South Market Street*, 67 Hun, 594.

Per Curiam:

This was a taxpayer's action to restrain the board of supervisors from proceeding to levy a tax upon one of the towns of Orange county in order to pay the claims of certain persons or their heirs who were drafted into the military service of the United States, or had commuted in lieu of such service, under the act of Congress of March 3, 1863, entitled "An Act for Enrolling and Calling Out the National Forces, and for Other Purposes." The parties seeking to enforce the claims proceeded regularly under the provisions of chapter 664 of the Laws of 1892.

It will be seen that under the provisions of this statute the supervisors are directed to levy the tax in certain cases, and upon due proof that certain conditions specified have been complied with. The courts below have sustained the action, and restrained the supervisors and the authorities of the town from proceeding under the act on the sole ground that the enactment, in its entire scope and purpose, is in conflict with the Constitution, and therefore void. That is the only question necessary to consider upon this appeal. The statute, in substance, empowers and directs the supervisors of the several counties, upon a petition of a majority of the taxpayers, to raise by ordinary taxation the money needed to pay to any drafted man who served personally in the civil war, or paid commutation money, or to the heirs of any such man, the sum of \$300, with the interest thereon for a period of about thirty years.

Every government must possess the inherent right or power to call upon its citizens to perform military duty in time of war. The exercise of this power involves the right of self-preservation, and that right in the government imposes upon the citizen a corresponding duty to render such services whenever the emergency arises, and it is demanded of him. The government must necessarily be the judge of the necessity for requiring the performance of this duty. This power was called into action by the act of Congress referred to since it provided for a conscription to recruit the army. The individuals selected in the manner provided by the act were under obligations to serve, but they were permitted to commute such services, or pay in lieu thereof to the government a specified sum of money. The legislation which the courts below have condemned attempted to authorize taxation for the purpose of refunding to the person who paid, or his heirs, the moneys expended, with interest, and to pay to the person who personally served under the call, or to his heirs, a like sum with interest. The power to impose taxes, general or local, which rests with the legislature, is without much express restriction in the Constitution, and yet even this power cannot be said to be absolute. On general principles it has at least one limitation, and that is that the money to be raised must be required for some purpose that in some sense, at least, can be said to be public. The legislature cannot authorize taxation for the purpose of making gifts or paying gratuities to private individuals. It is quite clear that this was the purpose of the act in question. The individuals for whose benefit the tax was to be levied under the act had no claim, legal or equitable, against the town or county where the money was to be raised by taxation. Those who actually served under the conscription only discharged their obligations to the general government. Those who commuted simply paid so much money in order to be relieved from the obligation to render military serv-

ice. In either case the individual did nothing more than to discharge his obligations to the government as a citizen and hence he had no claim against the locality to reimburse him for what he was obliged to do. The fact that a majority of the taxpayers requested the supervisors to levy the tax is of no importance. Majorities, however potent in many respects, have no power to impose taxes upon the minority for the purpose of raising money to be devoted to gifts or gratuities to individuals. We think that, under the general principles which control the exercise of the power of taxation, the legislature had no power to pass the act in question. It did not attempt to authorize taxation for any public purpose, but was, in effect, a method of taking private property, not for any public use, but for the benefit of private individuals. Legislation of this character has often been questioned in the courts, and quite uniformly condemned. *Taber v. Erie County Supers.* 131 N. Y. 432; *Perkins v. Milford*, 59 Me. 315; *Moulton v. Raymond*, 60 Me. 121; *Freeland v. Hastings*, 92 Mass. 570; *Mead v. Acton*, 139 Mass. 341; *Kelly v. Marshall*, 69 Pa. 319; *Ferguson v. Landram*, 1 Bush, 548. The amendments to the Constitution of this state adopted in 1874 imposed an additional limitation upon the power of the legislature to authorize taxation in counties or towns for private or local purposes. By

§ 11, art. 8, it was enacted that no county, city, town, or village shall hereafter give any money or property to or in aid of any individual, association, or corporation, nor shall any such county, city, town, or village be allowed to incur any indebtedness except for county, city, town, or village purposes. The statute in question provides for the imposition of the tax upon the town to raise money for the payment of claims which there was no legal or moral obligation on the part of the town to pay, and hence it is in conflict with the provision of the Constitution above referred to, which forbids the town from giving any money to or in aid of an individual. The action of the town authorities in auditing or recognizing the claims as obligations to be paid by taxation or similar action by the supervisors, all of which is contemplated by the statute, also violates the restriction against incurring obligations for other than county or town purposes. Whatever other merit these demands may have, it is quite clear that money raised to pay them by taxation on the county or town cannot with any propriety be said to be raised for a county or town purpose. So we think that the courts below were right in deciding that the statute was violative of the Constitution.

The judgment must therefore be affirmed, with costs.

All concur.

RHODE ISLAND SUPREME COURT.

Denis ROBILLARD

v.

SOCIÉTÉ ST. JEAN BAPTISTE DE CEN-
TREVILLE.

(.....R. I.....)

Insanity is included in the word "sickness" as used in the by-laws of a beneficial society.

(June 14, 1898.)

ACTION to recover sick benefits under the by-laws of the defendant society. *Judgment for plaintiff.*

The facts are stated in the opinion.

Mr. Ambrose Choquet for plaintiff.

Mr. A. R. Greene for defendant.

Matteson, Ch. J., delivered the opinion of the court:

This is an action to recover from the defendant, a beneficial society, moneys claimed to be due, under the by-laws of the society, as sick benefits. The facts, as shown by the agreed statement, are as follows: In 1887 Denis Robillard joined the defendant society, and some time in 1890, while still a member, became, or was discovered to be, insane, and

was paid by the defendant the benefits to which, as an insane person, he was entitled under the by-laws of the society then in force, for a period of a year or more, and until September 1, 1892. Those by-laws were as follows: "Art. 28. Of Benefits. Section 1. A member who shall find himself completely incapable of working on account of sickness, accident, or mental alienation shall receive five dollars per week, so long as he shall furnish proper certificates." "Sec. 3. When a member shall have received two hundred dollars for the same sickness, with or without intermission allowing him to work, but never being completely cured, he then shall be entitled only to two dollars per week." In May, 1892, § 1 of these by-laws was amended by striking out the words "mental alienation," and so as to read as follows: "Section 1. A member in good standing, who finds himself completely incapable of working on account of sickness or accident shall receive five dollars per week so long as he shall furnish proper certificates." These amendments took effect September 1, 1892. Robillard, after it was known that he was insane, was removed from Boston, where he was then living, to Long Point, in the dominion of Canada, and was supported in an institution, at public expense, until his decease, intestate, May 26, 1896. At the time of his death he was still a mem-

NOTE.—For insanity as affecting condition as to suicide in life insurance policy, see note to *Mutual L. Ins. Co. v. Wiswell* (Kan.) 35 L. R. A. 258.

ber of the society, in good standing, and the society paid his death benefits. From the time the amended by-laws took effect, September 1, 1892, the society ceased to pay him any benefits on account of his insanity or mental alienation, and he never was entitled to any benefits for physical malady or sickness, as distinguished from mental alienation or insanity. This suit was brought in the lifetime of Robillard by his guardian, and since his death has been prosecuted by the administrator on his estate in this state. The sum claimed is \$322, being for benefits at the rate of \$2 per week from the time when the amendment of the by-laws as stated above took effect, September 1, 1892, to October, 1895, when this suit was brought. The question raised is: "Was Robillard entitled, on the facts stated, to benefits because of mental alienation or insanity, after the date on which the amendments to the by-laws went into effect, September 1, 1892?" We think the question must receive an affirmative answer. The word "sickness," as used in the by-laws of beneficial societies, is construed to include insanity. In *McCullough v. Expressman's Assn.* 133 Pa. 142, 150, 7 L. R. A. 210,—a suit against a beneficial association,—Mr. Justice Mitchell remarks: "That insanity is a sickness in some senses of the word is beyond question, and such legal authorities as appear to have considered the question hold that it is sickness within the meaning of such charters and articles of association as the defendant's." And in *Kelly v. Ancient Order of Hibernians*, 9 Daly, 292, Mr. Justice Van Brunt says: "Insanity has always been considered a disease, and comes strictly within the meaning of the term 'sickness.'" In *Pellazzino v. German Catholic St. Joseph Soc.* 16 Ohio L. J. 27, it seems to have been assumed, without question by either party, that insanity entitled a member of such a society to sick benefits. See also *Burton v. Eyden*, L. R. 8 Q. B. 295, in which it was held that insanity was sickness, within the meaning of the rules of a friendly society, by which any member should receive eight shillings per week during any sickness or accident that might befall him, unless by rioting or drunkenness. Blackburn, J., says: "I am of the opinion that lunacy is sickness, within the meaning of the rules of this society. . . . It certainly seems to me that lunacy is a sickness affecting the health of the body in such a way as to prevent a man's ability for earning his livelihood. If it were not the intention to include it, the rules of the society should be framed so as expressly to exclude it." And Quain, J., in the same case, states: "I am also of opinion that insanity is sickness within the society's rules." Perhaps the defendant intended by its amendment of the by-laws of May, 1892, striking out the words "mental alienation," that its members should no longer be entitled to sick benefits on the ground of insanity, since it ceased to pay sick benefits to Robillard from the time these amendments went into effect. But, if such was its intention, it apparently became

aware of its failure to accomplish that end by the amendment, for in the revision of its constitution and by-laws in 1896, when it re-enacted the amended by-law, it impliedly recognized sickness as including mental alienation by adding to the by-law as it previously stood a clause limiting its liability, so that the by-law now reads as follows: "Art. 30. Of Benefits. Section 1. A member in good standing, who finds himself incapable of working on account of sickness or accident, shall receive five dollars per week so long as he shall furnish proper certificates. However, the society shall not pay benefits for mental alienation when insane members shall be at the charge of the state or any institution where those persons are gratuitously supported."

Having answered the question in the affirmative, judgment must be rendered for the plaintiff, in accordance with the stipulation of the parties, for \$322 and costs.

Theodore W. PHILLIPS

v.

PROVIDENCE STEAM ENGINE COMPANY *et al.*

(.....R. I.....)

1. A corporation unable to go on may dispose of its property by a majority vote, in the absence of unfairness, oppression, or fraud.
2. A receiver will not be appointed at suit of a minority stockholder for a corporation which is unable to go on with its business, when the majority stockholders have agreed on a reasonable arrangement for the disposal of all its property for a fair price, on a private sale.
3. A private sale of its property, made by a corporation which is unable to go on with its business, will not be disturbed at suit of a minority stockholder and a sale ordered at public auction, merely because he deems that the agreed price is inadequate, and that part of the property is worth more than the price at which it is scheduled, where he does not show that more, or even as much, would be offered for the whole property if sold at auction.

(May 14, 1899.)

SUIT in equity to enjoin the defendant corporation from disposing of its property. *Dismissed.*

The facts are stated in the opinion.

Messrs. David S. Baker and Lewis A. Waterman, for complainant:

A corporation when it finds itself unable to carry on business at a profit may be dissolved by vote of stockholders holding a majority of the stock.

NOTE.—On the question of the power to appoint receivers of corporations where no other relief is asked, see *note* to Supreme Sitting, O. of I. H. v. Baker (Ind.) 20 L. R. A. 210; *Whitney v. Hanover Nat. Bank* (Miss.) 23 L. R. A. 531; and *State, Merriam, v. Ross* (Mo.) 23 L. R. A. 534.

Boston & P. R. Corp. v. New York & N. E. R. Co. 13 R. I. 260.

But if the purpose of such dissolution is not the bona fide discontinuance of the business, but is the continuance of that business by another new corporation, then the better rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation.

2 Cook, Stock & Stockholders & Corp. Law, § 667; 4 Thomp. Corp. § 4548.

The only way to ascertain the real value of the property is by a public sale of it, and the dissenting stockholders may insist upon this.

2 Cook, Stock & Stockholders & Corp. Law, § 668; *Mason v. Peucabie Min. Co.* 133 U. S. 50, 33 L. ed. 524; *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590; 5 Thomp. Corp. § 6544; 4 Thomp. Corp. § 4548.

The case at bar is more similar to a partnership than almost any case of a corporation that could be found.

Each partner has a right to a sale to the highest bidder.

2 Lindley, Parn. *557; *Rowlands v. Evans*, 30 Beav. 302; *Burdon v. Barkus*, 4 De G. F. & J. 42.

Phillips had as much right to purchase the property of the said corporation as the majority stockholders did.

Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; *Little, Partn.* *592; *Collyer, Partn.* § 226; *Williams v. Wilson*, 4 Sandf. Ch. 379.

The complainant has a right to the injunction prayer for, and to the appointment of a receiver.

2 Cook, Stock & Stockholders & Corp. Law, § 894; *Mills v. Central R. Co.* 41 N. J. Eq. 1; *McKean v. Vick*, 108 Ill. 373; 2 Bates, Partn. § 740; *Smith, Receiverships*, 306; *High, Receivers*, § 532; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Clegg v. Fishwick*, 1 Macn. & G. 294; *Dan. Ch. Pl. & Pr.* *1729; *Parsons, Partn.* § 346; *Jennings v. Chandler*, 10 Wis. 21.

If this court should hold that the circumstances of this case do not justify the appointment of a receiver, the value of the complainant's interest in this corporation should be ascertained under the direction of the court, or by public auction.

Mason v. Peucabie Min. Co. 133 U. S. 50, 33 L. ed. 524; *Baltimore & O. R. Co. v. Cannon*, 72 Md. 493.

Messrs. Comstock & Gardner, for respondents:

The question of the wisdom of the sale is a matter which the corporation, acting in the ordinary way by vote of its stockholders, should be allowed to determine for itself.

Peabody v. Westerly Waterworks, 20 R. I. 176; *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393, 66 Am. Dec. 490.

In order to render proper the interference by the court with the contemplated action of a majority of the stockholders in a corporation, within its corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation as to lead to the clear inference that no one thus acting could
45 L. R. A.

be influenced by any honest desire to secure such interests, but that he must have acted with intent to subserve some outside purpose regardless of the consequences to the company and in a manner inconsistent with its interests.

Gamble v. Queens County Water Co. 123 N. Y. 91, 9 L. R. A. 527; *Dudley v. Kentucky High School*, 9 Bush, 576; *Northwest Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589; *Story v. Jersey City & B. P. Pl. Road Co.* 16 N. J. Eq. 13, 84 Am. Dec. 134.

The fact that the pledgee of the majority's stock in the Providence Steam Engine Company is to become a stockholder in the Providence Engineering Works, to whom it is proposed to sell the property of the Providence Steam Engine Company, affords no reason for enjoying the sale which is otherwise a fair and reasonable one.

5 Thomp. Corp. § 6542, and cases cited.

There is absolutely no justification or occasion shown for the appointment of a receiver of this corporation nor the judicial sale of its assets.

Stiness, J., delivered the opinion of the court:

The complainant, a stockholder, seeks to restrain the respondent corporation from disposing of its property. The company is doing business under an extension by its creditors, in the terms of which an instalment becomes due in November next. It is agreed that this cannot be met, and that the company will be unable to go on in business, because the creditors refuse a further extension. In view of these facts, an arrangement has been made to form a new company, in which creditors holding extension notes will take preferred stock to the extent of one half of their claims, while other subscribers will furnish enough cash to pay for the plant and provide a working capital. The terms of the proposed sale give to the present stockholders \$70,000 over and above the indebtedness of the company, amounting to about \$228,000, making a total payment of about \$298,000. The estimates of the value of the property vary from \$327,000 to \$397,000,—the latter being the complainant's estimate,—but it does not appear that either party has reason to expect that either sum would be realized at a forced sale. This is not a sale in which the other stockholders are to gain any advantage, beyond the privilege, which is also offered to the complainant, of taking his proportionate amount of cash or its equivalent stock in the new company, as he may prefer. It is, in effect, a cash sale to strangers, approved by stockholders representing 3,675 shares against 75 held by the complainant. While this majority cannot affect any rights to which he is entitled, it tends to show a fair price. It is a well-known result, to which courts of justice cannot be blind, that large plants of this kind are often, if not usually, sold at a great sacrifice in case of a forced sale. We should not have to go outside of the records of our own court to find proof of this fact. A sale being

necessary, the question is, How shall it be made? The prayer of the bill is that a receiver may be appointed, that the business may be wound up and the company dissolved; and the argument is that the sale of the effects should be at public auction. The question, then, is whether the complainant is entitled to such a decree.

There is a difference of opinion as to the power of a corporation to sell its entire property, and thus practically to retire from business. Some courts hold that it may be done by the consent of all the stockholders (7 Am. & Eng. Enc. Law, 2d ed. p. 734, note 1), and others hold that it may be done by a majority (Id. notes 2-4). All of the authorities cited in note 1, however, do not hold that the consent of all the stockholders is necessary; e. g., *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393, 66 Am. Dec. 490; *Wilson v. Miers*, 10 C. B. N. S. 348, and others. But the editor adds: "There seems to be no doubt that it may do so when it is no longer able to profitably continue its business." We think that this is the correct rule. It has been recognized in this state. *Hodges v. New England Screw Co.* 1 R. I. 312, 350, 53 Am. Dec. 624. In *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590, Brayton, Ch. J., said: "No case has been cited, and, in view of the diligence of counsel in this case, we may say there is no case which holds, that where the purpose of the incorporation could not be accomplished, the business contemplated could not be carried on,—where the capital had been exhausted in endeavors to go on, having no means to go further,—a company thus laboring under burdens which they could no longer bear could not release themselves by a surrender of their franchise to the state which granted and which was willing to receive it, and that by a majority. This is not only for their benefit, but it is a necessity, and it would be hard indeed if one stockholder could by his dissent prevent such relief against the prayer of all other members of the company." In *Peabody v. Westerly Waterworks*, 20 R. I. 176, a necessary limitation to this rule was recognized, in the words: "The action of the company was taken by a vote of more than 1,100 out of a total of 1,350 shares. There is no proof of unfairness, oppression, or fraud in such action. The case, as presented, is simply that of a stockholder who differs from a large majority of his fellow stockholders as to the expediency of a sale." The principle upon which these cases rest is that a corporation may dispose of its property, by a majority vote, in cases which are free from unfairness, oppression, and fraud. Against wrongs of this kind equity will interfere. To this effect are *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685; *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393, 66 Am. Dec. 490; *Leathers v. Janney*, 41 La. Ann. 1120, 6 L. R. A. 661; *Sewell v. East Cape May Beach Co.* 50 N. J. Eq. 717; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Warfield v. Mar-* 45 L. R. A.

shall County Canning Co. 72 Iowa, 666; *Wilson v. Miers*, 10 C. B. N. S. 348. See also *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300. The complainant does not charge improper conduct, but simply that he considers the price inadequate and unjust, and hence he prays for a receiver, and a sale of the property by auction. Ordinarily, when a court orders a sale, it can only be done by auction. A court cannot negotiate a private sale, and it orders an auction, as the fairest chance for all parties to bid and buy. But when the parties in interest have negotiated a sale which is fair to all concerned, and there is nothing to show that a larger price may reasonably be expected, it does not follow that an auction sale would be ordered. This question was considered in *Quidnick Co. v. Chafee*, 13 R. I. 402, in which the trustee had an offer for the entire property, approved by nearly all the creditors. Then other parties intervened, agreeing to bid the amount named at auction, and the court ordered a sale by auction. In the present case there is no evidence that anybody is willing to give as much as the offer proposed, or that there is any reason to suppose that it will bring as much or more. The only testimony put in by the complainant is that the tools will probably bring more than they are valued at by the company, while, as to the bulk of the property,—the real estate, etc.,—there is no evidence of market value. Moreover, the complainant does not show that he desires to bid upon the property himself, or that he knows of anyone who would bid at a sale. In this absence of evidence that a larger total might be expected from an auction sale, we see no reason to disturb the agreement already made, which, upon the testimony given, seems to be fair. The complainant relies strongly on *Mason v. Peabody Min. Co.* 133 U. S. 50, 33 L. ed. 524. In that case the court had appointed a master to value the property, which he reported to be nearly \$500,000. A majority of the company had arranged a sale to themselves at \$50,000. Naturally, in view of such gross inadequacy, the court ordered a sale by auction. The case was very different in its details from the case before us. In *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590, the city of Providence had control of the corporation, and had sold the corporate property to itself. The court restrained the city from taking possession, and ordered a sale by auction. That, too, was a different case from this one. The court is bound to look to the interests of all parties, and especially to protect the rights of a minority from oppression and fraud. But where, as in this case, no such thing is charged, and nothing is shown to lead to the belief of a better total price, the complainant makes no case for interference. To show that movable tools may be sold at a price somewhat, but not largely, higher than that at which they are scheduled, is quite a different thing from showing that the plant as a whole would sell for more than the price offered. To set aside the sale un-

der these circumstances would be to risk a certainty for an uncertainty, without any testimony on which to base a hope of benefit

to the stockholders from such interference. We see no reason for such a step in the dark.
Bill dismissed.

SOUTH CAROLINA SUPREME COURT.

B. G. WORTH *et al.*, *Appts.*,

v.

James NORTON, *Resp't.*

-(.....S. C.....)

1. The privilege from "arrest" conferred upon members of Congress by U. S. Const. art. 1, § 6, does not extend to service of summons in a civil action, unaccompanied by an arrest.

2. A member of Congress not in attendance or going to or returning from its session, but absent on private business, is not within the constitutional privilege of members of Congress from arrest during their attendance at the session of their respective houses and in going to and returning from the same.

(*Pope, J., dissents.*)

(August 2, 1899.)

A PPEAL by plaintiffs from an order of the Circuit Court for Marion County setting aside the service of a summons and complaint upon defendant upon the ground that he was exempt therefrom as a member of the United States House of Representatives. *Reversed.*

The facts are stated in the opinion.

Messrs. Willeox & Willeox, for appellants:

The privileges of members of Parliament, from small and obscure beginnings, have been advancing for centuries with a firm and never-yielding pace.

Claims seem to have been brought forward from time to time, and repeated, till some example of their admission enabled them to build law on that example.

That these privileges must be continually progressive seems to result from the members rejecting all definition of them; the doctrine being that "the dignity and independence are . . . preserved by keeping their privileges indefinite;" and that "the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of Parliament itself, and are not defined and ascertained by any particular stated laws."

1 Bl. Com. 163, 164.

It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged senators and

representatives themselves from the single act of arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective Houses, and in going to and returning from the same, and from being questioned in any other place for any speech or debate in either House.

U. S. Const. art. 1, § 6.

Messrs. Sellers & Sellers for respondent.

Pope, J., dissenting:

Plaintiffs commenced an action against defendant in the court of common pleas for Marion county, in this state, by the service of a summons and complaint upon him while he was at Florence C. H., in Florence county, in this state, on the 6th day of July, 1898, for the recovery of a money judgment. Thereupon the defendant, by his counsel, served the following notice: "The defendant, James Norton, by his counsel, Sellers & Sellers, without at present answering the complaint herein, alleges: (1) That he is a representative from the sixth district of the state of South Carolina in the Congress of the United States of America; that, as such, he is not amenable to process, either criminal or civil, except in specified cases, during the session of the said Congress or in going to or returning from the same; (2) that on the 6th day of July, 1898 (the day on which copy of summons and complaint was served upon him in the town of Florence, S. C.), the said Congress was in session in the city of Washington, D. C., he being absent therefrom on leave. Wherefore you will take notice that defendant, by his counsel, will move the court of common pleas, at 12 o'clock M., on the first day of the next term thereof for said county, or as soon thereafter as counsel can be heard, to set aside the service of said summons and complaint as being unconstitutional, illegal, and void; and failing in that motion, he hereby reserves the right, by leave of the court, to answer said complaint *nunc pro tunc*." It was admitted at the hearing that on the 6th day of July, 1898, the time of service of summons and complaint, James Norton, defendant, was a representative in Congress from this state, and at the time of service he was in Florence, S. C., on private business, being absent from Congress, then in session, and that Congress adjourned *sine die* on the 8th of July, 1898. The motion being heard, his honor, the presiding judge, passed the following order:

The motion made in above case to set aside the service of the summons and complaint, on the grounds set forth in the notice served upon plaintiff's counsel 25th July,

NOTE.—As to privileges of members of Congress and state legislatures from suit, see also *Rhodes v. Walsh* (Minn.) 23 L. R. A. 632.
45 L. R. A.

1898, having been heard, and, after argument of counsel, it is ordered that the service of said summons and complaint be set aside as illegal and void, it being admitted that Congress was in session, and that James Norton was a member thereof, and absent therefrom on leave. R. C. Watts, Presiding Judge.

The plaintiffs, through their counsel, gave due notice of appeal, and subsequently filed their exceptions, as follows: "It is submitted that his honor, the circuit judge, erred (1) in dismissing the service of the summons and complaint, and in holding the same to be illegal and void, on the ground that 'Congress was in session, and that James Norton was a member thereof, and absent therefrom on leave;' (2) in not holding that the service of the summons and complaint was legal and valid, because the same was not an arrest, and the defendant was neither in attendance upon Congress, nor going to or returning from the same; (3) in not holding that representatives in Congress are privileged solely from arrest, except in treason, felony, and breach of the peace, during their attendance upon Congress while in session, and in going to and returning from the same, and in not holding that a representative in Congress is at all times amenable to the service of a civil process of the character served upon the defendant."

The language of the Federal Constitution is as follows (art. 1, § 6): "The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; . . . they shall not be questioned in any other place." Of course, the question we are called upon to settle depends upon the meaning to be given to the words "privileged from arrest." If we adhere to the literal meaning of the word "arrest," the circuit judge was in error. But is such a restricted meaning proper? In the judgment of the writer of this opinion, the words "privileged from arrest," as used in the Federal Constitution, were words of art meaning "freedom from service of any civil process." These are the words of the common law of the mother country. It is to be regretted that the Supreme Court of the United States has not spoken in regard to the true meaning to be accorded the words "privileged from arrest." In our state, in the case of *Tillinghast v. Carr*, 4 McCord, L. 152, when the privilege of a member of the house of representatives of the state of South Carolina was invaded by a summons in a civil proceeding, the court held that the language of the 14th section of article 3 of the state Constitution (which was in these words: "The members of both houses shall be protected in their persons and estates, during their attendance on, going to, and returning from the legislature, but these privileges shall not be extended so as to protect any member

who shall be charged with treason, felony, or breach of the peace") was broad enough to cover the case, not only of arrest, but summons in a civil proceeding. The court in its reasoning uses this language: "It must be obvious that a member may be much harassed by suits, although his body be not arrested. His mind must, of course, be greatly disturbed and drawn off from his business. Besides, it brings upon him a sort of odium which lessens his usefulness. If it be admitted that he may be served with summons while attending on the legislature, it follows as a matter of course that he may be served with summons *eundo et redeundo*, and thus he might, by ill-natured and malicious creditors, be sued in every district through which he passed, going or returning, and might be required to attend a court which might be sitting while the legislature was convened, and thus, perhaps, an undue advantage taken of him," etc. It must be admitted that the judge who prepared this opinion (Judge Colcock) did not understand the word "arrest" to be synonymous with the words just quoted from the state Constitution. This was not necessary to the decision of the court.

There are at least two decisions of courts in other states which have construed the meaning of the word "arrest" in the Federal Constitution, as used in the section of that instrument already quoted herein, to include freedom from a summons in a civil action, as well as actual arrest in such an action. The case of *Doty v. Strong*, 1 Pinney, 84, arose when a delegate in Congress from the territory of Wisconsin had been served with summons in a civil action. He pleaded his privilege as a member of Congress in freedom from arrest and summons in a civil action. The supreme court held that, as a member of Congress, under the Federal Constitution, he was free, not only from actual arrest, but also from any summons in a civil action. Here is the language used by Mr. Justice Miller in delivering the opinion of the court: "The defendant relied upon the 6th section of the 1st article of the Constitution of the United States, which, in speaking of the senators and representatives in Congress, contains the following language: 'They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.' The reason of this provision is obvious. The people elect their representatives to Congress to protect their rights and advance their interests, which should not be jeopardized by the arrest of their representative for debt or private contracts of his own; and it is equally necessary that his rights and interests should be protected while absent in the public service. In order to render this provision available to the extent of its necessity, it will not do to construe the words 'privilege from arrest' in a confined or literal sense. A liberal construction must be given to these words upon principle and reason. It is just as necessary for the protection of the

rights of the people that their representative should be relieved from absenting himself from his public duties during the session of Congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution. If the people elect an indebted person to represent them, this construction of the Constitution must also be made to protect his rights and interests, although it may operate to the prejudice of his creditors; but the claims of the people upon his personal attendance are paramount to those of individuals, and they must submit. We have only been able to find one authority on this subject after a careful search. It is a decision of the supreme court of Pennsylvania in the case of *Gyer v. Irwin*, 4 Dall. 107. That decision was made upon the same provisions in the Constitution of that state, and couched in the same language as that under consideration. The court in that case declared that 'a member of the general assembly is undoubtedly privileged from arrest, summons, certiorari, or other civil process during his attendance on the public business confided to him, and that, upon principle, his suits cannot be forced to a trial and decision while the session of the legislature continues.' " There has been a more recent case (that of *Miner v. Markham*, 28 Fed. Rep. 387) where Judge Dyer, of the United States circuit court, in construing this same provision of the Federal Constitution, held that a "member of the house of Congress is entitled to exemption from service of process, although not accompanied with arrest of the person, while on his way to attend a session of Congress." Although this is only a circuit opinion, Judge Dyer has done his work in defending the construction of this provision of the Constitution so ably that we are strongly tempted to quote at length from such an admirable opinion; but we have already quoted quite enough to set forth the principle upon which we rely in sustaining the circuit judgment of Judge Watts in the case at bar.

The decision of this question renders unnecessary any prolonged notice of the ground of appeal claiming that the circuit judge overlooked the fact that service of process was made upon Norton in his absence from his seat in Congress two days before the Congress adjourned. Mr. Norton, although absent on leave from his seat in Congress, was liable to be summoned to return to Congress at any moment. Besides, Congress was in session when he was served with process. Public policy, as well as the Federal Constitution, demand that these gentlemen, who are elected by the people as their representatives in the lower House of Congress, shall not be harassed by civil suits while Congress is in session, and also for a reasonable time in going to and returning from Washington.

In my opinion our judgment should be: "It is the judgment of this court that the order of the circuit court which was appealed from be affirmed." But the majority of the court think otherwise. Hence it is 45 L. R. A.

my duty to state that the judgment of the Circuit Court must be reversed, and the cause remanded to the circuit court, with leave to the defendant to answer in twenty days after the remittitur reaches the court below, but that, in the event the defendant fails to answer in said twenty days, the plaintiff have leave to apply to the court for judgment; but I dissent from this judgment.

MeIver, Ch. J., delivered the opinion of the court:

Being unable to accept the conclusion reached by Mr. Justice Pope in this case, I will proceed to state briefly the grounds of my dissent. The facts of the case are all conceded, and are so fully and fairly stated in his opinion as to supersede the necessity of any further statement here. The exemption claimed is based entirely upon § 6 of article I of the Constitution of the United States, the terms of which are set forth in the leading opinion. I do not think that the defendant is entitled to the exemption claimed, for two reasons: (1) Because it is not pretended that the defendant was arrested, but simply served with a summons to answer to a civil action, brought to recover the amount of an ordinary money demand, and the constitutional provision above referred to confers only the privilege of immunity from arrest, and not an immunity from suit. (2) Because it is conceded that the defendant, at the time he was served with the summons, was not in attendance upon the session of the House of Representatives, of which he was a member, nor was he going to or returning from the same; but, on the contrary, he was absent on leave from said House, and was at Florence, S. C., attending to his own private business. The question which the court is called upon to decide turns entirely upon the construction of the language used in the constitutional provision under which the exemption is claimed. The language is that senators and representatives "shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest." It seems to me that this language is so plain as to admit of but one construction. The privilege granted is freedom from "arrest," and that word has such a plain and well-defined meaning that there can be no doubt what was intended by the use of such a well-known word, having such a well-defined meaning. There is not a word or syllable in the section of the Constitution which in the slightest degree indicated an intention that this word shall have any other than its universally accepted signification. No court, therefore, has any authority from its own views of public policy to stretch that word beyond its usual and accepted signification. It cannot for a moment be supposed that the framers of the Constitution were ignorant of the wide difference between arresting the person of a debtor and simply serving him with a summons to answer to a civil action, which is, practically, nothing more than a mere notice. It would therefore be wholly unwarranted for a court to put such

a construction upon the language found in the Constitution as would make the exemption conferred apply to two such very different things. As is said in that standard authority, Cooley, Const. Lim. 2d ed. 58-60: "In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. Says Marshall, Ch. J.: 'The framers of the Constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant.' . . . This is but saying that no forced or unnatural construction is to be put upon their language, and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is so often made by interested subtlety and ingenious refinement to induce the courts to force upon these instruments a meaning which their framers never held that it frequently becomes necessary to redeclare this fundamental maxim." So in Potter's Dwarrr. Stat. at page 145, we find the same principle laid down in the following language: "Whether courts are interpreting an agreement between parties, a statute, or a Constitution, the thing to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which they stand. If, thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such case there is no room for construction. That which the words declare is the meaning of the instrument, and neither the courts nor the legislature have a right to add to or take away from that meaning." See also Endlich, Interpretation of Statutes, §§ 4 et seq., especially at § 5, where that writer, after saying: "What is called the policy of the government, with reference to any particular legislation, is said to be too unstable a foundation for the construction of a statute,"—introduces the following quotation from Mr. Justice Story's treatise on the Constitution: "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, *Ita lex scripta est*, to follow, and to obey; nor, if a principle so just could be overlooked, could there well be found a more unsafe guide or practice than mere policy and convenience."

While, therefore, it may be supposed that good policy demands that a member of Congress, during his attendance upon the sessions of the House to which he belongs, should not only be protected from any restraint upon his liberty by the arrest of his person, but also from being harassed by suits or actions, yet I am unable to understand by what authority a court can add to the terms of the Constitution, so as to add an additional privilege to that conferred in plain terms

by the Constitution, whereby a member of Congress may claim a privilege, not only exempting his person from arrest, but also an exemption from suit. Accordingly, as is said in Cooley, Const. Lim. 2d ed. 133, in some of the states the privilege of members of the legislature of exemption from arrest on civil process has, by constitutional provision, been extended so as to exempt members of the legislature from the service of civil process, as well as from arrest of their persons, and in others of the states the estates of the members are exempted from attachment for some prescribed period. This certainly tends to show that it is considered that, without such additional provision, the privilege from arrest cannot be so construed as to include an exemption from suit; and in a note to the passage to which I have referred that distinguished author cites two cases, *Gentry v. Griffith*, 27 Tex. 461, and *Case v. Rorabacher*, 15 Mich. 537, as holding that "exemption from arrest is not violated by the service of citations or declarations in civil cases."

The only case from our own state cited by Mr. Justice Pope is *Tillinghast v. Carr*, 4 McCord, L. 152, which as it seems to me, tends to support my view rather than his. In that case Carr was a member of the legislature in Columbia, and he moved to set aside the service of the writ, under the privilege conferred by our Constitution of 1790, which motion was granted. The language of that provision, which is fully set out in the opinion of Mr. Justice Pope, and need not, therefore, be repeated here, is very different from that relied on in this case. The exemption there conferred is expressed in this language: "The members of both houses shall be protected in *their persons and estates*, during their attendance," etc. (Italics mine.) And that language might well be construed as extending the exemption so as to embrace immunity from suit as well as arrest, for the protection intended applied, not only to the persons of the members, but also to their estates, which, of course, would be affected by a civil suit as well as where the person of the member was arrested; and hence, when the declared intention was to protect, not only the person, but also the estate of the member the court was well warranted in construing the constitutional provision as conferring an immunity from the service of any civil process, as well as from the arrest of his person in a civil action. This view seems to have been that taken by Judge Colcock, who opens his opinion with these words: "In determining this question I must be governed by the words of our Constitution. It will be observed that all cases of privilege are now provided for by some law, and in most of those which have been passed on that subject, both here and in Great Britain (before the act of Anne), the word 'arrest' is used; and the construction which has been almost always given to that word has been that, if the body be not taken, the privilege is not violated. There can be no doubt but that the framers of our Constitu-

tion were fully apprised of the various opinions on this subject, and of all the important cases which had occurred in England, and that, after a full knowledge of these circumstances, they passed the clause of the Constitution. Now, if the framers of our Constitution meant no more than that the members should be exempt from arrest, why did they not use that word, so common on such occasions?" This language, it seems to me, plainly indicates that, if Judge Colcock had been construing the constitutional provision of the Constitution of the United States, upon which the question under consideration turns, in which not only the word "arrest" is used, but what is more important, no other word implying an intention to extend the exemption beyond an arrest of the person is found therein, he would have held, as he says it had almost always been held, "that if the body be not taken, the privilege is not violated."

It is true, as Judge Pope frankly admits, that the case just considered is not decisive of the question; yet it does seem to me that the language which I have quoted plainly indicates that Judge Colcock would have sustained my view in this case. I find, however, another case in our state, which, by analogy, is more in point,—*Huntington v. Shultz*, Harp. L. 452, 18 Am. Dec. 660. In that case the question was whether the defendant was exempt from the service of a writ in a civil action while attending court, the exemption being claimed under the act of 1791 (1 Brevard, Dig. p. 223), which provided as follows: "That all persons necessarily going to, and attending on, or returning from the same [the superior courts] shall be freed from arrests in any civil action." Held, that the service of a writ in a civil action is not an arrest, within the meaning of the act of 1791, exempting from arrest persons necessarily attending on courts.

In preparing this opinion, which I have had to do hastily, I have not had any access to the cases cited from Wisconsin, Pennsylvania, and the Federal Reporter, and therefore I cannot comment upon them, except to say that, judging from the quotations made from them in the opinion of Mr. Justice Pope, they seem to be based largely upon consideration of public policy and convenience,—a line of reasoning, as may be seen above, which is condemned by the standard authors on constitutional law, and the rules for the construction of Constitutions. At all events, those cases are not binding authority here.

2. There is also another reason why I cannot concur in the conclusion reached by Mr. Justice Pope. Even if it could be conceded (as I am unwilling to do) that the word "arrest," in the constitutional provision relied upon, could be so construed as to include an exemption from the service of a summons in a civil action, still I do not see how the exemption claimed in this case could be allowed. It will be observed that the privilege conferred is not an exemption from arrest while a member of Congress, or dur-

ing the sessions of that body, as we are told by the books was once the case in regard to members of the British Parliament, but the exemption here is only during attendance at the session of the House of which the person claiming the exemption is a member, and in going to or returning from the same. Now in this case the conceded facts are that the defendant, when served with a copy of the summons in this case, was neither in attendance on, nor was he going to or returning from, the House of Representatives of which he was a member, but, on the contrary, was in the city of Florence on his private business, so that in no view of the case was the defendant entitled to the exemption claimed. I think, therefore, the order appealed from should be reversed.

STATE of South Carolina, *Respt.*,
v.

Charles HOLLEYMAN *et al.*, *Appts.*

STATE of South Carolina, *Respt.*,
v.

Louis HOLLEYMAN, *Appt.*

(.....S. C.....)

1. **Intoxicating liquors purchased in another state at a distillery**, for the use of the purchaser himself, and transported by him in his own private conveyance across the state line toward his home, have not arrived within the state, within the meaning of the Wilson act, so as to become contraband under the South Carolina statutes while in course of transportation between the state boundary and the home of the purchaser.
2. **Discrimination in favor of intoxicating liquors bought from a dispensary**, as against liquors purchased beyond the limits of the state for the personal use of the purchaser, with respect to the necessity of having certificates as to the purity of the liquors or the fact that they are kept for personal use, would constitute a burden on interstate commerce.

(*Pope, Jones, Townsend, and Klugh, JJ., dissent.*)

(October 31, 1898.)

A PPEAL by defendant from a judgment of the General Sessions Circuit Court for Chesterfield County convicting them of unlawfully handling and hauling contraband spirituous liquors in the night-time against the form of the statute in such case made and provided. *Reversed.*

The facts are stated in the opinions.

Mr. W. P. Pollock, for appellants:

Ardent spirits, distilled liquors, ale, and beer are subjects of exchange, barter, and

NOTE.—As to the arrival of intoxicating liquors in a state within the meaning of the Wilson law, see *State v. Rhodes* (Iowa) 24 L. R. A. 245, *Reversed* by the Supreme Court of the United States in 170 U. S. 412, 42 L. ed. 1089.

traffic like any other commodity in which a right of traffic exists; and being thus articles of commerce, a state cannot, in the absence of legislation on the part of Congress, prohibit their importation from abroad, or from a sister state, nor, when imported, prohibit their sale by the importer.

Mugler v. Kansas, 123 U. S. 661, 31 L. ed. 210; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36.

The dispensary act of 1896 does not come within the scope and effect of the Wilson law. That law only applies in cases where the state law prohibits and forbids entirely the manufacture, sale, use, etc., of intoxicating liquors, or requires the payment of a license from all parties for the privilege of selling the same.

When a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in and importing them from other states.

Scott v. Donald, 165 U. S. 58, 41 L. ed. 632.

Before a statute of a state can be declared an inspection law by which the importation of articles from foreign countries and from sister states can be regulated and prohibited, there must be provision made for the actual inspection of such articles.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

The Supreme Court of the United States has declared the act of 1895 to be unconstitutional, and, whether that court was right or wrong, we are bound by that decision.

Congaree Construction Co. v. Columbia *Top.* 49 S. C. 535.

Messrs. U. X. Gunter, Jr., C. P. Townsend, and J. M. Johnson for respondent.

Pope, J., delivered the following opinion:

The two above-stated cases were heard together before Judge Benet and a jury at the April term, 1897, of the court of general sessions for Chesterfield county, in this state; and both cases originated out of the same transaction and the same state of facts, and the indictments were similar in all respects, excepting the names of the defendants. The defendants were convicted, and, after sentence, appealed to this court on twelve grounds. Before considering these grounds of appeal, it may not be amiss to state briefly the facts underlying the controversy. On the 11th of December, 1896, in the night-time the defendants were arrested by the officers of the law, and were found to have in their possession twenty-one gallons of corn whisky, from Hightower's distillery, in the state of North Carolina; and they were in Chesterfield county, in this state, with the said whisky transported in two buggies; and they were on their way to their homes at Lamar, in the county of Darlington, in this state; 45 L. R. A.

and also the whisky was purchased and so transported for the individual use of the defendants (appellants). Each keg and jug filled with whisky was claimed by one particular individual, so that there was no joint ownership thereof. The indictments alleged that said defendants "did unlawfully handle and haul contraband spirituous liquors in the night-time, against the form of the statute in such case made and provided," etc. The statute referred to was what was known as the "Dispensary Law" of this state. It was admitted that no tags were upon said liquors. The grounds of appeal were as follows: "First. Because his honor, W. C. Benet, presiding judge, erred in charging the jury that the dispensary law (the act of 1896) is in all respects a lawful exercise of the police power by the general assembly of South Carolina. Second. Because he erred in charging the jury that a citizen of this state can bring into the state, from without the state, only one gallon of intoxicating liquors, without complying with certain requirements of the dispensary law, and then only when he is accompanying the same as his personal baggage. Third. Because he erred in instructing the jury that all liquors, except such as have been bought from a state officer authorized to sell the same, and have been tested by the chemist of the South Carolina College, and found to be chemically pure, are contraband; and he erred in instructing the jury that all liquors in this state, except dispensary liquors, and liquors passing through the state in transit, going through the state consigned to points beyond this state, shall be deemed contraband, and may be seized without warrant; and he erred in instructing the jury that all alcoholic liquors, other than domestic wines, which do not have on the packages in which they are contained labels and certificates going to show that they have been tested by the chemist of the South Carolina College, and purchased from a state officer authorized to sell them, are contraband, and upon seizure shall be forfeited to the state, except liquors held by owners of registered stills, in bonded warehouses. Fourth. Because he erred in instructing the jury that these defendants could have gotten certificates from the state dispensary commissioner, by which the liquor purchased by these defendants without the state, while said liquor was without the state, could be protected under the dispensary law. Fifth. Because he erred in refusing to instruct the jury whether a citizen of the state has a right to handle and haul liquors, purchased from a dispensary, in the night-time, and in charging the jury that there is no such question as that in this case, and in further charging the jury that there is no evidence in this case to which the law can apply. Sixth. Because he erred in refusing to charge the jury that liquors and wines are recognized as commodities which may be lawfully made, bought, and sold, and must therefore be deemed to be the subject of foreign and interstate commerce; and so,

if the liquors for the handling and hauling of which the defendants herein were indicted were brought from the state of North Carolina into this state, the defendants had the right to carry them on to their destination, unmolested, under the United States Constitution, and they were guilty of no violation of state law in handling and hauling the same,"—and in adding the following proviso thereto: 'Provided, that the liquors were not contraband liquors, in the sense of the dispensary law; and I have given you the definition which the law gives to "contraband liquor" in this state.' Seventh. Because he erred in refusing to charge the jury that 'it does not matter for what purpose an article is imported from another state or from a foreign county. The state cannot interfere with its bringing or importation. It does not matter whether the importation is for personal use, or for some other purpose. It is the importation, and not the use, which is protected by the Constitution of the United States; and the importation is general, and not confined to any particular class or kind of importation,'—and in adding the following proviso thereto: 'I charge you that, with this addition: Unless the liquor, when seized, is contraband liquor.' Eighth. Because he erred in charging the jury that 'if liquor is found in the possession of a person, in the condition which makes it contraband, then, whether it comes from another state or inside the state, it would be liable to seizure, and the handling and hauling of it in the night-time would be illegal.' Ninth. Because he erred in refusing to charge the jury that 'the only way that a state can interfere with the free importation of commodities or articles of commerce from one state to another is under an inspection law; but the act of South Carolina of 1896, known as the "Dispensary Law," is not an inspection law.' Tenth. Because he erred in refusing to charge the jury that 'if the defendants were engaged in bringing in or importing liquors from the state of North Carolina into the state of South Carolina at the time they were arrested, they were simply doing what they had a right to do, under the Constitution of the United States, and were violating no valid state law; the United States Supreme Court having declared so much of the dispensary law of South Carolina as relates to the importation of liquors from without the state into the state to be unconstitutional, null, and void.' And he erred in charging the jury: "That is correct, except that, if the liquors in their possession were contraband liquors, then they were not doing what they had the right to do in this state.' Eleventh. Because he erred in refusing to charge the jury that 'when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such liquors in and importing them from other states. Such legislation is void, as a hindrance to interstate commerce.' And he erred in holding that this proposition did not 45 L. R. A.

apply to the dispensary law. Twelfth. Because he erred in charging the jury: 'If you are satisfied beyond a reasonable doubt that they (the liquors in the possession of the defendants) were contraband liquors, you will find them (the defendants) guilty.'"

At the beginning of our remarks upon the contention here presented, it is proper to state that the appellants concede that the dispensary law of this state, now to be reviewed, is conformable to the provisions of our state Constitution; so that our inquiries will be directed to the alleged want of conformity of such state law with the Constitution of the United States, or, to limit the inquiry to the precise part of the Federal Constitution, to an alleged conflict with article 1, § 8, which declares: "The Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes." Our investigations are happily limited to that commerce between the states in the matter of intoxicating liquors. And here again it is our good fortune to find a line of decisions of the United States Supreme Court which relieve our labors of much tedium. Beginning with the cases of *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572; *Scott v. Donald*, 165 U. S. 68, 41 L. ed. 633; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088; and *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100,—the United States Supreme Court has had before it some very interesting phases of the liquor problem, as it intertwines itself about the interstate commerce provisions of the United States Constitution. Briefly stated, the results of these cases established these propositions:

(a) *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, held that it was not in the power of a state, by its legislation, exclusive of some action by Congress, to lay a restriction upon a common carrier (which was a railroad) to regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable that end might be.

(b) *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, held that a state law could not prevent the sale of liquors in unbroken packages which were received by the resident of the state from parties outside the state.

(c) *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572, held that after August 8, 1890 (at which date the Wilson bill became a law of the United States), it was in the power of a state to punish, under laws enacted under the police power of the state, anyone who sold liquors in original packages bought from parties outside the state.

(d) *Scott v. Donald*, 165 U. S. 68, 41 L. ed. 633, held that the dispensary law passed by the state of South Carolina, in those of its provisions which sought to discriminate

between citizens of its own state, against citizens of another state, in the privilege of receiving from parties outside the state spirituous liquors, was void, as a violation of the interstate commerce provision of the Federal Constitution; or, to reproduce the language of Mr. Justice Shiras, who formulated the opinion of that court: "It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from, other states; that such legislation is void as a hindrance to interstate commerce, and an unjust preference of the products of the enacting state as against similar products of the other states."

(e) *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, held that under the Wilson bill a state could not punish a common carrier, or its agent, for moving an unbroken package of liquor from one point to another point in the state of Iowa before it delivered the same to the consignee, although the common carrier or its agent knew it was an unbroken package of liquor; and it also held, in construing the words of the act of Congress usually called the "Wilson Bill," whose language was "that all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise" (26 Stat. at L. 513), that the word "arrival," as used in this act, in the light of all its provisions, was not intended to and did not cause the power of the state to attach to an interstate commerce shipment while the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee.

(f) *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, held, in construing the dispensary law enacted in 1896, and the identical act now undergoing consideration, that: (1) Under the act of August 8, 1890, the restrictions and regulations of state laws become operative on the original packages of intoxicating liquors imported into a state before the sale thereof, and therefore such packages cannot be sold, if the state law forbids the sale, or can only be sold in the manner and form prescribed by the state regulations. (2) A state law cannot be void because in excess of state authority, when it is but the execution of a power lawfully vested in the legislature of the state to forbid the sale of liquors in the original packages. (3) From the fact that a state law permits the sale of liquor subject to particular restrictions, and 45 L. R. A.

only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the state. (4) The act of Congress of August 8, 1890, subjects the sale of original packages of intoxicating liquors to state laws which restrict or regulate such sales as well as to laws which forbid them. (5) Giving to state officers the exclusive right to purchase all intoxicating liquors to be sold in the state does not make a state law regulating such sales inherently discriminatory, and therefore unconstitutional, on the ground that the officers have arbitrary discretion in determining where and from whom they will purchase liquors. (6) The fact that the provision omitted from a new law had been, before its enactment, declared to be unconstitutional, affords a conclusive demonstration of its inconsistency with the new law. (7) Authorizing the use by a resident of wine or liquor made by him for such purpose does not make an unconstitutional discrimination. (8) Compelling a resident of the state who desires to order intoxicating liquors from another state for his own use first to communicate his purpose to a state chemist, and depriving any nonresident of the right to ship any intoxicating liquors, unless previous authority is obtained from state officers, are unconstitutional regulations of interstate commerce. (9) The right of a citizen to carry on interstate commerce is conferred by the Constitution of the United States, and its exercise depends solely upon the will of the person engaged therein, and cannot be, in advance, controlled or limited by the state, in any department of its government. (10) An inspection law must not substantially hamper or burden the constitutional right, on the one hand, to make, and, on the other hand, to receive, an interstate shipment. (11) A requirement that a sample shall be sent in advance for inspection, before intoxicating liquors are brought into the state, cannot be supported as an inspection law, but such a law must, at least, provide for some inspection of the article imported.

Since all the questions except one seem to be Federal questions, we very naturally turn to the decisions of the Supreme Court of the United States for their decision; and it is to the two latest decisions that we must turn, for the appellants, in common with many others, have given a force and meaning to the decision of *Scott v. Donald*, 165 U. S. 68, 41 L. ed. 633, which the Supreme Court of the United States, in its last decision (*Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100), has taken occasion to point out. The appellants, as before remarked, seem to attribute to *Scott v. Donald*, 165 U. S. 468, 41 L. ed. 633, this meaning, namely, that the dispensary act of 1895 was not, in any of its features, a valid exercise of the police powers of the state, whereas the court, in the case just cited, was careful to avoid this. When the facts underlying the controversy in *Scott v. Donald*, 165 U. S. 68, 41 L. ed. 633, are considered, it will be seen that *Scott*, the appellee, had ordered three shipments of alcohol-

ic liquors to be made to him from the states of California, Maryland, and New York, respectively, which shipments, when so made, were seized while in the hands of a common carrier, and before delivery to the consignee could be made; and the judgment of the Supreme Court of the United States was that, because of some features in the act of 1895, the state could not justify the exercise of its police power because the act was invalid, being in violation of the Federal Constitution. Hence, when the latest decision (that of *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100), was rendered by the United States Supreme Court, it was held that the act of 1896, amendatory of the act of 1895, was a valid exercise of the police power of the state, except when it interdicted the delivery to a consignee within the state of alcoholic liquors from outside the state for the use of the consignee, but not so as to liquors which were intended to be sold by the consignees; and passing upon the first phase of this question (as to consignees for their own use), the said court did hold that the inspection laws were invalid. So far as these latest decisions extend, it may be said: First, that no state can interdict the delivery by a common carrier of any alcoholic liquors from without the state to a consignee within the state for his own use; second, that when the word "arrival," occurring in the act of Congress commonly called the "Wilson Bill," is to be construed, it must be held that such word means an arrival of such liquors into the hands of the consignee within the state. The trouble in connection with the cases we are considering is that the liquors were in the hands of their owners when they crossed the threshold of this state; coming from Hightower's distillery, in the state of North Carolina, where these liquors were purchased by these three citizens of South Carolina. They may be said to have reached the consignees at the state line. As will be perceived, this is an entirely different question from that decided in the *Rahrer Case*, the *Scott-Donald Case*, or the *Vance-Vandercook Case*; for in each of these cases the liquors had not reached the hands of the consignees. So now we are confronted with this difficulty in the cases now at bar: The owners of those packages of liquors have in their own hands such liquors, and are confessedly handling and hauling such liquors in the night-time, in violation of §§ 33 and 37 of the dispensary act passed in 1896. Is not the police power of the state sufficiently powerful to interdict the citizens of the state from handling and hauling in the night-time alcoholic liquors, when they are the owners thereof? Is it not in exact keeping with the laws of the state in relation to hauling seed cotton at night? Section 280 of the Criminal Statutes of South Carolina provides: "It shall not be lawful for any person to buy or sell or receive by way of barter, exchange, or traffic of any sort, any seed cotton between the hours of sundown and sunrise. . . . This is confessedly in the exercise of 45 L. R. A.

the police power. Why, therefore, may not a state in the exercise of its police power, forbid the handling or hauling of spirituous liquors at night? This also would be the exercise of the police power of the state, and cannot in any sense affect the interstate commerce laws. It should be noted, however, that these §§ 33 and 37 by their terms affect "contraband liquors." A question may arise as to whether a person purchasing for his own use liquors from persons outside this state, and carrying this property with him into his own state, may not justly claim that such liquors in his hands are not "contraband liquors," and therefore not in violation of these sections. If a man may order for his own use spirituous liquors from another state, and have such liquors delivered to him at his own home, in South Carolina, without incurring liability therefor under the dispensary law, which forbids it,—relying for freedom from such liability upon the interstate commerce provision of the United States Constitution,—why may not a citizen take his buggy or wagon, and go into another state, and purchase spirituous liquors, and by his own buggy or wagon transfer such liquors to his home, and claim immunity therefor under the interstate commerce clause of the Constitution? We are inclined to think he could, except for § 37 of the dispensary act of 1896, which provides: "Any person handling contraband liquors in the night-time or delivering the same shall be guilty of a misdemeanor, and on conviction. . . ." The word "contraband," used in this section, refers to any liquors other than dispensary liquors. The appellants admit that the liquors found in their possession were not dispensary liquors.

When the exceptions here presented are taken up *seriatim*, it will be found that they are untenable, in the light of our views heretofore expressed. As to the fifth exception, when examined it will be found to ask of the circuit judge a ruling upon what would be the effect of hauling liquors at night-time which had been purchased of the dispensary. The circuit judge declined to rule upon the matter, for the simple reason that the liquors here involved were admitted not to have come from the dispensary. This was not error. I think, therefore, our judgment should be, "It is the judgment of this court that the judgment of the circuit court be affirmed." But the members of the court are equally divided. Hence, under the Constitution of this state, the judgment of the circuit court stands affirmed.

Jones, J., concurring:

I concur in affirming the judgment of the circuit court in these cases. The act of Congress known as the "Wilson Act," quoted in the opinion of Mr. Justice Pope, expressly leaves intoxicating liquors within the control of the police power of the state, "upon their arrival in said state." In *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, reaffirmed in *Vance v. W. A. Vandercook Co.* 170 U. S.

439, 42 L. ed. 1100, the supreme court of the United States has construed "arrival in the state," in this act, to mean "arrival at the point of destination, and delivery to the consignee." Let us assume that the police power of the state can only operate upon an article of interstate commerce after it ceases to be such in an interstate commerce transaction. When is an interstate commerce transaction as to intoxicating liquors consummated? Manifestly, when such article is delivered to the consignees. In the case before us it is admitted that the whisky was actually delivered into the hands of the buyers in North Carolina. So far as the non-resident seller was concerned, it reached its destination when the buyers received it. Even if such a transaction between citizens of this state and a citizen of North Carolina could be called an interstate commerce transaction, it was consummated by actual delivery in North Carolina. The moment, therefore, that the whisky, in the actual custody of its owner, a citizen of this state, entered the territory or jurisdiction of this state, it became subject to the operation of the police power of the state; the commercial power of the United States having yielded its grasp when the interstate transaction was consummated by delivery. Suppose a common carrier had delivered this whisky to the defendants at a station on or near the state line; could it be fairly contended that the whisky had not reached its destination, because the owners in actual possession contemplated carrying it through Chesterfield county to their residences, in Darlington county? Such a view would make easy the illicit traffic in intoxicating liquors, especially in border counties; for, under the cover of darkness, evil men could travel the country loaded with such liquors, and, if an actual sale could not be proved, escape all risk, under the plea of "personal use." It is surely within the police power of the state to prohibit the hauling and handling of contraband liquors in the night-time, as a means to prevent, or make more difficult, illicit traffic under cover of night. Admitting that the state cannot confiscate, as contraband, intoxicating liquors imported for personal use, while in the control and protection of interstate commerce, undoubtedly the state may declare such liquors contraband for failure to comply with state regulations after such articles are received by the importer in this state, for then interstate commerce control ends. Whether such state regulations are reasonable, as applied after the liquor ceases to be an article in interstate commerce, is a question not appertaining to the commercial power, but to the police power,—if, indeed, any legislation not void on constitutional grounds can in this state be declared void merely on the ground of unreasonableness. We are not called upon in this case to say whether the dispensary law should be read so as to give the importer for personal use a reasonable time after receipt of the imported liquor in which to comply with state regulations, so as to prevent such article

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from being regarded as contraband, in view of the provision that "persons having liquor which they wish to keep for their own use may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the state commissioner and applying for certificates to affix thereto." The defendants made no such defense, and, if they had, the question would be one, not under the commercial power of the United States, but under the police power of the state. Appellants stand or fall on the question whether § 37 of the dispensary law is void as applied to the admitted facts in this case as against the interstate commerce clause of the United States Constitution. As to this question, I have endeavored to show that such clause has no application in this case. Bona fide importers for personal use, as well as importing illicit traffickers under the guise of "personal use," must comply with state regulations, when they attach under its police power or take the consequences. If these views are correct, the circuit court committed no reversible error in modifying defendants' requests to charge, and in his refusal to charge certain requests touching interstate commerce. Appellants admit that they were hauling and handling intoxicating liquors in the night-time in this state without compliance with the regulation of the dispensary law, after the actual receipt by them of such liquors. Under these circumstances, such liquor was contraband.

McIver, Ch. J., delivered the following opinion:

I cannot concur in the conclusion reached by Mr. Justice Pope, for the reason that such conclusion is, as it seems to me, in direct conflict with the decisions of the Supreme Court of the United States in the cases which will be hereinafter cited. The precise question presented by these appeals (for it is conceded that both of the cases stated in the title are to be controlled by the same principle) is whether a citizen of South Carolina, residing herein, can lawfully bring into this state, for his own use, spirituous liquor which he has bought in another state. This question has been conclusively determined in the affirmative by the case of *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, and the same principle there decided has been recently reaffirmed in *Vance v. W. A. Vandercook Co.* reported in 170 U. S. 438, 42 L. ed. 1100. In the case first cited the action was brought against a state constable to recover damages for seizing and carrying away certain packages containing spirituous liquors belonging to the plaintiff, which he had imported from other states, while such packages were in the hands of the common carrier through whose agency the packages had been brought into this state. The plaintiff recovered judgment below, and the case was carried by writ of error to the Supreme Court of the United States, where the judgment was affirmed. Mr. Justice Shiras, in delivering the opinion of the court (concurred in by all the other

justices except one), after determining that the dispensary law of this state was not an inspection law, and is not within the scope of the act of Congress of the 8th of August, 1890, commonly called the "Wilson Bill," and after holding that the dispensary law recognized the manufacture, sale, and use of spirituous liquors as lawful, announced the holding of the court in these words: "It is sufficient for the present cases to hold as we do, that when a state recognizes the manufacture, sale, and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from, other states; that such legislation is void, as a hindrance to interstate commerce, and an unjust preference of the products of the enacting state as against similar products of the other states." It is true that the case of *Scott v. Donald* arose under the dispensary law approved the 2d of January, 1895, while the case now under consideration arose under the dispensary law approved the 6th of March, 1896; but the two acts, so far as the questions which arise in the present case are concerned, are identically the same, and hence the construction placed upon the provisions of the act of January, 1895, by the Supreme Court of the United States must be regarded as the proper construction of similar provisions in the act of March, 1896. Indeed, we do not understand that it is claimed, in the opinion of Mr. Justice Pope, that the act of 1896 must receive a different construction from that placed upon the act of 1895 by the supreme court in the case of *Scott v. Donald*, so far as the present case is concerned,—perhaps for the reason above indicated. But (what is absolutely conclusive) we find that in the case of *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, which arose not only after the passage of the act of 1896, but after the passage of the act of 1897 (22 Stat. at L. p. 535) amendatory thereof, the Supreme Court of the United States distinctly reaffirms the ruling in *Scott v. Donald*, that a resident of this state may lawfully import from another state spirituous liquor for his own use, and goes on to declare that this right arises from the Constitution of the United States, and cannot be prohibited or materially interfered with, or in any way hampered, by any state law; and the court proceeds to hold that the provisions of the act of 1897 designed to provide for the inspection of liquor imported by a resident for his own use (which, however, have no application to the present case), doubtless enacted to avoid the effect of the decision in *Scott v. Donald*, cannot so operate, as those provisions do not impart to the act of 1897 the features of a valid inspection law, and then concludes the discussion of this branch of the case in these words: "Conceding, without deciding, the power of the state, where it has placed the control of the sale of all liquor within the state in charge of its own officers, to provide an inspection of liquors shipped into a state by residents of

other states for use by residents within the state, it is clear that such a law, to be valid, must not substantially hamper or burden the constitutional right on the one hand to make, and on the other to receive, such shipment." It is very obvious that the case of *Vance v. W. A. Vandercook Co.* draws a marked distinction between the power of a state to prohibit the importation of liquor for sale, and the power to prohibit the importation of that article for personal use. Under that authority a state may prohibit the importation of liquor for sale, even in original packages, by virtue of the provisions of the act of Congress of the 8th of August, 1890, commonly called the "Wilson Bill," but it cannot prohibit the importation of spirituous liquors by a resident of this state for his own personal use. This being the decision of a tribunal which is confessedly the final arbiter in all questions involving the construction of the Constitution and laws of the United States, must be accepted by all other tribunals and all citizens as the settled law of the land, whether conformable to our own views or not.

Applying these principles to the case in hand, the inevitable result is a reversal of the judgment below. The undisputed evidence is that these defendants, who are residents of the state of South Carolina, had gone over into the adjoining state of North Carolina, and there purchased the liquor in question for their own use, and were transporting the same, in their buggies, to their homes, in South Carolina. While on their way, during the night-time, they were arrested by a state constable and his posse at some point in South Carolina, their liquor and teams seized, and they placed in jail. At the next succeeding term of the court of general sessions they were indicted for a violation of § 37 of the dispensary act of 1896, under the charge that they "did unlawfully handle and haul contraband liquors in the night-time," contrary to the provisions of said act. The case came on for trial before his honor, Judge Benet, and a jury. Under his charge the jury found the defendants guilty, and from the judgments rendered they have appealed, upon the several grounds set out in the opinion of Mr. Justice Pope, in which various errors are imputed to the circuit judge in his charge, as well as in his refusals to charge certain requests. I do not propose to consider these grounds *seriatim*, but rather to confine myself to what I consider the controlling questions in the case.

In the first place I would remark that I do not suppose that any question can be or will be made, based upon the fact that these defendants were not bringing this liquor into the state by the use of the agencies usually employed for that purpose, such as railroad, etc., but were bringing it into the state in their own private vehicles. Indeed, no such point has been presented by Mr. Justice Pope, and in fact Judge Benet expressly instructed the jury that this fact made no difference, using this language: "Interstate

commerce may be carried on in this country on foot or by wagon or by caravan, as well as by railroads or steamboat or canal or river, or in any other of the more modern and improved forms of transportation." It is suggested, however, that this case differs from the cases decided by the Supreme Court of the United States in this respect: That in all of those cases the liquors were seized before delivery to the consignee by the common carrier through whose agency the liquors ordered for personal use from another state were brought into this state, whereas in the case now under consideration the liquors bought by the defendants in the state of North Carolina for their own use were brought into this state by the owners of such liquors in their own private vehicles, and not by the agency of a common carrier, and therefore when these parties crossed the state line the liquors were in the hands of the owners,—had reached the possession of the consignees, so to speak,—and when these parties were arrested they were engaged in transporting the liquors to their homes in this state. But what difference this can make I am at a loss to conceive. If a resident of this state has a right, under the interstate commerce clause, to import into this state, through the agency of a common carrier, spirituous liquors for his own use, it is impossible for me to conceive why he may not bring liquors which he has purchased in North Carolina for his own use into this state in his own private vehicle. To hold otherwise would involve the absurdity of holding that a person may lawfully do by an agent what he cannot do himself. This, as I understand it, was the view which Mr. Justice Pope seemed inclined to take; but he bases the conclusion which he reaches upon the ground that the liquor in question was "contraband," and as § 37 of the dispensary act of 1896 makes it a penal offense to handle "contraband liquor in the night-time," the parties could be convicted for a violation of that section of the statute. It is quite true that there are several sections in the act just referred to declaring that any spirituous liquors not obtained from the dispensary authorities are contraband liquors. But the very meaning of the term "contraband" shows that no article can be so characterized, unless it is an article the importation or exportation of which is prohibited by law. Now, if, as we have seen, the interstate commerce clause of the Constitution of the United States secures to a resident of this state the right to import from another state spirituous liquor for his own use, it follows necessarily that such liquor cannot be regarded as contraband, and the statute of any state which undertakes to declare such liquor contraband must be held void, because in conflict with the Constitution of the United States. A right conferred upon the citizen by the Constitution of the United States cannot be denied or destroyed by any state legislation. If spirituous liquor be a legitimate article of commerce, as it is declared to be in 45 L. R. A.

the case of *Re Rahrer*, 140 U. S., at page 556, 35 L. ed. 575, and if, as we have seen from the cases above cited, a resident of this state has a right, secured to him by the Constitution of the United States, to import spirituous liquor into this state for his own use, then it follows necessarily that a state statute which declares such liquor "contraband," and makes it a penal offense to handle such liquor in the night-time, not only materially interferes with and hampers the right secured to the citizen by the Constitution of the United States, but absolutely destroys such right, and cannot, therefore, be sustained as a legitimate exercise of legislative power. The analogy suggested by Mr. Justice Pope, drawn from the provisions of § 280 of the Criminal Statutes, which make it a penal offense for any person to traffic in seed cotton in the night-time, does not hold good, for the reason that such statute does not purport to interfere with any right derived from the interstate commerce clause of the Constitution of the United States, while the object and purpose of the dispensary law are to deprive the residents of this state of such right, and for the further reason that the seed-cotton act makes no discrimination between seed cotton raised in this state and that which may be obtained from another state, while the dispensary law does discriminate between liquors obtained from another state and those obtained from the dispensary; making the handling of the former in the night-time a penal offense, while the handling of the other in the night-time is not forbidden.

It may be said, however, that under the provisions of the act of Congress of the 8th of August, 1890, commonly called the "Wilson Bill," the legislature is permitted to enact any legislation, in the exercise of its police powers, that it may deem necessary or proper, in regard to spirituous liquors imported into one state from another state, after such liquor has reached the hands of the owner or consignee. Such a view would completely emasculate the interstate commerce clause of the Constitution of the United States, and would effectually destroy the right thereby secured to the citizen. Under that view, a resident of this state who ordered spirituous liquors shipped to him by rail from California, North Carolina, or any other state, for his own use, would be liable, as soon as he received the liquor from the railroad depot and placed it in his wagon for transportation to his home, not only to have his liquor, but his wagon and team, seized and confiscated; and, if night should overtake him while hauling the liquor to his own home, he would further be liable to indictment for violating § 37 of the dispensary law. Indeed, if he should succeed in reaching his home unmolested, and should undertake to remove such liquor in the night-time from one apartment in his dwelling house to another, he would be liable to an indictment for handling contraband liquor in the night-time. It is very manifest, if this view should be

adopted, that the right secured to the citizen by the Constitution of the United States would be as effectually denied and destroyed as if a state should pass a statute forbidding, in the most explicit and positive terms, a resident of this state from importing into this state from another state spirituous liquor for his own use; for no person would venture to import liquor from abroad, if he knew that he was liable to lose such liquor as soon as it was brought within the limits of the state, and to be subjected to indictment and punishment if he happened to be overtaken by night in hauling such liquor from the railroad depot to his own home. As is held in *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, any state law containing provisions which "are so onerous and burdensome in their nature as to substantially impair the right" thus derived from the Constitution of the United States, or which "so hamper and restrict the exercise of the right as to materially interfere with or, in effect, prevent its enjoyment," are void, so far as such provisions are concerned; for, as is further said in the same case in speaking of what are claimed to be the inspection features of the dispensary law, "it is clear that such a law to be valid must not substantially hamper or burden the constitutional right on the one hand to make, and on the other to receive, such shipment."

There are other errors pointed out by the exceptions which would be sufficient to call for the reversal of the judgments appealed from,—for example, exception 9, which is fully sustained by the case of *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, and exception 11, which imputes error in refusing to charge defendants' seventh request, which is nothing but a quotation from the opinion of the court in *Scott v. Donald*, at page 101, 165 U. S., and page 645, 41 L. ed., laying down the rule applicable to that case, in which the court was called upon to construe and apply the dispensary law; and hence there was clearly error in refusing that request because not applicable to the dispensary law. There are other exceptions worthy of consideration, but what I have said sufficiently indicates the grounds of my dissent, and I do not deem it necessary to extend this opinion by considering all of the exceptions. I am of opinion, therefore, that the judgment of the circuit court should be reversed.

Gary, A. J., concurring.

The court having thus been equally divided on a constitutional question, the constitutional court composed of the justices of the Supreme Court and of the circuit courts were called together, and, after the cause had been heard by such court, **Eugene B. Gary, A. J.**, on June 3, 1899, delivered the opinion of the court:

These two cases arose out of the same transaction and the same state of facts. By consent they were heard together. The indictments were identical, except as to the 45 L. R. A.

names of the defendants. They charged that the defendants, "on the eleventh day of December, A. D. 1896, with force and arms, at Chesterfield, in the county and state aforesaid, did unlawfully handle and haul contraband spirituous liquors in the night-time, against the form of the statute in such case made and provided, and against the peace and dignity of the state."

The following facts, which seem to be undisputed, were developed by the testimony: The defendants live near Lamar, in Darlington county, about 40 miles from Chesterfield C. H. On the 11th of December, 1896, they left their homes in Darlington county, and traveled by private conveyance to Hightower's distillery in North Carolina, where they purchased about 21 gallons of corn whisky, which was put up in kegs and jugs. The jugs and kegs were then placed in the defendants' buggies, and they started back to their homes. After crossing the state line, and when within about 2 miles of Chesterfield, S. C., during the night-time, they were arrested by a state constable and his posse, their liquor and teams seized, and they placed in jail. The liquor was purchased for their personal use. Up to the time of their arrest they had done no act even tending to break the continuity of the transportation, and the liquor was seized while in transit. The defendants were convicted, whereupon they appealed upon exceptions which will be set out in the report of the case.

The pivotal point in the case is whether the liquor was contraband when seized as aforesaid. If the liquor, when seized, came within the protection guaranteed by the Constitution of the United States to interstate commerce, all statutory enactments in South Carolina upon this subject were inoperative. Our first inquiry, therefore, will be whether it came within this protection. This will involve a construction of the Constitution of the United States relative to interstate commerce and of the statute of the United States commonly called the "Wilson Act."

Section 8, art. 1, of the Constitution of the United States provides that Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. The "Wilson Act" (26 Stat. at L. 313) is as follows: That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein, in original packages or otherwise."

The intention of the foregoing provision of the Constitution is thus succinctly stated in the case of *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088: "The fundamental right

which the decision in the *Bowman Case*, 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one state into another, from the point of transmission to the point of consignment, and the accomplishment thereof of delivery covered by the contract." The word "arrival," in the *Wilson act*, was construed by the court in *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, to mean when the merchandise reached its destination and delivery there to the consignee. Unless there is something in this case to take it out of the principle laid down in *Rhodes v. Iowa*, the liquor was under the protection of the United States Constitution until it reached its destination. A statement of some of the general principles decided by the Supreme Court of the United States will show that the liquor was in transit as interstate commerce at the time it was seized. Interstate commerce, ordinarily, consists of three elements, to wit: (1) The purchasing of merchandise by a resident of one state from a resident of another state; (2) the delivery of the articles of commerce; and (3) the transportation thereof. The purchase may be made by the buyer in person, or through a traveling salesman of the nonresident, or by an order sent by the purchaser to the nonresident. The delivery may be made directly to the purchaser when the goods are sold, or when they reached their destination, in cases when they have been consigned to him.

In this case the defendants purchased the liquor, and the delivery was made to them in person at the distillery in North Carolina. This is not disputed. Therefore we may eliminate from our consideration two of the elements of interstate commerce, to wit, the purchase of the liquor and its delivery.

This brings us to a consideration of the principal element of interstate commerce in this case, to wit, the transportation of the liquor. At the time the United States Constitution was adopted, the vehicles for the convenience of travel and common carriage were insignificant as compared with those of the present day, and the transportation of merchandise from one state into another was to a great extent conducted under the supervision of the purchaser, and in vehicles belonging to him. The right, under the Constitution, to transport merchandise was guaranteed to him; but, for convenience, this right which was primarily in him might be exercised through agents who undertook to deliver the goods to him at their destination. In this case transportation began when the defendants left the distillery in North Carolina, with the intention of conveying the liquor to their homes in South Carolina, and this transportation was protected until the liquor reached that destination. We must bear in mind that the fact that the liquors were in the possession of the defendants when they crossed the state line did not constitute a delivery to them. The delivery had 45 L. R. A.

taken place at the distillery, and there was not even the semblance of any act on the part of the defendants breaking the continuity of the transportation. Can it be contended for a moment that, if the defendants had employed men to transport them and their liquor to their homes in South Carolina in buggies, the liquor, although it was in the possession of the defendants when they crossed the state line, would have been subject to seizure before it reached its destination? The provision of the Constitution as to interstate commerce was intended as much for the protection of the seller as for the protection of the purchaser. It would be anomalous to hold that, if the defendants had transported the liquor through an agent, it would have been protected until it reached its destination and was delivered to the consignee, while, if the defendants themselves undertook to transport the liquor, it was subject to the laws of the state as soon as it came within its borders. It would be the exercise by an agent of greater powers and the enjoyment of larger privileges than those possessed by his principal, which cannot be done. *State, George, v. Aiken*, 42 S. C. 222, 26 L. R. A. 345. To give a contrary construction to this provision of the Constitution would place a heavy burden upon interstate commerce, as, although the seizure was made while the liquor was being transported in this state, it would necessarily affect that part of the transportation beyond the limits of the state.

In the case of *Rhodes v. Iowa* the court says: "But to uphold the meaning of the word 'arrival,' which is necessary to support the state law, as construed below, forces the conclusion that the act of Congress in question authorized state laws to forbid the bringing into the state at all. This follows from the fact that, if arrival means crossing the line, then the act of crossing into the state would be a violation of the state law, and hence necessarily the operation of the law is to forbid crossing the line, and to compel remaining beyond the same. Thus, if the construction of the word 'arrival' be that which is claimed for it, it must be held that the state statute attached and operated beyond the state line confessedly before the time when it was intended by the act of Congress it should take effect." So in this case it would enable the statutes of this state to become operative beyond the state line if the liquor became subject to those statutes the moment it entered the territorial limits of the state, and would thus enable a state to defeat the provision of the Constitution guaranteeing protection to interstate commerce.

There is another reason why the liquor did not become subject to the statutes of the state as soon as it crossed the state line. The dispensary law allows a person to keep in his possession, for his own personal use, liquor which has been purchased from a dispensary without requiring certificates of any kind either as to its chemical purity, or that it is for personal use, to be attached thereto. Liquor purchased beyond the lim-

its of the state must receive the same treatment that is accorded to liquor purchased within the state. As the liquor was purchased by the defendants for personal use, they had the right to keep it in their possession, unmolested, until it was consumed in the use, as long as this privilege was allowed to persons having in their possession liquors bought from a dispensary; otherwise, there would be a discrimination in favor of the state, and interstate commerce would thereby be burdened. As the statutes of this state were inoperative at the time the seizure was made, it becomes unnecessary to consider the exceptions complaining of error on the part of the presiding judge in his charge as to the requirements that certain certificates should be attached to liquor purchased beyond the limits of the state, in order to prevent it from being contraband.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded for a new trial.

Pope, Jones, Townsend, and Klugh, JJ., dissent.

Benet, Gage, and Ernest Gary, JJ., did not sit.

Jones, J., dissenting:

Being unable to concur in reversing the judgment of the circuit court in these cases, I will briefly state my reasons therefor. The indictments were brought under § 37 of the dispensary act of 1896, which provides that "any person handling contraband liquor in the night-time or delivering the same shall be guilty of a misdemeanor," etc. This act, in §§ 1 and 35, defines what is meant by "contraband liquors," as follows: Sec. 1: "All such liquors, except when bought of a state officer authorized to sell the same, or in possession of one, and having been duly tested by the chemist of the South Carolina College and found to be chemically pure, are declared to be contraband and against the morals, good health, and safety of the state, and all alcoholic liquors in this state not having been tested by the chemist of the South Carolina College and found to be chemically pure are hereby declared to be of a poisonous and detrimental character, and their use and consumption as a beverage are against the morals, good health, and safety of the state," etc. Section 35: "All alcoholic liquors, other than domestic wine, which do not have on the packages in which they are contained the label and certificate going to show that they have been tested by the chemist and purchased from a state officer authorized to sell them are hereby declared contraband and on seizure will be forfeited to the state as provided in § 31: provided that the section shall not apply to liquors held by the owners of registered stills in bonded warehouses. Persons having liquor which they wish to keep for their own use may throw the protection of the law around the same by furnishing an inventory of the quantity and kinds to the state commission-

er and applying for certificates to affix thereto." The circuit judge in his charge to the jury defined the term "contraband" in the language of the statute, and substantially charged the requests of the appellants, except that he added a proviso as to "contraband liquor," in accordance with the statute. The charge of the circuit judge should be officially reported along with the exceptions, in order to show the precise points in issue. It is not accurate to state as a fact that defendants purchased the liquors in question for personal use. They did so state in their testimony; but there were other circumstances in the case from which a different conclusion might have been reached if the jury had been called on to decide such an issue. The contention of the defendants in the circuit court was that they had the right to import intoxicating liquors for any purpose, as shown by the sixth request to charge.

Appellants admit that they violated the terms of the dispensary act. The main contention here is that the legislation concerning the offense charged is void and inoperative as applied to the conduct of appellants in this case, because the liquors which they confessedly were handling and hauling in the night-time were at the time of the alleged offense within the protection of the interstate commerce power of the United States, and not subject to the police power of the state. Mr. Justice Gary in his opinion takes this view. Two reasons are assigned: First, that at the time of the alleged hauling of the liquors the same were under transportation, within the meaning and protection of the interstate commerce clause of the United States Constitution, to the exclusion of the police power of the state; and, second, because the legislation requiring certificates as to the chemical purity of liquors imported is a discrimination against such imported liquors in favor of dispensary liquors.

I will notice this second ground first. The dispensary act of 1896 expressly provides, in § 2, that the state board of control shall purchase all liquors for lawful use in this state, and shall have the same tested and declared to be pure, and in § 3 it is provided that the state commissioner shall not furnish to county dispensers any intoxicating or fermented liquors, except such as have been tested by the chemist of the South Carolina College, and declared to be pure, and further provides that the certificate of the said chemist shall be attached to the packages of liquors sold in the dispensaries. It thus appears that liquors kept for sale, and sold under the dispensary law, must have such certificate attached. This at once dispels the idea that there is any discrimination against imported liquors in favor of dispensary liquor in reference to the matter of certificate as to purity. There is no discrimination whatever in this regard, whether the liquor be made in this state, or sold in the dispensaries, or imported for personal use. The design of the dispensary law is to restrict the use of intoxicating liquors to such liquors as are chemically pure. To allow liquors for

personal use to be kept and used without such test of purity, while requiring such tests as to liquors produced in the state, or sold in the dispensaries, would be a discrimination in favor of the liquor imported for personal use, and against all other liquors in this state, and would tend to defeat the police regulation designed to prevent the use of impure and poisonous liquors. The legislation in question does not seek to have any extraterritorial effect. It is local, operating on all intoxicating liquors within the state belonging to the class of liquors not tested and found to be pure. It does not burden commerce by operating materially on any interstate contract, involving interstate transportation. It does not discriminate against nonresident producers and sellers. It does not prohibit the right to receive an interstate shipment or consignment of liquors for personal use. It is on its face a mere police regulation defining the circumstances under which intoxicating liquors within this state shall be deemed contraband, and forbidding the handling of the same in the night-time. Intoxicating liquors are universally held to be peculiarly subject to police control. Surely it is within the police power of the state to declare when such liquors, if within the state, in the hands of citizens of the state, shall be deemed contraband, and to interdict the hauling thereof about the country under cover of night, as a means to prevent or make more difficult illicit traffic.

In reference to the question whether the liquors at the time of the alleged offense were exclusively within the protection of interstate commerce, and exempt from state regulations: It is not easy to define with exactness the domain of the commercial power from which the police power is excluded. While the states did surrender to the Federal government the right to regulate commerce with foreign nations and between the states, the police powers of the states were never surrendered, and ought to be zealously guarded by the courts of the state. Cases falling clearly within either domain are easy of solution; but much difficulty is experienced in the proper solution of those matters that lie near the dividing line between these great powers. Such is the case before us. I understand the settled rule of the United States Supreme Court is this: that state regulations enacted in the exercise of the police power are not void, unless they directly and substantially interfere with or burden interstate commerce. Numerous instances might be cited in which the Supreme Court of the United States has held police regulations valid, notwithstanding they remotely, or indirectly, or for a limited time, or to a limited extent, affected interstate commerce. I will cite two cases recently decided: *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, and *Lake Shore & M. S. R. Co. v. Ohio, Laurence*, 173 U. S. 285, 43 L. ed. 702. In the first-mentioned case the court held that a statute of Georgia making it a misdemeanor to run a freight

train on the Sabbath day was within the police power of the state, even as applied to a freight train engaged in interstate commerce. The court said: "Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because for a limited time or to a limited extent they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight." In the second case mentioned, the court held that an Ohio statute requiring all railroad companies operating lines within the state to cause three, each way, of its regular passenger trains, if so many are run daily, to stop at a city or town with over 3,000 inhabitants, to receive and discharge passengers, is a valid exercise of the police power of the state, and applies to an interstate railroad operating through such state; Congress not having taken affirmative action, under its power to regulate interstate commerce, in reference to that matter. The court adjudged that the Ohio statute was in itself a regulation of interstate commerce, but was designed to subserve public convenience, and was within the police power of the state, notwithstanding such regulation incidentally or remotely affected interstate commerce.

It must be noted here that the legislation in question here is not the legislation that was condemned in *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100. The obnoxious regulation in that case considered was an amendment to the act of 1897 (22 Stat. at L. 535), which expressly regulated the importation of liquors for personal use, which was held void as a substantial interference with interstate commerce, because the resident desiring to import liquors was required to first communicate his purpose to a state chemist, and because the nonresident was deprived of his right to ship by means of interstate commerce any liquors into South Carolina without previous authority obtained from a state officer. This was a practical prohibition on the nonresident's right to ship, directly affecting the interstate contract or transaction. This question before us now is quite different, and is not at all concluded by the decision in *Vance v. W. A. Vandercook Co.*—in fact, as I shall presently attempt to show, the case of *Vance v. W. A. Vandercook Co.* leads logically to a different conclusion from that reached in the opinion of Mr. Justice Gary. I come now to the act of Congress known as the "Wilson Act." This act, in express terms, places intoxicating liquors within the police

power of the state upon "arrival" in the state. In the case of *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, the Supreme Court of the United States construed "arrival" to mean "arrival at the point of destination and delivery to the consignee." It clearly appears from the extract from the case in the opinion of Mr. Justice Gary, as well as from the whole case, that "arrival at destination and delivery to consignee" involve an interstate shipment pursuant to an interstate contract. In such case the interstate commerce transaction is consummated by delivery to consignee. In the case before us the delivery was made at Hightower's distillery in North Carolina. The destination and delivery, so far as the nonresident seller was concerned, was the actual custody of the buyers in North Carolina. There could not possibly be any further delivery by the buyers to themselves, either at the state line or at their homes in Darlington. So it is impossible to entertain in this case the idea of delivery in South Carolina at the defendants' homes. I concede, of course, that transportation is included in interstate commerce, but it must be, as I conceive under the Wilson act and the construction placed upon it, a commercial transportation pursuant to an interstate shipment, and delivery at the end of the transportation. There is, it is true, a constructive delivery to the consignee when the goods are delivered for shipment to a common carrier; but in such case interstate commerce protects the goods before actual delivery, because the carrier is an agent of interstate commerce, and holds the goods, under interstate contract, for shipment and delivery. But, when the carrier delivers intoxicating liquors at the place of consign-

ment, it surely cannot be successfully maintained that the liquors are protected by interstate commerce until consumed in the use. Interstate commerce yields its grasp when the interstate transaction is consummated by actual delivery of the intoxicating liquors. The liquors became subject to the police power of the state when they entered the territory of the state, in the absence of any contract by or with a carrier involving shipment and delivery at a destination within the state. The police power extends to persons and things within the territory of the state, and is operative thereon unless the commercial power shields to the exclusion of the police power, which cannot be when the interstate commerce transaction is completed by actual delivery of the liquors. To hold that intoxicating liquors imported for personal use are protected by the commercial power until consumed in the use is to hold that such liquors never became subject to the police power of the state, which carries the argument on the question when intoxicating liquors "arrive" in the state to the unreasonable length of saying that liquors imported for personal use never arrived in the state. Note the language of the Wilson act,—liquors "transported into any state or remaining therein for use, consumption, sale, or storage." In *Vance v. W. A. Vandercook Co.* it was held that police regulations attached as to imported liquors after delivery and before sale under this act. How can the conclusion be escaped that police regulations attach as to imported liquors before use, before consumption, before storage? The act makes no distinction. The judgment of the circuit court should be affirmed.

CALIFORNIA SUPREME COURT (In Banc).

Alfred H. WILCOX, *Appt.*,
v.

Juan M. LUCO, *Respt.*

(118 Cal. 639.)

A state court has jurisdiction to render judgment in civil actions against a

foreign consul residing in the state unless he claims his right to have the case heard by the United States court under the section of the United States Constitution extending the judicial power of those courts to cases affecting consuls.

(October 16, 1897.)

NOTE.—*Exemptions and privileges of consuls.*

I. *Generally.*

II. *Jurisdiction of civil actions against consuls.*

- a. *Supreme Court of the United States.*
- b. *Circuit courts of the United States.*
- c. *United States district courts.*
- d. *State courts.*
- e. *English courts.*

III. *Jurisdiction of criminal actions against consuls.*

IV. *Exemption from obligation to appear as a witness.*

V. *Exemption from taxation.*

VI. *Exemption from military and jury duties.*

VII. *Domicil.*

VIII. *Trading with an enemy.*

IX. *Exemption from liability for judicial and other acts.*

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I. *Generally.*

A consul is not entitled to the diplomatic or other privileges of a foreign minister or an ambassador. But a consul is such a representative of his nation as entitles him to safe conduct, and an assault upon him may be punished as an offense against the law of nations. It seems that a consul is not within the terms of the Federal statute making it a crime to offer violence to the person of an ambassador or other public minister.

The principal privileges of a consul founded upon treaties are a free entry for his furniture; exemptions from excise for articles of consumption for family; a seat with the magistrates when acting as counsel for subjects of his nation, in disputes between them and the natives; an exemption from lodging the military in his house; a guard to assist him in his authority

A PPEAL by plaintiff from an order of the Superior Court for the City and County of San Francisco vacating a judgment in favor of plaintiff in an action brought to enforce payment of a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. Orestes J. Orena and William Rix for appellant.

Mr. I. N. Thorne for respondent.

Harrison, J., delivered the opinion of the court:

The defendant made his promissory note to the plaintiff for the sum of \$2,000 and in an action brought against him thereon in the superior court for San Francisco suffered default, and judgment was rendered against him and in favor of the plaintiff for the full amount of the note. Thereafter, upon his motion, based upon his affidavit

over the subjects of his country trading to the port; the privilege of receiving a polite message from the magistrates, requesting his attendance, when necessary, at their assemblies. He must never obey their summons. *Beawas, Lex Mercatoria*, 419.

Wicquefort, *The Ambassador*, b. 1, § 5, says "that consuls are only merchants, who, notwithstanding their office of judge in the controversies that may arise between those of their own nation, carry on at the same time their own traffic, and are liable to the justice of the place where they reside, as well in criminal as civil matters." See 1 Taunt. 106.

In 7 Ops. Atty. Gen. 18, it was said: "Notwithstanding the somewhat vague speculations of Vattel and some other continental authors on the question whether consuls are quasi ministers or not (*Vattel, Droit des Gens*, l. iv, chap. 8; *De Cussy, Réglements Consulaires*, § 6; *Morcuil, Agents Consulaires*, p. 348; *Borel, Des Consuls*, chap. 3), it is now fully established by judicial decisions on the continent, and by the opinions of the best modern authorities there, that consuls do not enjoy the diplomatic privileges accorded to the ministers of foreign powers; that in their personal affairs they are justiciable by the local tribunals for offenses, and subject to the same recourse of execution as other resident foreigners; and that they cannot pretend to the same personal inviolability and exemption from jurisdiction as foreign ministers enjoy by the law of nations. *Fœlix*, l. ii, title 2, chap. 2, § 4; *Dalloz, Dic. de Jurispr.* title *Agents Diplomatiques*, no. 35; *Ch. de Martens, Guide Diplomat*, § 83."

A consul is not a public minister within the law of nations or acts of Congress. *Foreign Ministers, Consuls*, 1 Ops. Atty. Gen. 406; *Respect Due to Consuls*, 1 Ops. Atty. Gen. 41.

A consul is not privileged from legal process by the general law of nations, nor is the French consul general by the consular convention between the United States and France. *Consular Privileges*, 1 Ops. Atty. Gen. 77.

In *Heathfield v. Chilton*, 4 Burr. 2016, it was said that the privileges of ministers as to exemption from suits cannot be claimed by consuls.

In *Coppell v. Hall*, 7 Wall. 553, 19 L. ed. 246, it was said that "consuls are approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the *exequatur* which has been given may be revoked, and they may be punished, or sent out of the country, at the option of the offended government. . . . 45 L. R. A.

that at and prior to the commencement of the action, and ever since, he had been consul general of the Republic of Chili, residing in San Francisco, and engaged in performing the functions of his office, the court vacated and set aside this judgment, and ordered the action dismissed, upon the ground that by reason of his position as consul he was not subject to the jurisdiction of the courts of this state. From this order the plaintiff has appealed.

The correctness of the order appealed from is to be determined upon the construction to be given to the Constitution of the United States and the legislation of Congress thereunder, and not upon any consideration of the rules of international law. The immunity of ambassadors and public ministers from suits in the courts of the country to which they are sent is not extended by any principles of international law to consuls. "Con-

The character of consul does not give any protection to that of merchant when they are united in the same person."

In *Viveash v. Becker*, 3 Maule & S. 284, it was said that "nobody is disposed to deny that a consul is entitled to privileges to a certain extent, such as for safe conduct; and if that be violated the sovereign has a right to complain of such violation."

Where a consul general and secretary of legation in France was assaulted on the street, and afterwards by the same party insulted in the house of the minister of that country, a demand that the offender be sent to France because he had claimed to be an officer in the French army, was denied; but he was convicted for violation of the law of nations, and of an assault and battery in the state court, and was sentenced to two years' imprisonment, and required to give security to keep the peace. *Republica v. De Longchamps*, 1 Dall. 111, 1 L. ed. 59.

But a riotous attack on the house of a foreign consul is not an offense under act of Congress April 30, 1790, providing punishment for any infraction of the laws of nations by offering violence to the person of an ambassador or other public minister. *Respect Due to Consuls*, 1 Ops. Atty. Gen. 41.

II. Jurisdiction of civil actions against consuls.

a. Supreme Court of the United States.

Courts have jurisdiction over consuls except where limited by a treaty. The question in most cases was, What court had jurisdiction? United States Const. art. 3, § 2, gives the United States Supreme Court original jurisdiction in cases affecting consuls. United States Rev. Stat. § 563, cl. 17, provided that district courts should have jurisdiction against consuls, except for certain offenses. The judiciary act 1789, Rev. Stat. § 711, cl. 8, provided that the jurisdiction of courts of United States should be exclusive of the state courts in actions against consuls and vice consuls, but this clause was repealed by act of Congress February 18, 1875, 18 Stat. at L. p. 318. The repeal of this clause is now held to give state courts jurisdiction of actions against consuls as in the case of *WILCOX v. LUCO*.

The Supreme Court of the United States has original jurisdiction of actions against consuls under the Constitution of the United States giving such courts original jurisdiction. As to whether "original" means "exclusive" may be considered as settled in the negative. Under

suls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled, by the general law of nations, to the peculiar immunities of ambassadors. . . . In civil and criminal cases they are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state." Wheaton, International Law, § 249; 1 Kent, Com. p. 44; Story, Const. § 1660; *Gittings v. Crawford*, Taney, 1. Section 2 of article 3 of the Constitution of the United States declares that "the judicial power shall extend . . . to all cases affecting ambassadors, other public ministers and consuls;" and "in all cases affecting ambassadors, other public ministers and consuls, . . . the supreme court

shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." It is held that the judicial power thus vested in the courts of the United States is to be exercised in accordance with such legislation as Congress may prescribe. Wherever the Constitution does not make this jurisdiction exclusive of state authority, it may be made so by Congress; and Congress may also declare the extent to which the state courts may exercise concurrent jurisdiction, as well as at what stage of procedure the jurisdiction of the United States courts may attach in cases originally commenced in the state courts,—either after final judgment has been rendered therein, or at any period subsequent to the commencement of the action. *Martin v. Hunter*, 1

various statutes the district court and the state court since the repealing act of 1875 assume jurisdiction in such cases. The exercise of original jurisdiction by the supreme court does not appear to have been asserted in many cases, although the question appears to have been raised in a number of cases.

In *Jones v. Le Tombe*, 3 Dall. 384, 1 L. ed. 647, an action was brought in the United States Supreme Court against the consul general of the French Republic on a bill of exchange, but it was held that there was no cause of action against the defendant on the ground that the contract was made on account of the government, and that the credit was given to it as an official engagement.

In *Börs v. Preston*, 111 U. S. 252, 28 L. ed. 419, where the objection was made that the circuit court did not have jurisdiction, but that the district court had jurisdiction, the court, referring to this constitutional provision giving original jurisdiction to the Supreme Court of the United States, says: "It is thus seen that neither the Constitution nor any act of Congress defining the powers of the courts of the United States has made the jurisdiction of this court or of the district courts, exclusive of the circuit courts, in suits brought against persons who hold the position of consul, or in suits or proceedings in which a consul is a party."

In *Pooley v. Luco*, 76 Fed. Rep. 146, it was said that the Supreme Court of the United States has not exclusive jurisdiction of cases affecting consuls.

And in *United States v. Ortega*, 11 Wheat. 467, 6 L. ed. 521, the question as to whether the jurisdiction of the Supreme Court under U. S. Const. art. 3, § 2, is not only original, but exclusive of the circuit courts, was not decided.

b. Circuit courts of the United States.

There are some cases in which the United States circuit court will take jurisdiction of a civil action against a foreign consul where the citizenship of the parties is such as to confer jurisdiction independent of the question of consulship. But where the citizenship will not give jurisdiction, the fact that the defendant is a foreign consul will not authorize the circuit court to entertain the suit.

So, the United States circuit court has jurisdiction of an original civil action in which the plaintiff is a citizen and the defendant is an alien, although the defendant is a foreign consul. *St. Luke's Hospital v. Barclay*, 3 Blatchf. 259.

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But the circuit court has no jurisdiction of a suit by a citizen of the United States against a foreign consul where it is not shown that the defendant is an alien. *Börs v. Preston*, 111 U. S. 262, 28 L. ed. 422.

In *Pooley v. Luco*, 72 Fed. Rep. 561, it was said the case of *Börs v. Preston* necessarily holds that the fact of being a consul does not confer jurisdiction on the circuit court.

The consular character of the defendant will not give United States circuit courts jurisdiction of a suit where both parties are aliens. *Pooley v. Luco*, 72 Fed. Rep. 561. In this case the court said: "No case has been brought to my attention where it has been held, or even intimated, that the consular character of a party to the controversy gives jurisdiction to the circuit court."

It was further said that the cases of *Valarino v. Thompson*, 7 N. Y. 576, and *Lorway v. Lousada*, 1 Low. Dec. 77, do not intimate that the United States circuit court had jurisdiction of a suit against a foreign consul.

c. United States district courts.

The United States district court has jurisdiction in civil actions against consuls under U. S. Rev. Stat. § 563, cl. 17, providing that district courts shall have jurisdiction against consuls except for certain offenses. This jurisdiction was exclusive of state courts under judiciary act 1789, Rev. Stat. § 711, cl. 8, providing that the jurisdiction of courts of the United States shall be exclusive of the state courts in actions against consuls and vice consuls. But this clause was repealed by act of Congress February 18, 1875, 18 Stat. at L. p. 318, and now the jurisdiction of the district court is concurrent with that of state courts in actions against consuls.

Under the judiciary act the United States district court has jurisdiction of civil actions against a consul. *Gittings v. Crawford*, Taney, 1. In this case it was held that the judiciary act was not contrary to the Federal Constitution, which gives the Supreme Court original jurisdiction.

And the district court has jurisdiction of a suit against a foreign consul where he is not recognized by this country as a diplomatic officer. *Hollander v. Balz*, 41 Fed. Rep. 732. In this case two communications had been sent to the consul from the department of state describing him "in charge of the legation."

And an action may be maintained in such

Wheat, 304, 4 L. ed. 97; *The Moses Taylor*, 4 Wall. 411, *The Moses Taylor v. Hammons*, 18 L. ed. 397; *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 333. By the judiciary act of 1789, and afterwards in the Revised Statutes, Congress distributed the exercise of this power between the courts of the United States and those of the several states, making it exclusive in the former in many instances, and in others giving to the state courts concurrent jurisdiction, and also provided for the removal to the United States courts in certain cases of causes commenced in the state courts, and for the exercise by the supreme court of an appellate jurisdiction over judgments of the state courts in causes of which those courts had original jurisdiction concurrent with the courts of the United States. Other statutes have

court by an alien against a consul of his nation residing in the district to recover official fees improperly exacted. *Lorway v. Lousada*, 1 Low. Dec. 77.

So this court may issue a writ of ne exeat. *Graham v. Stucken*, 4 Blatchf. 50.

In this case it was also held that the Constitution did not give exclusive jurisdiction to the Supreme Court of the United States in actions against consuls.

Proceedings may be had for a civil arrest of a consul under act of Congress, February 28, 1839, 5 Stat. at L. 321, and January 14, 1841, 5 Stat. at L. 410, allowing imprisonment for debt, and N. Y. Code Proc. § 179, providing for arrest in an action for money received in a fiduciary capacity. *McKay v. Garcia*, 6 Ben. 556.

It was further held that the pendency of a civil action in a state court was no bar, as the latter court had no jurisdiction.

And a district court has jurisdiction of an action against a foreign consul on a joint contract, without making a joint obligor a party. *Valerino v. Thompson*, 22 Betts, D. C., MS. 216, Fed. Cas. 16,813a. In this case the judiciary act was construed to sever the joint liability.

And the jurisdiction of the United States district court is held to apply in a similar case, notwithstanding the repeal of cl. 8, U. S. Rev. Stat. § 711, giving to such courts exclusive jurisdiction. *Froment v. Duclos*, 30 Fed. Rep. 385.

And a district court has jurisdiction of a suit to foreclose a mortgage where the defendant is a foreign consul. *Pooley v. Luco*, 76 Fed. Rep. 146. This case also holds that the supreme court has not exclusive jurisdiction under U. S. Rev. Stat. § 687, providing that in all cases affecting consuls the supreme court shall have exclusive jurisdiction.

But in *Bixby v. Janssen*, 6 Blatchf. 315, it was held that the district court has no jurisdiction of an action against a partnership, where the only ground of jurisdiction is that a member of the firm is a foreign consul, and the debt sued upon was the debt of a prior partnership for which the consul was not liable.

Referring to this case, the court, in *Froment v. Duclos*, 30 Fed. Rep. 385, said that it was brought and determined on the merits, and, although the complaint was dismissed on the ground that the joint liability of the consul was disproved, a correct inference of the decision is that otherwise the suit would have been sustained.

d. State courts.

Prior to act of Congress 1875, repealing that clause of the judiciary act giving United States 45 L. R. A.

since been enacted enlarging or changing this exclusive as well as concurrent jurisdiction. Section 687 of the Revised Statutes of the United States, which became the law on the subject from and after December 1, 1873, declares that the supreme court shall have "original but not exclusive jurisdiction of all suits . . . in which a consul or vice consul is a party." And by § 563 jurisdiction is given to the district courts ". . . Seventeenth. Of all suits against consuls or vice consuls," with the exception of certain offenses previously named. It had been held in *Gittings v. Crawford*, Taney, 1, that the provision in the Constitution giving to the supreme court "original" jurisdiction in all cases affecting consuls did not imply that that jurisdiction was to be exclusive; and in *Börs v. Preston*, 111 U. S. 252, 28 L.

courts exclusive jurisdiction in actions against consuls, state courts had no jurisdiction in civil actions against consuls, although there appear to be some exceptional cases. It seems that there is some doubt as to whether the objection to jurisdiction will not be waived if the defendant does not succeed in having his privilege appear in the record. The case of *Wilcox v. Luco* also holds that the failure to plead the privilege is a waiver, although it held that under the present state of the law since 1875 the state court has jurisdiction.

So, under act of Congress, Sept. 24, 1789, providing that the district court of the United States shall have jurisdiction, exclusive of the courts of the several states, of all suits against consuls, a state court had no jurisdiction in a civil action against a foreign consul. *Sartori v. Hamilton*, 13 N. J. L. 107; *Sagory v. Wissman*, 2 Ben. 240; *Durand v. Halbach*, 1 Miles (Pa.) 46; *Mannhardt v. Soderstrom*, 1 Binn. 138; *Naylor v. Hoffman*, 22 How. Pr. 510. *Reversing Rock River Bank v. Hoffman*, 22 How. Pr. 250; *Griffin v. Dominguez*, 2 Duer, 651; *Valerino v. Thompson*, 7 N. Y. 576; *Davis v. Packard*, 7 Pet. 281, 8 L. ed. 685, *Reversing 6 Wend. 327*; *Cf. 10 Wend. 50*; *Torladé D'Azambuja v. Barrozo Pereira*, 1 Miles (Pa.) 366; *Dupont v. Plchon*, 4 Dall. 321, 1 L. ed. 851; *Foreign Ministers, Consuls*, 1 Ops. Atty. Gen. 406; *Immunities of Foreign Consuls*, 2 Ops. Atty. Gen. 725.

So, a justice of the peace had no jurisdiction in a civil action against a foreign consul. *Sartori v. Hamilton*, 13 N. J. L. 107.

And the state court had no jurisdiction of a suit against a foreign consul. *Sagory v. Wissman*, 2 Ben. 240. In this case the court said that a consul might be plaintiff in an action brought in the state court.

And a state court had no jurisdiction of a civil action against the consul general of Sweden. *Mannhardt v. Soderstrom*, 1 Binn. 138.

And state courts had no jurisdiction against a firm to recover a firm debt where one of the members of the firm is a foreign consul. *Naylor v. Hoffman*, 22 How. Pr. 510. It was also held that the withdrawal of his *exequatur* after a motion to dismiss the action did not give the court jurisdiction.

So, a foreign consul could not be examined as a judgment debtor, or be attached for his refusal to obey an order for his personal examination. *Griffin v. Dominguez*, 2 Duer, 656. It was also held that the objection could be made at any stage of the proceedings.

In *Davis v. Packard*, 7 Pet. 281, 8 L. ed. 685, the United States Supreme Court held that a state court had no jurisdiction over consuls;

ed. 419, the supreme court approved this ruling, and held that Congress could confer upon the subordinate courts of the United States concurrent original jurisdiction in cases affecting consuls. It was also held in *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, that the provision extending the judicial power of the United States to "all cases" arising under the Constitution and laws of the United States does not imply that the jurisdiction of the Federal courts is necessarily exclusive. Section 711 of the Revised Statutes, as originally enacted, declared: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. . . . Eighth. Of all suits or proceedings against ambassadors or other public minis-

ters, . . . or against consul or vice consuls." By the act of February 18, 1875 (18 Stat. at L. 316), entitled "An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States," § 711 was amended by striking out subdivision 8, and since that date there has been no express declaration in the statutes of the United States that the jurisdiction of its courts in actions against a consul is exclusive of the state courts. It is very evident that prior to this amendment the state courts had no jurisdiction in such cases. *Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684; *Valarino v. Thompson*, 7 N. Y. 576. We have not been cited to any case since that date in which the question appears to have been considered. The decision in *Miller v. Van Loben Sels*, 66 Cal. 341, was made up-

but on filing the mandate of reversal the New York court of errors, in 10 Wend. 50, affirmed the proposition, and said that a state court has no jurisdiction over a consul, but that court could not take notice of any question on error not appearing in the record, and would have to affirm the judgment of the supreme court notwithstanding the mandate of reversal, and thereupon quashed the writ of error. From this error was taken to the Supreme Court of the United States again, and that court finally agreed with the court of errors of New York that the remedy was by writ of error *coram nobis* in order to bring the fact of want of jurisdiction into the record. *Davis v. Packard*, 8 Pet. 312, 8 L. ed. 957.

A foreign consul residing in the United States could not be sued in a state court, and his exemption was not waived by appearance and pleading to the merits. *Valarino v. Thompson*, 7 N. Y. 576. In this case the claim was against a firm, and only one was served with process, who, after trial, claimed he was consul.

This case resembles *Davis v. Packard*, 8 Pet. 312, 8 L. ed. 957. But the difference is that in the *Davis* Case the defendant did not succeed in having the fact that he was consul appear on the record, while in the *Valarino* Case, after a trial on the merits, a motion was made to set aside the judgment, accompanied by an affidavit showing that the defendant was consul, thus making a record on which error could be taken. This distinction was not noticed in the decision in *Valarino v. Thompson*, but must have been the reason for the ruling in that case, or else it would not have been in accord with *Davis v. Packard*, 10 Wend. 50.

Where a judgment was taken in an action against a firm one of which was a consul from Prussia, but the question of privilege was not made until after judgment, it was held that such privilege could not be waived, but that after plea and judgment it was too late to obtain relief by a motion to set the judgment aside, and that relief could only be obtained by a writ of error *coram nobis*. *Durand v. Halbach*, 1 Miles (Pa.) 46.

This case, following *Davis v. Packard*, 10 Wend. 50, seems to throw some doubt on the remedy of the defendant who fails to plead his privilege until after judgment, as the facts and record appear to be the same as in *Valarino v. Thompson*, 7 N. Y. 576, which held *contra* on the question of practice.

In this case it was said that in the case of *Davis v. Packard*, *supra*, after the record had been twice carried up to the Supreme Court of the United States, it was found that the only 45 L. R. A.

mode of giving the defendant relief was to send him back to the supreme court of New York that he might, by suing out a writ of error *coram nobis*, establish the fact of his consulship, and obtain in that court a reversal of the judgment.

A judgment of the state court in a civil action against a foreign consul is not void where the official character of the defendant is not shown, and on a *scire facias* against the bail he cannot take advantage of want of jurisdiction in the original action. *Hall v. Young*, 3 Pick. 80, 15 Am. Dec. 180, Approved in *Springfield Card Mfg. Co. v. West*, 1 Cush. 388.

In this case it was said that if it had appeared that the defendant was a consul the judgment would have been erroneous.

In *Flynn v. Stoughton*, 5 Barb. 115, it was held that the privilege of a foreign consul of exemption from a civil action in a state court was waived by a plea to the merits, but the verdict was set aside on account of an irregularity. This case was overruled in *Valarino v. Thompson*, 7 N. Y. 576.

In *Flynn v. Stoughton*, 5 Barb. 115, it was said that the United States Supreme Court in reversing *Davis v. Packard*, 10 Wend. 50, only asserted that the jurisdiction over foreign consuls was vested solely in the Federal judiciary by the act of Congress, 7 Pet. 276, 8 L. ed. 684, 8 Pet. 324, 8 L. ed. 961. "That court does not touch the principle established in our state tribunal of last resort."

A *charge d'affaires*, also consul, is entitled to privilege as *charge d'affaires cundo morando et redeundo*, where he was arrested in a civil action in a state court and did not claim privileges as "consul." *Dupont v. Pichon*, 4 Dall. 321, 1 L. ed. 851.

And where a *charge d'affaires*, acting also as consul general, informed the department at Washington that his functions as *charge d'affaires* had ceased owing to the change of government in his country, it was held that his privilege as returning minister was not waived, and he could not be sued in a civil suit in a state court. *Torladé D'Azambuja v. Barrozo Pereira*, 1 Miles (Pa.) 366.

In *Caldwell v. Barclay*, 1 Dall. 305, note, 1 L. ed. 149 (1788), a rule to show cause why an attachment should not be quashed was discharged, where one of the defendants in an action against a partnership was an American consul, and in that character actually resided abroad in the public service.

Where a consul is summoned as garnishee in a foreign attachment, the service will not be set aside on account of privilege as it is not a suit

on a consideration of the judiciary act of 1789, and, although in the petition for rehearing the amendment to § 711 was called to the attention of the court, the failure of the court to reconsider its opinion does not authorize us to say that it held that the exclusive jurisdiction of the Federal courts had not been changed. *Kellogg v. Cochran*, 87 Cal. 192, 12 L. R. A. 104; *San Francisco v. Pacific Bank*, 89 Cal. 23. We do not consider that the case of *De Give v. Grand Rapids Furniture Co.* 94 Ga. 605, is entitled to any weight in determining the question before us, for the reason that the court in that case merely affirmed an order refusing to set aside a judgment against a consul, without giving any opinion in support of its judgment. *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, cited by the appellant, was an action

brought in a state court, prior to the enactment of the Revised Statutes, by an assignee in bankruptcy, to recover the assets of the bankrupt's estate; and the jurisdiction of the state court was contested under the provision of the Constitution that the judicial power of the United States shall extend to "all cases" arising under the Constitution and laws of the United States. The supreme court, however, upheld the jurisdiction of the state court upon the ground that the laws of the United States are operative within the states, and that, wherever rights of property are created by virtue of these laws, such rights may be enforced in state courts competent to decide rights of like character and class. This was a case, moreover, in which the assignee himself invoked the jurisdiction of the state court, and the

against a consul. *Kidderlin v. Meyer*, 2 Miles (Pa.) 242.

In this case the court said that the act of Congress must be restricted to cases in which the consul is made a defendant directly and originally to respond for his own debt.

Since 1875.

Prior to 1875 the state courts had no jurisdiction of a civil action against consuls, but since the repeal of the Federal statute giving United States courts exclusive jurisdiction of actions against consuls the state courts have concurrent jurisdiction with the United States district court of actions against consuls.

In *Wilcox v. Lucio* it was held that since the repeal of U. S. Rev. Stat. § 711, subd. 8, giving to the Federal courts exclusive jurisdiction in actions against consuls, the state court has jurisdiction in a civil action against a consul. It was further held that, as Rev. Stat. § 709, gave jurisdiction to the Supreme Court of the United States to review a judgment of the highest court of the state, that the defendant could claim his right under the Constitution to have the matter determined by the courts of the United States, and if the state court decided adversely he could have that decision reviewed by the Supreme Court of the United States, but the failure to make this defense in the state court is a waiver of his right.

The state court has jurisdiction in a civil action against a consul of Belgium for furniture sold him for his opera house, since the repeal of U. S. Rev. Stat. cl. 8, § 711, as no treaty exempts consuls of either country from suits of this nature in the country of their residence, nor are they exempt by international law. *De Give v. Grand Rapids Furniture Co.* 94 Ga. 605.

In *Re Iasigi*, 79 Fed. Rep. 751, it was said: "As stated by Mr. Justice Harlan in *Börs v. Preston*, 111 U. S. 261, 28 L. ed. 422, there is now no statutory provision which in terms makes the jurisdiction of the Federal courts exclusive in suits (in civil suits) against consuls."

The consular privilege is no bar to a proceeding *in rem*, fixing the lien of tax under an assessment. *Reclamation Dist. No. 551 v. Runyon*, 117 Cal. 164. In this case the question whether, under the amendment of 1875 to the Federal judiciary act, the courts of a state may take jurisdiction of actions *in personam* against consuls of a foreign country, is not decided.

In *Pooley v. Lucio*, 72 Fed. Rep. 561, it was said that whether the state courts have concurrent jurisdiction with the district court in suits against consuls since the repeal of Rev. 45 L. R. A.

Stat. § 711, ¶ 8, has not been definitely adjudicated.

But in *Miller v. Van Loben Sels*, 66 Cal. 341, it was held that a state court has no jurisdiction of a civil action against a foreign consul, under U. S. Const. art. 3, § 2, providing that the judicial power of the United States shall extend to all cases affecting consuls, and the judiciary act of 1789, vesting the United States district courts with jurisdiction, exclusive of the courts of the several states, of all suits against consuls or vice consuls. It was also held that the question of jurisdiction may be raised on appeal after answer.

In this case the repealing act of 1875 does not appear to have been noticed, although in *Wilcox v. Lucio* it was said that the attention of the court was called to this in the petition for the rehearing. *Wilcox v. Lucio* virtually overrules this case.

e. English courts.

The English courts hold that a consul is not privileged from being sued in a civil action, or from being arrested in such a suit.

So, where a commercial agent of the King of Prussia exercised the trade of a tallow chandler in England for twenty years, and in a suit styled himself a merchant, and on judgment against his person claimed that he was a public minister, it was held that his employment was in the nature of a consul, and that he was not entitled to the *ius gentium* belonging to ambassadors. *Barbult's Case*, Cas. t. Talb. 280.

In the note to the case it was said that the person was fully discharged by the debt being paid by the Secretary of State.

And a consul who is a resident merchant is not exempt from arrest on mesne process. *Viveash v. Becker*, 3 Maule & S. 284. In this case it did not appear that the debt was not contracted before the defendant was a consul.

So, the consul is not privileged from arrest in a civil case where he had been dismissed from his office three months previously, although he had received no official notification of his dismissal, and was in the exercise of his office. *Clarke v. Critico*, 1 Taunt. 106; *Marshall v. Critico*, 9 East, 447.

It was not shown in the latter case that the consul intended to depart from the Kingdom, although he claimed the privilege of a reasonable time to return to his country.

III. Jurisdiction of criminal actions against consuls.

A consul is not exempt from criminal proce-

court limits its decision to holding that he had authority to bring a suit in the state courts whenever those courts were invested with appropriate jurisdiction suited to the nature of the case. The proposition thus determined is not, however, conclusive of the present appeal, since there is not here presented for determination any question of property rights or of personal liberty depending upon or arising under the Constitution or any law of the United States. The defendant claims an exemption from the jurisdiction of the state courts as a right guaranteed to him by the Constitution.

By the above amendment to § 711, removing from the statutes the express provision that the jurisdiction of the Federal courts in suits or proceedings against consuls should be exclusive of the courts of the

several states, Congress must have intended to declare that such jurisdiction should no longer be exclusive, unless it was made exclusive either by the Constitution itself or by other existing legislation. There is, however, as above seen, no express declaration by Congress that such jurisdiction is exclusive, but it must be conceded that a consul who has been recognized by the President, and admitted to the exercise of his official functions, shall not, so long as he continues in the exercise of those functions, be deprived of the benefits of the provision in the Constitution extending the judicial power of the United States to all cases in which he is affected, and that, unless there is some law by which he may invoke this judicial power for the purpose either of removing the cause into the courts of the United States before

cution for violations of the laws where he resides. There appears to be some conflict as to whether state courts had jurisdiction previous to 1875. The Federal courts had jurisdiction of an offense contrary to the Federal statutes. As to whether the Federal courts had jurisdiction of offenses against the state laws may be said to be in doubt, although *Com. v. Kosloff*, 5 Serg. & R. 545, *infra*, intimates that such court had jurisdiction.

The United States circuit court has jurisdiction of a criminal action against a consul for the crime of sending fraudulent letters to extort money under judiciary act, § 11, giving circuit courts exclusive jurisdiction of crimes in certain cases. *United States v. Ravara*, 2 Dall. 297, 1 L. ed. 388.

It was further held that United States Const. art. 3, § 2, providing that in all cases affecting consuls the Supreme Court shall have original jurisdiction, does not prevent the legislature from exercising the power of vesting concurrent jurisdiction in such inferior courts as might by law be established. In this case the defendant was found guilty, but was afterwards pardoned on condition that he surrender his commission and *exequatur*.

So, where a consul general resigned June 15 on request by his government made May 30, and the resignation was accepted June 20, and he was indicted in the district court of Columbia on June 17, for an offense under U. S. Rev. Stat. § 5209, prescribing offenses by presidents of national banks, a certiorari was refused. *Ex parte Hitz*, 111 U. S. 766, 28 L. ed. 592. In this case it was also shown that the Federal government had refused to extend diplomatic privilege to the defendant.

In *State v. De La Foret*, 2 Nott & M'C. 217 (1820), it was held that a foreign consul is not exempt from indictment for an assault and battery. It was further held that U. S. Const. art. 3, § 2, providing for original jurisdiction of the United States Supreme Court in such cases, did not prevent the state from exercising the power which was not expressly taken away from her, and that the jurisdiction given to the Supreme Court of the United States under treaties and Constitution did not take away from state courts jurisdiction over offenses against the laws of the state. In this case the six judges sitting were equally divided, but as one of them had sat upon the trial before, the opinion *supra* of the other three was the judgment of the court.

In *Seidel v. Peschkaw*, 27 N. J. L. 427, *Coppell v. Hall*, 7 Wall. 553, 19 L. ed. 246, and 45 L. R. A.

Foreign Ministers, Consuls, 1 Ops. Atty. Gen. 406 (1820), it was said that consuls in criminal cases are subject to the local laws.

In *Re Isagi* (1897) 79 Fed. Rep. 751, it was said that it is not necessary to pass upon the question whether the jurisdiction of the Federal court over consular offenses is now concurrent with the state courts or exclusive of the state courts, since the repealing act of 1875. In this case it was said that "it remained the accepted law, until 1875, that the Federal courts had exclusive jurisdiction of offenses by consuls, whether at common law or under state or United States statutes. The ordinary rule that the United States could not punish common-law or state offenses did not apply."

The provisions of the judiciary act were carried into the United States Revised Statutes (enacted June 22, 1874) without any substantial change, but under a different arrangement. See § 563, ¶¶ 1, 17; § 629, ¶ 20; §§ 687, 711, ¶¶ 1, 8. By this latter paragraph (8) the jurisdiction of the state courts was excluded in all "suits or proceedings" against consuls. The word "proceedings" in that paragraph was new, while the word "offenses," which was in the exception in § 9 of the judiciary act, was omitted in § 8 of § 711. By the act of February 18, 1875 (18 Stat. at L. 816, chap. 80), the 8th paragraph of § 711 was stricken out. The provisions of §§ 563 and 629, conferring jurisdiction on the Federal courts in all cases against consuls, both of crimes and of suits, were left untouched; and so was the exclusive jurisdiction of crimes and offenses under the 1st paragraph of § 711. *Ibid.*

As respects any actual intention of Congress, the repeal of ¶ 8 of § 711, by the act of 1875, affords no light. The explanation of that repeal is difficult, if not impossible. The act is entitled "An Act to Correct Errors and Supply Omissions" in the Revised Statutes of the United States. So far as concerns crimes and offenses, it may have been considered that the 1st paragraph of § 711 included all offenses committed by consuls; and that the 8th paragraph had no reference to "offenses," as it covered only "suits or proceedings." There is a manifest propriety, amounting sometimes to a practical necessity in order to avoid international complications, that the prosecution, punishment, or pardon of consuls, which would necessarily materially affect their personal attention to their consular duties, should be within the control of the Federal courts and of the Federal government to which the consuls are accredited, and which alone is responsible to foreign powers for the treatment of their representatives. *Ibid.*

judgment, or to review the judgment of the state court, a state court can have no jurisdiction to entertain an action in which he is a defendant. Under this provision of the Constitution he is entitled to invoke the exercise of that power in any case to which he may be a party; and, if Congress has made any provision by which he can avail himself of this right, he is amply protected in the enjoyment of this provision of the Constitution. The Constitution does not declare that he shall be exempt from the jurisdiction of the state courts, but that the judicial power of the United States shall extend to all cases affecting him. It is for Congress to determine the mode and time at which he may invoke this jurisdiction, and, if that body has provided a means by which he can avail himself of this judicial power, he is not deprived of any right given him by the Constitution. There is no provision in the removal act of 1875, or in that of 1887, for removing to the circuit court an action commenced in a state court against a consul, but

it is provided in § 700 of the Revised Statutes that "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, . . . may be re-examined and reversed or affirmed in the supreme court upon a writ of error." Under this section that court has jurisdiction to review the judgment of a state court whenever it appears from the record that one of the questions mentioned in the section was raised and presented to the state court, and decided by it adversely to the claim asserted; and, if such decision is erroneous, that court will then examine the entire case, and affirm or reverse the judgment, according as it shall determine whether the decision of the state court upon the other matters in the record was correct or not. *Murdock v.*

A consul may be committed by a magistrate of New York to await a requisition from the government of Massachusetts for the crime of embezzlement committed in the latter state notwithstanding U. S. Rev. Stat. § 711, gives the Federal court exclusive jurisdiction of all crimes and offenses cognizable under the statutes of the United States, as the commitment of a consular officer by a magistrate merely for the purpose of transmitting him to the state where the crime was committed, and where alone he can be tried, is not a proceeding in court or by any court. *Re Iasigi* (1897) 79 Fed. Rep. 751.

In *Re Iasigi*, 79 Fed. Rep. 755, an appeal was attempted in the above case, but it was held that the district judge had no power to admit the defendant to bail pending the appeal.

In *Iasigi v. Van de Car*, 106 U. S. 391, 41 L. ed. 1045, on appeal it appeared that before the order was made remanding him to the custody of the state officer his *escquatur* was withdrawn (March 19), the supreme court affirmed the order denying the writ of habeas corpus, and said: "If the application for the writ had been made on the 12th of March it could not have been awarded on the ground alleged in this petition, and as, on that day, the petitioner could not have been discharged on that ground, in accordance with the principles of law and justice, we are unable to hold that the order of the district court was erroneous."

A consul general is not protected by the law of nations from a prosecution for the crime of rape; but it was held that the state courts have no jurisdiction in such cases, as exclusive jurisdiction is vested in the courts of the United States. *Com. v. Kosloff*, 5 Serg. & R. 545. In this case the court said: "But upon mature reflection I am unable to deny that the courts of the United States can take cognizance when I find it written in the Constitution that the supreme court shall have jurisdiction in all cases affecting a consul."

It seems that the question as to the jurisdiction of state courts over offenses committed by consuls is still somewhat in doubt unless it shall be held that the repeal of that clause of the judiciary act giving Federal courts exclusive jurisdiction of "all suits or proceedings" against consuls shall be held to embrace criminal cases, and then the state court would have jurisdiction in criminal as well as in civil cases. There 45 L. R. A.

seem to be but two decisions on the question as to the jurisdiction of state courts, and these were prior to 1875 and conflict with each other.

IV. Exemption from obligation to appear as a witness.

This exemption is secured by articles of convention with France, and except for defense of crime is secured by conventions with Austria-Hungary, Belgium, Italy, Netherlands, Roumania, Salvador, Servia. Consular Regulations 1896, § 82.

A consul of France is not liable to *subpoena duces tecum* under treaty between the United States and France, providing that their consuls shall never be compelled to appear in court as witnesses. *Re Dillon*, 7 Sawy. 561.

This was held notwithstanding U. S. Const. 6th Amendment, providing that the accused in all criminal prosecutions shall enjoy the right to have compulsory process for witnesses in his favor. It was further held that in such a case it must be shown that the document is not an official paper.

And the vice consul of Chili is exempt from compulsory attendance as a witness in courts of this country, under treaty with Chili, April 29, 1832, art. 25, providing that the contracting parties grant to their envoys, ministers, and other public agents the same exemptions which those of the most favored nations do or shall enjoy, as the convention between United States and France, April 1, 1853, provides that their consuls shall never be compelled to appear in court as witnesses. *United States v. Trumbull*, 48 Fed. Rep. 94.

In this case it was further said that as the revolution had been successful it would tend to give offense to the government now recognized by the United States to require its representative to give testimony against the revolutionists.

The Convention of February 23, 1853, between the United States and France, provides that consuls shall never be compelled to appear as witnesses before the courts. The testimony of a French consul at San Francisco was required by the defendant, and the United States court caused the consul to be arrested and brought before him, whereupon he pulled down the consular flag and suspended his functions, but was discharged upon the reargument of the case.

Memphis, 20 Wall. 590, 22 L. ed. 429. It is thus seen that, if a consul is sued in a state court, he can, in addition to any defense he may have to the cause of action set up against him, claim his right under the Constitution to have the matter determined by the courts of the United States; and, if judgment is rendered against him in the state court, he can have that judgment reviewed by the Supreme Court of the United States, and the sufficiency of his defense determined by that tribunal, and thus fully enjoy the rights given him by the Constitution. This right, however, may be waived by him, since he has the same right to rest content with the judgment of the state court, either by merely pleading his defense to the cause of action without invoking this provision of the Constitution, or by suffering default, as he would have to invoke its jurisdiction as a plaintiff; and, if so waived, he cannot, after judgment has been rendered against him, claim the right to a review of

this judgment under a writ of error by the Supreme Court of the United States. The superior court therefore had jurisdiction to entertain the action against the defendant, and, as he did not appear in answer to the complaint, or in any mode present a defense to the action, the court properly rendered judgment against him, and its subsequent order setting it aside and dismissing the action was erroneous.

The order is reversed.

We concur: **Beatty**, Ch. J.; **Van Fleet**, J.; **Garoutte**, J.; **Henshaw**, J.

McFarland, J., dissenting:

I dissent. My views of the case were expressed in my opinion delivered when the case was in department.

That opinion was as follows:

The only question presented in this case is whether the superior court had jurisdiction in a civil case over the

An embarrassment arose from the conflict with U. S. Const. 8th Amendment, giving defendants in criminal prosecutions the right of compulsory prosecution for witnesses, and when the Constitution went into effect consuls had no diplomatic provisions and were not exempt, and after the adoption of the Constitution the defendant had a right to compulsory process to bring into court as a witness any foreign consul whatsoever, and this could not be taken away by treaty. Mr. Marcy, Secretary of State, to Mr. Mason, Minister in Paris, September 11, 1854.

After the President's message the matter was settled between Mr. Mason and Count Walewski, and instructions were sent to the French consuls to attend and testify according to treaty, and, unless in case of actual disability, there was to be no refusal thereafter.

A similar question appears to have been decided by the court of appeal of Aix in 1843, where the judgment was "as the consul is a foreigner, as he is ignorant of the economy and mechanism of the criminal procedure in France, and has acted in good faith, in his refusal, the court will not impose a fine on him." Martens, *Guide Diplomatique*, tom. 1, chap. 12, § 79, p. 298, ed. 1851." Lawrence's *Wheaton*, *International Law*, 2d Anno. ed. 433, note.

V. Exemption from taxation.

If a consul is not a citizen, and does not own real estate, and is not engaged in business where the consulate is situated, he is exempt from taxation by treaties or convention with Austria-Hungary, Belgium, Bolivia, Colombia, Denmark, Dominican Republic, Ecuador, Egypt, France, Germany, Haiti, Hawaiian Islands, Italy, Kongo Free State, Netherlands (and Colonies), Orange Free State, Persia, Peru, Portugal, Roumania, Russia, Salvador, Servia, Switzerland. His official income is taxable in Germany. Generally if a consul engages in business or property such property is taxable. United States Consular Regulations, 1896, § 83.

In 7 Ops. Atty. Gen. 18, it was said that consuls are privileged from personal taxation.

VI. Exemption from military and jury duties.

If consuls are not citizens of a country or domiciled in it at the time of their appointment, they are exempt from military service by convention. 45 L. R. A.

tion with Austria-Hungary, Belgium, France, Germany, Italy, Kongo Free State, and Netherlands, and are exempt from all public service by treaties with Colombia, Denmark, Germany, Peru, Salvador.

In 7 Ops. Atty. Gen. 18, it was said that consuls are privileged from political or military service.

Citizens of the United States who hold foreign consulates in the United States are not exempt from jury duty or service in the militia by the law of nations, or by the Constitution and laws of the United States, nor unless exempted by the statutes of the state of the Union in which they respectively reside. 8 Ops. Atty. Gen. 169.

In 8 Ops. Atty. Gen. 169, it was said that "as to the particular question now before me, some writers have assumed, without due authority, that a citizen of the country, bearing the consulate of a foreign country, is exempted by the law of nations from service in the civic guards or the militia. Such is the assertion of Phillimore (*International Law*, Vol. 2, p. 246), repeated by Horne (*Diplomacy*, p. 93). In support of the doctrine, they cite Ch. de Martens. But this author goes further, and affirms that such a person ceases for the time being to be a citizen or subject of his country. (*Guide Diplomatique*, pte. 1 re, chap. 10, s. 79). On these premises, and not as a necessary consequence of consular functions, the exemption from municipal charges might be sustained. But the fallacy of the premises themselves has been fully exposed by Pinheiro Ferreira. (*Ibid.* *Observ.* ed. 1837, tom. 1, p. 214.) Indeed, the material point has been adjudicated by the courts, in the discussion of the important question of the national character in time of war. (*The Indian Chief*, 3 C. Rob. Adm. 26; *The Falcon*, 6 C. Rob. Adm. 197; *The Josephine*, 4 C. Rob. Adm. 26; *Arnold v. United Ins. Co.* 1 Johns. Cas. 363.)"

VII. Domicile.

The temporary residence of a consul abroad does not cause him to lose his residence. *Wheat v. Smith*, 50 Ark. 266.

In *Arnold v. United Ins. Co.* 1 Johns. Cas. 363, it was said that if the consuls engage in business inconsistent with or foreign to their diplomatic or public character, they are thenceforth to be considered as domiciliating them-

person of the defendant, who is the consul general of Chili for the United States, resident at San Francisco, California. The court below held that it had no jurisdiction, and the plaintiff appeals from the judgment. The question was determined adversely to the contention of appellant by this court in the case of *Miller v. Van Loben Sels*, 66 Cal. 341. Appellant contends that said case should not be considered as conclusive authority upon the question because at the time it was decided the 9th section of the judiciary act of 1789 expressly provided that the jurisdiction of the United States over consuls was exclusive, and that since then, on February 18, 1875, the Congress of the United States, by an act entitled "An Act to Correct Errors, etc., in the Revised Statutes," repealed the said section of the said act of 1789, and that the court in said case of *Miller v. Van Loben Sels* assumed that said § 9 was still in existence, and that its attention was not called to the said repeal of said section. The attention of the court in that case was called to such repeal by a petition for rehearing, but it is contended by appellant that the court must be deemed to have not considered a point presented for the first time in such petition. Whether that decision should or should not be considered as final authority upon the question, we are satisfied that the rule there declared was correct, even in view of the fact that said section of the act of 1789 has been repealed. By § 2 of article 3 of the Constitution of the United States it is provided that the judicial power of the United States shall extend "to all cases affecting ambassadors, other public ministers, and consuls." By this provision consuls are put on the same footing with ambassadors. Under our system the govern-

ment of the United States is the only sovereign having relations with foreign countries under the law of nations, and all dealings with the representatives of foreign nations must be by the courts or other agencies of the government which is alone sovereign in that regard. It is the right and privilege of the foreign government to be thus treated. In *Davis v. Packard*, 7 Pet. 276, 8 L. ed. 684, it was contended that Davis, who was consul general of the King of Saxony, had waived his privilege by not setting it up at the proper time in the court below. The Supreme Court of the United States, however, did not sustain this contention, and said: "If this was to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered. It is the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations, and our Constitution and law seem to put consuls on the same footing in this respect. If the privilege or exemption was merely personal, it can hardly be supposed that it would have been thought a matter sufficiently important to require a special provision in the Constitution and laws of the United States. Higher considerations of public policy doubtless led to the provision. It was deemed fit and proper that the courts of the government with which rested the regulation of all foreign intercourse should have cognizance of suits against the representatives of such foreign governments." We think, therefore, that under the said provision of the Constitution of the United States there was no jurisdiction of the case at bar in the superior court of this state.

ment abroad and becoming as subjects amenable to the ordinary jurisdiction of the state. (Vattel, 711.)

In *Sampson v. United States*, 30 Ct. Cl. 365, it was said that under U. S. Rev. Stat. 1691, a consul is not permitted to hold the office of consul at any other consulate, or exercise the duties thereof.

VIII. Trading with an enemy.

A ship belonging partly to a consul of Austria, resident in Richmond during the war, was liable to seizure although the consul made every effort to prevent her breaking the blockade, and directed her to be sent to a loyal port, where it was not shown that he dissolved his partnership business at Richmond and continued his residence solely as consul, as a consul engaged in merchandise in an enemy's country is regarded the same as any other merchant. The Pioneer, Blatchf. Prize Cas. 666, Fed. Cas. 11,175, Affirming Blatchf. Prize Cas. 22, Fed. Cas. 11,171a.

In *Arnold v. United Ins. Co.* 1 Johns. Cas. 363, it was said that consuls have certain privileges and immunities, but that if they enter into trade they are tied down by the same restrictions as other merchants are; that if consuls had a right in their consular capacity to enter into trade, and to be freed from being considered as residents in a belligerent country, they would have it in their power to cover foreign property under the mask of its being American, to an immense extent. 45 L. R. A.

Consular character does not protect that of a merchant united in the same person, where a vessel was seized for trading in an enemy's country, and was claimed to be the property of an American consul. The Indian Chief, 3 C. Rob. Adm. 22.

And a consul of Netherlands at Finland engaged there in merchandising cannot assert a claim as mortgagee of a cargo of a Danish ship captured as an enemy. The Aina, 28 Eng. L. & Eq. 600. See also *note, Jurisdiction and powers of consuls*, subd. III, 1, ante, 481.

IX. Exemption from liability for judicial and other acts.

A British consul at Madagascar is not liable in damages for dismissing a suit as vexatious where the defendant has plaintiff's receipt for the demand, and for not allowing plaintiff to show that the receipt was obtained by fraud. As a consul is entitled to the same privileges and exemptions as a judge of a court of record. Haggard v. Pellicier [1892] A. C. 61, 61 L. J. P. C. N. S. 19, 65 L. T. N. S. 769.

A consul procuring the arrest of a fugitive from justice on a telegram from his country was held to be not chargeable with malice, when he had reasonable grounds to believe that the offense was within the time prescribed by the Spanish treaty relating to such offenses, although it was not within that time. Castro v. De Uriarte, 16 Fed. Rep. 93.

I. T.

TENNESSEE SUPREME COURT.

W. M. SLACK

v.

A. K. SUDDOTH, Appt.

(.....Tenn.....)

No forced sale or transfer can be made of a goodwill, such as that of a partnership of dentists, in a suit to wind up the partnership, when it is based upon professional reputation and standing or upon business connections, although it might be the subject of a voluntary sale.

(April Term, 1899.)

A PPEAL by defendant from a judgment of the Chancery Court for Shelby County stating the account in a proceeding to wind up a partnership. *Reversed.*

The facts are stated in the opinion.

Messrs. Smith & Trezevant, for appellant:

The additional rental value over the amount due the landlord is all that Slack could have been entitled to. This rental value is distinguished from market value.

Jonas v. Noel, 98 Tenn. 440, 36 L. R. A. 862.

The leasehold, though only for a year or shorter period, is real estate.

Shannon's Code, § 51, p. 63; *Kelley v. Shultz*, 12 Heisk. 218.

On dissolution of the firm, it being proved that there were no debts against it, as between themselves the parties were tenants in common.

Williamson v. Fontain, 7 Baxt. 212; *Piper v. Smith*, 1 Head, 97.

Slack voluntarily withdrew from the possession, leaving it to Suddoth. The latter is therefore only responsible, at most, to Slack for one half of the rents, which are shown to be nothing.

Tyner v. Fenner, 4 Lea, 469; *Schneider v. Taylor*, 16 Lea, 304; 2 Bates, Partn. § 798; *Stoughton v. Lynch*, 2 Johns. Oh. 209; *Ligare v. Peacock*, 109 Ill. 94.

In an English case where there was a partnership between solicitors, with a stipulation that if one retired the others would pay him the value of his goodwill, and one retired two days before the expiration of the partnership, he was held entitled to the goodwill as of two days' duration, and no more.

Austin v. Boys, 2 De G. & J. 626; 2 Bates, Partn. § 668.

There is no goodwill attaching to a professional partnership.

Story, Partn. § 99, and note; 2 Bates, Partn. § 668; *Parsons*, Partn. 2d ed. pp. 275, 276; *Collyer*, Partn. §§ 163, 164; 17 Am. & Eng. Enc. Law, pp. 1192, 1193, and notes; *Holden*

v. M'Makin, 1 Pars. Sel. Eq. Cas. 281; *Farr v. Pearce*, 3 Madd. 78; *Rice v. Angell*, 73 Tex. 350, 3 L. R. A. 769.

Messrs. L. Lehman and E. Lehman for appellee.

Wilkes, J., delivered the opinion of the court:

Drs. Slack & Suddoth were partners in the practice of dentistry in the city of Memphis for a number of years. They occupied two offices on the second floor of No. 243 Main street, which they rented or leased year by year. They were equally interested in the business and property of the firm, and the partnership was unlimited as to duration. The subject of dissolution was discussed between them for several months, but no satisfactory conclusion was reached until, on the 30th April, 1894, complainant notified defendant that the partnership was dissolved. Before doing so, however, or on the day after, he rented another office in the same building, and near the head of the stairway, and on the next day after the dissolution he advertised in the daily paper that the partnership was dissolved, and he was located for practice in an adjoining room in the same building, and he put his sign up at his office door. Attempts were made between the parties to settle up their business, but they were unsuccessful. Suddoth remained in charge of the old offices, and used such of the furniture and instruments as he needed or wished. Slack then filed a bill to wind up the partnership, and he asked that a receiver be appointed to take charge of the lease and property, and sell the same, and that he be allowed to start the biddings for the same at \$2,000. The defendant answered. The chancellor appointed a receiver, and directed him to offer the use and rent of the two rooms to both parties for the remainder of the year (about seven months), and to let them go to whichever would indemnify the other against the landlord's rent and give the greatest bonus in addition. He was also to take possession of the personal property, and hold it for further orders. Defendant thereupon obtained from one of the judges of this court a fiat superseding the order of the court below to sell the use of the offices. This was dissolved at the April term, 1895, of this court, and the cause remanded for further proceedings. In the meantime the current rent or lease expired, and defendant himself leased the rooms from the landlord, and continued in possession. The chancellor ordered a reference upon the several features necessary to settle accounts between the parties, and, among other things, the master was directed to report "what leases the partnership had when the suit began, and which one of the parties had received the benefit of the same, and how much, if anything, he should pay therefor, and who had paid the landlord's rent, and what damage had accrued to complainant by reason of the supersedeas sued

NOTE.—On the question of the sale of a goodwill, see also *Rice v. Angell* (Tex.) 3 L. R. A. 769, and note; and *Wilmer v. Thomas* (Md.) 13 L. R. A. 380, and note.
45 L. R. A.

out in this court." The clerk reported the facts as already stated, and that defendant should pay to the complainant \$500 for his interest in the lease, upon the ground that it was valuable, and enabled the holder to appear to the public as the successor of the old and well-established firm, and procure a release of the property. This was excepted to, and exception overruled by the chancellor, and there was an allowance of \$500 in favor of complainant for his interest in the remainder of the rental or lease contract reciting that it was the value of the goodwill attached to the offices. From this much of the decree the defendant appealed, and this presents the only question before us.

The rental paid the landlord for the rooms under the lease to the firm was \$49 per month, and after the firm dissolved defendant continued to pay this amount of rental, and after the expiration of that lease he rented at the same rate. It appears that the complainant also tried to rent the rooms at the same price after the firm lease terminated. The chancellor, as well as counsel, have treated the item of \$500 as the "goodwill" of the firm. It is difficult to define what goodwill is. Lord Eldon said that it was simply "the probability that the old customers will resort to the old place." *Crutwell v. Lye*, 17 Ves. Jr. 335; *Moreau v. Edwards*, 2 Tenn. Ch. 349. But in *Churton v. Douglas*, Johns. V. C. (Eng.) 174, it was said that this was too narrow a view to take of it, and there it was said that it was every positive advantage acquired, arising out of the business of the old firm, whether connected with the premises where it was carried on, with the name of the late firm, or with any other matter carrying with it the benefit of the business of the old firm. But it is evident that this definition is too narrow, when applied to the good will of a partnership to practise a profession, since it leaves out of view the advantage to be gained from the professional standing and reputation of the partners themselves which constitutes the principal feature of value in such partnership. Accordingly, it is insisted that there is no such thing as goodwill attaching to professional partnerships. Certainly, there can be no forced sale or transfer *in invitum* of such goodwill, so far as it is based upon professional reputation and standing, such as arises from the skill of physicians, dentists, attorneys, etc., whatever may be done as to such goodwill as arises out of location. Still, in the sense in which Lord Eldon uses the term "goodwill of the premises," there may be an advantage of pecuniary value in occupying premises which have been occupied by skilled professional men, and to which the public has resorted, or has been attracted by advertisements, or prior visits, or general reputation of prior occupants. Many persons, attracted to the place by the reputation of former occupants, might remain, no matter who might be in occupancy, and others might leave so soon as it was ascertained they were not occupied by 45 L. R. A.

the persons in whom they have professional and personal confidence.

It will be seen, from this brief mention, what an unreliable—and, we might say, imaginary—value could be placed upon what is called "goodwill" in this case. *East Tennessee Nat. Bank v. First Nat. Bank*, 7 Lea, 420. Certain it is that there was no actual goodwill between these parties after the dissolution. On the contrary, they were hostile in their views. It was not the case of one professional retiring, and recommending his successor to his old customers, which is the principal feature in sales of goodwill, when voluntarily made. But, in this instance, the defendant was not recommended by complainant. On the contrary, he entered immediately into open and aggressive competition with him. Neither could defendant hope to reap much, if any, advantage from occupying the same quarters; for the complainant, as an active competitor, was hard by in the next room, and as likely to get the old customers, perhaps, as was the defendant. The clerk and master and chancellor evidently fixed the value of this "goodwill," as it is termed, from the circumstance that complainant had expressed a willingness to pay defendant \$500 for the use of the offices for the remaining term of seven months unexpired. But it must be evident, on the one hand, that he might be willing, after having secured his own office adjoining, to pay this sum to have the old offices closed, and defendant removed entirely from the premises, and never use the rooms himself; and, on the other hand, defendant did not stand upon an equal footing in bidding for the use of the offices, because, if he failed to get them, he must go off into some other locality, while, if complainant failed to get them, he had only to step into the next room, and, according to the proof, be as favorably located, if not more so, than in the old offices. The complainant could thus set himself up in the premises of the old firm, and, inasmuch as defendant had gone out of the building, he might be taken as the successor of the old firm. But defendant could not do this, because complainant was located at his very threshold, to rebut such an inference by the public. We do not think this offer was any criterion of value of the use of these rooms. It might more properly be said to be complainant's estimate of benefit to be secured from closing them up.

But we think the principle back of all is that no forced sale or transfer can be made of a goodwill, when it is based upon professional reputation and standing, or upon business connections. Goodwill implies something gained by consent,—not something realized by force or coercion. We do not mean to hold that goodwill has no value, and may not be the subject of a voluntary sale. On the contrary we think it might be sold, and is a valid consideration for a contract: and it has been so held in a number of cases. 8 Am. & Eng. Enc. Law, p. 1372, note 7. In *Bunn v. Guy*, 4 East, 190, a contract by a practising attorney to relinquish his busi-

ness, and recommend his clients to two other attorneys, and that he would not re-enter the practice in certain localities, was held a good contract. So in *Whittaker v. Howe*, 3 Beav. 383. In *Hoyt v. Holly*, 39 Conn. 326, 12 Am. Rep. 390, there was a similar contract, made by a physician with a brother physician, and it was sustained. So in the case of *Warfield v. Booth*, 33 Md. 63. In all these cases there was a voluntary sale, and an obligation to aid the purchaser, or not to enter into competition with him for a certain time or in certain localities. No doubt, in this case, complainant could have made a valid agreement with defendant, for a consideration, to leave the old offices, and let him have the advantage of their use; but this was not done.

We are of opinion it was error to allow this item, and it is stricken out. Judgment will be rendered as may be indicated by the result. This may be agreed on, or the clerk of this court, in the absence of such agreement, will report the amount. The appellee will pay costs of appeal. Costs of court below will remain as adjudged by that court.

William H. COOPER, Admr. of Oscar Cooper, Deceased, Plff. in Err.,
v.

Jesse M. OVERTON et al.

(.....Tenn.....)

1. The liability of the owner of dangerous premises to trespassers does not exist, even in the case of children, unless they are induced to enter on the land by something unusual and attractive placed upon it by the owner, or with his knowledge, and permitted to remain there.
2. A pond on an unfenced city lot, formed by surface water on account of the damming up of a natural drain therefor, by the dumping of trash and dirt into it by city authorities, without the knowledge of the owner, who did not know of the existence of the pond, will not render him liable for the drowning of a boy while playing on the pond.
3. Opinions of witnesses as to what attracts children to water, or as to whether or not boys like to ride on a plank in the water, are inadmissible.

(April Term, 1899.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of defendants in an action brought to hold defendants liable for the death of plaintiff's intestate which was alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

NOTE.—On the question of liability for dangerous private grounds, see note to *Lepnick v. Gaddis* (Miss.) 26 L. R. A. 686.

As to liability for negligence in permitting a pond on one's premises in which children may drown, see, as supporting the liability, *Pekin v. McMahon* (Ill.) 27 L. R. A. 206; and as denying the liability, *Moran v. Pullman Palace Car Co.* (Mo.) 33 L. R. A. 755; *Dobbins v. Missouri, K. & T. R. Co.* (Tex.) 38 L. R. A. 573; *Omaha v. Bowman* (Neb.) 40 L. R. A. 531; *Standal v. Boyd* (Minn.) 42 L. R. A. 288; and *Ritz v. Wheeling* (W. Va.) 43 L. R. A. 148.

Messrs. G. H. Gillham and George Gillham, for plaintiff in error:

If a pond should form upon the vacant property of an owner, situated in a populous district of a city, and near streets and public schoolhouses where many children attend, and which pond is deep enough to drown a child, it is the duty of the owner to abate the nuisance,—to drain the pond, or to fill up the pond.

Whirley v. Whiteman, 1 Head, 610; *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206; *Price v. Atchison Water Co.* 58 Kan. 551; *Brinkley Car Co. v. Cooper*, 60 Ark. 545; *Barthold v. Philadelphia*, 154 Pa. 109; *Malloy v. Hibernia Sav. & L. Soc.* (Cal.) 21 Pac. 525.

The owner has been held liable for allowing some dangerous agency to exist on his premises, which was attractive to children.

Siddall v. Jansen, 168 Ill. 43, 39 L. R. A. 112; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 293; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313; *Dwyer v. Missouri P. R. Co.* 12 Mo. App. 597; *Whirley v. Whiteman*, 1 Head, 610.

The owners have been held liable for failure to properly protect their premises where children have been injured.

Mackey v. Vicksburg, 64 Miss. 777; *Lepnick v. Gaddis*, 72 Miss. 200, 26 L. R. A. 686; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Union P. R. Co. v. McDonald*, 152 U. S. 202, 38 L. ed. 434; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; 1 Thomp. Neg. 304, 305; *Cooley, Torts*, 608.

Pekin v. McMahon, 154 Ill. 141, 27 L. R. A. 206, is almost identical with the present case.

The principle of that case, if followed by this court, must result in a reversal of the present case.

Price v. Atchison Water Co. 58 Kan. 551, approves and follows the Illinois case.

Brinkley Car Co. v. Cooper, 60 Ark. 545; *Barthold v. Philadelphia*, 154 Pa. 109; *Malloy v. Hibernia Sav. & L. Soc.* (Cal.) 21 Pac. 525; *Siddall v. Jansen*, 168 Ill. 43, 39 L. R. A. 112; *Schmidt v. Kansas City Distilling Co.* 90 Mo. 293; *Penso v. McCormick*, 125 Ind. 116, 9 L. R. A. 313; *Union P. R. Co. v. McDonald*, 152 U. S. 202, 38 L. ed. 434; *Dwyer v. Missouri P. R. Co.* 12 Mo. App. 597; *Mackey v. Vicksburg*, 64 Miss. 777; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Lepnick v. Gaddis*, 72 Miss. 200, 26 L. R. A. 686; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

Negligence cannot be attributed to children under these circumstances.

Pratt Coal & I. Co. v. Brawley, 83 Ala. 371; *Kerr v. Forgue*, 54 Ill. 482, 5 Am. Rep. 146.

Children, even when trespassing, are required to exercise only such care and judgment as may reasonably be expected from those of their age.

Rockford, R. I. & St. L. R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; *Fitzpatrick v. Fitchburg R. Co.* 128 Mass. 13; *Byrne v. New York C. & H. R. R. Co.* 83 N. Y. 620; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Philadelphia & R. R. Co. v. Spearen*, 47 Pa. 300, 86 Am. Dec. 544; *Pennsylvania R. Co. v. Lewis*, 79 Pa. 33; *Johnson v. Chicago & N. W. R. Co.* 56 Wis. 274; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 67; *Barley v. Chicago & A. R. Co.* 4 Biss. 430.

A warning to children not to go upon the premises can have no or little weight, as they have not sufficient discretion to give proper heed to it.

Dublin Cotton Oil Co. v. Jarrard, 91 Tex. 289; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755; *Price v. Atchison Water Co.* 58 Kan. 551.

Messrs. Turley & Wright, for defendants in error:

It is not the duty of an owner of a vacant lot, even if situated in a populous district of a city and near streets and public schools, to abate a pond from the mere fact and solely because it is deep enough to drown a child; nor is such a pond *per se* a nuisance.

Blyth v. Topham, Cro. Jac. 158; *Morgan v. Halliwell*, 57 Me. 375.

The owner of property can do with it what he pleases, so long as he does not disturb others in the lawful enjoyment of their legal rights.

Morgan v. Halliwell, 57 Me. 375; *Gillespie v. McGowan*, 100 Pa. 149, 45 Am. Rep. 365.

Where an excavation is made adjoining a public highway, so that a person walking on it might by making a false step or being affected with sudden giddiness fall into it. It is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the highway, and the person falling into it would be a trespasser upon defendant's land before he reached it, the case seems to be different.

Where the owner of property has exercised reasonable care with regard to its management, and a stranger comes upon the property, and, without the knowledge or authority of the owner, does something that causes an injury to a third party, the injured party cannot recover against the owner of the land.

Shearm. & Redf. Neg. 5th ed. § 705.

Admitting that Overton & Overton knew that children were in the habit of playing on this vacant lot, there could be no recovery in this case.

Gillespie v. McGowan, 100 Pa. 144, 45 Am. 45 L. R. A.

Rep. 365; *Richards v. Connell*, 45 Neb. 467; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Ratte v. Dawson*, 50 Minn. 450; *Clark v. Manchester*, 62 N. H. 578; *Overholt v. Vieths*, 93 Mo. 422; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *McEachern v. Boston & M. R. Co.* 150 Mass. 515; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Cooley, Torts*, 606; *Shearm. & Redf. Neg. 4th ed. § 505.*

If one gives a bare license or permission to cross his premises, the licensee takes the risk of accident in using the premises in the condition in which they are.

1 *Thomp. Neg.* 361; *Hardcastle v. South Yorkshire R. & River Dun Co.* 4 Hurlst. & N. 67; *Hargreaves v. Deacon*, 25 Mich. 1; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684.

The owner of land where children are allowed or accustomed to play must use ordinary care to keep it in a safe condition. And yet merely allowing children to play upon a vacant lot is held not to amount to an invitation which creates liability for its condition.

Shearm. & Redf. Neg. 5th ed. § 705, 4th ed. § 705; Galligan v. Metacomet Mfg. Co. 143 Mass. 527; *Clark v. Manchester*, 62 N. H. 577; *Hargreaves v. Deacon*, 25 Mich. 1; *Newdell v. Young*, 80 Hun. 364; *Ratte v. Dawson*, 50 Minn. 450; *Spokane & P. R. Co. v. Holt* (Idaho) 40 Pac. 56; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847; *Cooley, Torts*, § 605; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755; *Overholt v. Vieths*, 93 Mo. 422; *Charlebois v. Gogebic & M. River R. Co.* 91 Mich. 59; *Murphy v. Brooklyn*, 118 N. Y. 575; *Clark v. Manchester*, 62 N. H. 577; *Frost v. Eastern R. Co.* 64 N. H. 220; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714; *Clark v. Richmond*, 83 Va. 355; *Witte v. Stifel*, 126 Mo. 295; *Zoebisich v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660; *Frost v. Grand Trunk R. Co.* 10 Allen, 387, 87 Am. Dec. 668; *Southcote v. Stanley*, 38 Eng. L. & Eq. 295; *Kohn v. Lovett*, 44 Ga. 257; *Parker v. Portland Pub. Co.* 69 Me. 177, 31 Am. Rep. 262; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Malone v. Boston & A. R. Co.* 51 Hun. 532; *Peters v. Bowman*, 115 Cal. 345; *Whittaker's Smith, Neg. 2d ed. p. 67; Cleary v. Blake*, 14 App. Div. 602; *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36; *Butz v. Cavanaugh*, 137 Mo. 503; *Dehanitz v. St. Paul* (Minn.) 76 N. W. 48; *Stendal v. Boyd* (Minn.) 42 L. R. A. 288.

Wilkes, J., delivered the opinion of the court:

This is an action for damages for the drowning of Oscar Cooper, the son of plaintiff, William H. Cooper; the father being the administrator of the son. It is conceded that there is no cause of action against John Overton, trustee, and as to him the action is dismissed. There was a verdict and judg-

ment for defendant, and an appeal by plaintiff, as administrator, and he has assigned errors.

The facts, so far as necessary to be stated, are that Oscar Cooper, a boy about ten years of age, was drowned by falling from a plank upon which he was attempting to float upon a pond of water upon a lot owned by defendant Jesse M. Overton, in Memphis, Tennessee. Overton is a resident of Nashville, Tennessee, and is the owner and in possession of lots Nos. 48 to 53 of block 24 in the tenth ward of Memphis. These lots front about 148½ feet on the east line and about 400 feet on the north line of Clay street. They had descended to him from his grandfather. They were unimproved, unfenced, and uninclosed. The property had no other than natural drainage. The lot adjoining these lots is separated from them by a fence, and on it there is a house, about 150 feet from the line of the lots. There are no other houses in the immediate vicinity of these lots, but they are located within a few blocks of a somewhat thickly populated part of the city. About 450 feet northwest of these lots is a public-school building, usually attended by about 370 pupils, and there is a Catholic parish school a few blocks south. This property was looked after by Overton & Overton, real-estate agents, for the owner, Jesse M., who rarely visited Memphis. Surface water from contiguous property flowed across these lots, and gradually cut a gully several feet deep, through which it found vent. The city, it appears, without the knowledge of the owner or his agent, filled up the lower end of this drain by dumping trash and dirt into it, so as to form a dam and cause a pond of water to form or accumulate on the lot. The edge of this pond was about 50 feet from a sidewalk on Lea street, and 150 feet from a sidewalk on Clay street. It appears from the statements in the record that Overton & Overton, agents, were in the habit of inspecting the premises about twice a month, and when last inspected there was no pond upon them; and it is further stated that they had no knowledge there was a pond upon the lot until after the drowning, which occurred February 10, 1898. It further appears that the pond would form after a heavy rain, and in a short time would dry up and disappear, and at this time there had been a heavy rain for two days. When notified of the accident, Mr. Overton went to the city authorities, and complained of their action in stopping the drain, and the city at once removed the dam and filled up the pond. On both sides of this property defendant Overton had caused sidewalks to be laid, and the pond was about 50 feet from the nearest point of the sidewalk. There appears, also, to have been a path or walkway across the lot, which was used by a few persons as a cut-off, instead of going around the sidewalks, but the public was not in the habit of using it. Its nearest point to the pond was about 25 feet. It does not appear that the owner or his agent had ever given any permission to the

public to use a pathway across their lots, or that they knew of such use. The deceased was a pupil in the public school, and is shown to have been a boy of average intelligence. It appears that the school children had been playing in a bayou which crossed these lots. They had been forbidden (and the intestate with the others) from going on these lots by the principal, and as a rule these instructions had been obeyed. The deceased, however, with another boy, John Appling, aged about eleven years, and a younger brother of the latter, went over this lot from the sidewalk, about 50 feet, to the edge of the pond. A piece of the plank sidewalk had been torn up and thrown on the water of the pond,—by whom does not appear,—and appears to have been the only one on the surface of the water. Oscar Cooper got upon this plank and attempted to propel it around the pond, over the water, with a stick. He lost his balance and fell off the plank into deep water and was drowned. It appears that the two Appling boys declined to get on the plank, deeming it dangerous, though invited to do so by young Cooper. It appears that other children had been playing at or in this pond, sometimes bathing and swimming, but whether school children or not does not appear. It is not shown that the pond had any special attraction for boys, but some testimony tending in that direction was excluded, and forms the basis of a part of the assignments. There was no danger to anyone on or using the sidewalks. There is testimony tending to show that there was no pond there in the summer, and that it was only formed by heavy rainfalls, and would soon dry up. When the pond was full, it would extend up to and under the sidewalk of Clay street, but was shallow at that point, and generally around the margin of the pond. Various assignments of error are made, principally to the failure of the trial judge to give certain requests asked by plaintiff's counsel, and to the charge as given by him.

The first and second assignments will be treated together, and are refusals to charge as follows: "(1) The court instructs you that it is the duty of all owners of property situated in the city, or where many people live or travel to take such reasonable care of the same as will render it reasonably safe to the public. (2) It is the duty of any such property owner to abate any dangerous nuisance which may arise on his premises, and it is his duty to look after his property; and, if a nuisance has existed for a considerable time, he is, in law, presumed to know it, and then it becomes his duty to abate it." Without stopping to comment on these requests, which we think are too general and meager in terms, we think the trial judge in his general charge more correctly stated the law applicable to the facts of this case, and in much better language, as follows: "An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal right. This necessarily carries you to determining

what Oscar Cooper's legal rights were. He had a legal right to pass over and along either Clay or Lea street in safety. These were the streets that bounded the lots upon which it is claimed the pond was. Defendant Overton had no right to construct, maintain, or permit a pond upon his lots so near to the streets which bounded the lots as to make it dangerous to persons who were using the streets. So, if you find from the evidence that the pond was so near to the streets which bounded the lots as to endanger anyone who was using the streets, and as a consequence thereof Oscar Cooper was drowned, then the plaintiff can recover."

The third assignment is that the trial judge refused to charge a request as follows: "If a pond should form upon the vacant property of the owner, situated in the populous districts of a city, and near streets or public schools where many children attend, and which pond is deep enough to drown a child, it is the duty of the owner to abate the nuisance,—to drain or fill up the pond." This assignment will be considered with the fourth and fifth, which raise the question of the correctness of the trial judge's charge as a whole,—upon the duties of the landowner and the rights of the public. The judge charged as follows: "The pleading of defendant Overton puts upon plaintiff, Cooper, the burden of making out his case upon every material point by a preponderance of the evidence. The material points upon which the evidence must preponderate, before it authorizes the jury to give plaintiff a verdict, are the following: First, he must establish the fact that a pond was maintained or permitted to exist upon defendant's lots; second, that the manner or condition in which it was maintained or permitted to exist was negligence in itself; third, that it was because of its condition, or the negligent manner in which it was maintained or permitted, that Oscar Cooper was attracted to it and was drowned. Unless these three points are established by a preponderance of the evidence, there can be no recovery. An actionable nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights. This necessarily carries you to determining what Oscar Cooper's legal rights were. He had a legal right to pass over and along either Lea or Clay street in safety. These were the streets that bounded the lots upon which it is claimed the pond was. Defendant Overton had no right to construct, maintain, or permit a pond upon his lots so near to the streets which bounded the lots as to make it dangerous to persons who were using the streets, so that, if you find from the evidence that the pond was so near to the street that it endangered anyone who might be using the street, and as a consequence thereof Oscar Cooper was drowned, the plaintiff can recover. On the other hand, if you find from the evidence that Oscar Cooper had to leave the sidewalk, and go over on the private property of Overton 30 feet or more, 45 L. R. A.

before he came to a place of danger in the pond, then there can be no recovery in this case from the bare fact of maintaining or permitting a pond to remain on the lot, for the reason that every owner of real estate has the right to use his property just as he pleases, so long as the use which he makes of it does not endanger anyone else in the enjoyment of their legal rights; and, if any owner of real estate has a right to use his property just as he pleases, you can see that such owner has the right, if he so desires, to dig a pond on his lot. The only restriction which the law imposes upon this right is this: that the owner, in digging the pond, must see to it that he does not put it near enough to an adjoining lotowner to endanger the use of his property, and that he does not dig it near enough to a public street to make it dangerous to persons using the street. When the lotowner has observed these precautions in digging or maintaining a pond on his lot, he has complied with the law, and no one can legally complain. If he has not observed the precautions just mentioned, and injury results to anyone as a consequence of these owners failing to observe them, the injured person can recover." It will be noted that neither in the charge nor the requests is the idea prominently presented that this pond was or might be a place attractive to children, but the requests are based upon the idea that there is an obligation resting on the landowner to keep his premises near a public school or highway free from dangers which arise from natural or artificial causes. This feature of attractiveness of the pond was made prominent in the declaration, and some proof was attempted to be introduced upon it, but was rejected, so far as based on opinion. It is, however, pressed in argument, and will be considered along with the other features of the case. As to this feature of attractiveness, the record presents the following state of facts: Miss Conway, the principal of the school, testifies that some boys had been reported to her as having skated on ice over Overton's lots, and she had forbidden the little boys from going to the bayou to play, because they would get their feet muddy. She had never known that the children of the school had been in the habit of playing on it. Wall, the janitor, says he has seen children come into school, and had to strip them; that they had fallen in, and come out, but that he did not know of any of the school children playing there, except from hearsay; that he had to run some children out who were swimming there, but not at the time of the year (February) when this drowning occurred. He had seen some children playing on some planks in the pond, but when this was is not stated. His evidence is largely, if not altogether, hearsay, and is not at all definite.

The case has been very elaborately and ably argued by learned counsel, and we have been furnished with exhaustive printed briefs on each side, and a very full citation of authorities. The plaintiff insists that

the merits of the controversy are embodied in his third request, and he specially relies upon several cases which we will notice. The first is the case of *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206. In that case the court says: "There is conflict in the decisions upon this subject, some courts holding in favor of the liability of the private owner, and others ruling against it." It then proceeds to lay down the rule as follows: "Where the land of a private owner is in a thickly-settled city, adjacent to a public street or alley, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years, incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers." And again the case quotes with approval the statement made in *Shearman & Redfield on Negligence*, as follows: "The owner of land where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in safe condition; for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees,"—citing 2 *Shearm. & Redf. Neg.* 4th ed. § 705; 4 *Am. & Eng. Enc. Law*, p. 53, and cases in note. "In such case the owner should reasonably anticipate the injury which has happened. 1 *Thomp. Neg.* p. 304." In the *Pekin Case* there was a pond or pit of water, 5 to 14 feet deep, in a populous city, on lots belonging to the city, and filled with logs and timber floating therein, on which children were in the habit of playing near a driveway across vacant lots, but partially inclosed; and the city had been notified that it was dangerous, and requested to remove it, but had allowed it to remain a year, until a boy eight and one half years of age went through an opening on the causeway, and stepped on a log in the water, which rolled and threw him into the water. The case of *Price v. Atchison Water Co.* 58 Kan. 561, is also relied on by plaintiff. In that case a landlord maintained on his premises a reservoir filled with water, to which children were attracted for fishing and other sports, which was well known to the landlord, and who took no means to warn them or exclude them, and a child eleven years of age was attracted to the place, and fell in and was drowned; and it was held that the landlord was liable. The case turned upon the allurements and enticement held out to children, and the knowledge of the owner of its danger, and that children did frequent it habitually. To the same effect are cited *Brinkley Car Co. v. Cooper*, 60 Ark. 545, and a number of other cases more or less in point, and holding the same general doctrine.

45 L. R. A.

On the other hand, counsel for defendants call the attention of the court to a number of well-considered cases more or less in conflict with the cases cited for plaintiff, only a few of which we refer to, as illustrating defendants' contention. The case of *Richards v. Connell*, 45 Neb. 467, is where a demurrer was sustained to a petition which set out facts almost identical with the facts in the present case. The statements in the petition were that on the 29th day of June, 1891, and for a long time prior thereto the defendant was the owner of lots 40 and 41 in the city of Omaha, and the plaintiff's father was during said time the owner of the adjoining premises, described as "Lot 59;" that defendant had for a long time prior to the date named negligently permitted the surface water to accumulate on said lots, thereby creating a deep and dangerous pond; that he had failed and neglected to fence said lot, or to erect barriers of any kind to prevent children lawfully in the vicinity thereof from falling into said pond; that said lots are situated in the vicinity of one of the public schools of said city, and the pond is not only dangerous to persons passing along South street, adjacent thereto, but is situated in a public and much-frequented place, and attractive to children of tender age, many of whom are accustomed to play about and upon the water; that on said June 29, 1891, plaintiff's intestate, a boy ten years of age, yielding to the natural impulses of childhood, went on said pond, upon a section of wooden sidewalk floating therein, from which he fell into said pond and was drowned. The court, in passing on the demurrer, said: "The petition, we think, fails to state a cause of action against the defendants, and that the demurrers were rightly sustained. The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water or a dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon said premises, not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that, independent of statute, no such liability exists." The case of *Klue v. Nieman*, 68 Wis. 273, 60 Am. Rep. 854, is very similar to the one at bar. That case was also decided on demurrer, and the court said: "We think the demurrer in this case was properly sustained, for the reason that the complaint shows no actionable negligence on the part of the defendant. The complaint states that the defendant was the owner of, and in the possession of, a lot in the city of Milwaukee situated on the northeast corner of Hubbard and Loyd streets; that the lot was in a thickly-settled and populous part of the city, and was not inclosed by a fence . . . between it and Hubbard street, or on the side between it and Loyd street, but that the lot was vacant and open, so that the public had free and unobstructed access thereto from both Hubbard and Loyd streets; that

for a long time prior to the 5th of September, 1885, there had been upon the lot a deep and dangerous hole or excavation, partially filled with water, making a pond which covered about the entire surface; that the water of the pond was roily, so that its depth could not be ascertained except by measurement, but that in places it was of the depth of 9 feet, so that the pond was dangerous to the lives of children who might be attracted thereto for amusement or otherwise; that the defendant, well knowing that the pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently, and carelessly permitted it to remain unguarded by fence or barricade, and the plaintiff's son, a lad about nine years of age, 'while playing upon and about said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said hole as aforesaid fell and was precipitated into the same and was drowned.' It will be observed [says the court] that it is not alleged that the pond was so near the highway as to make it unsafe for passengers going along the street or sidewalk; and no averment that the boy, when he fell into the pond, was passing along the street or sidewalk. On the contrary, it is stated that the boy was playing upon and around the pond when he was precipitated into the water and drowned. So the single question presented is, Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made or caused to be made) where surface water collected, in order to secure the safety of strangers, young or old, who might go upon it or about the pond for play or curiosity? If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold. A learned author states the doctrine in these words: 'An owner of land is under no obligation to fence an excavation on his land unless it is so near the highway as to amount to a public nuisance; and, if persons or animals are killed or injured in consequence of his failure to do so, no damages can be recovered. A qualification of this rule is that when the owner of land, expressly or by implication, invites a person to come upon it he will be liable for damages if he permits anything in the nature of a snare to exist thereon, which results in injury to such person; the latter being at the time in the exercise of ordinary care. If, however, he gives a bare license or permission to cross his premises, the licensee takes the risk of accident in using the premises in the condition in which they are,'—quoting from 1 Thomp. Neg. 361. "Among other authorities cited by the author to sustain this doctrine of the text is *Hardcastle* 45 L. R. A.

v. South Yorkshire & R. River Dun Co. 4 Hurlst. & N. 67, where Pollock, C. B., uses this language: 'When an excavation is made adjoining to a public highway, so that a person walking upon it might, by making a false step or being affected with sudden giddiness, or in the case of a horse or carriage way might by a sudden starting of the horse be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the highway, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road in a dark night and losing his way may wander to any extent; and, if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not.'

In *Shearman & Redfield on Negligence*, 5th ed. § 705, it is said: "The owner of land where children are allowed or accustomed to play . . . must use ordinary care to keep it in a safe condition. . . . And yet merely allowing children to play upon a vacant lot is held not to amount to an invitation which creates liability for its condition,"—citing a large number of cases, and among them *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755. In the official syllabus of this case this language is used: "The owner of a lot in a city, who failed to fence the same, is not liable in damages for the death of a boy who entered upon the premises without invitation or permission, and was drowned while bathing in a pond on the lot." There was a judgment in favor of the defendant in this case, just as in the case at bar, and the argument was made by counsel for appellants in that case as is made here. Thus, on page 642, 134 Mo., and page 756, 33 L. R. A., we find appellant's counsel making this contention: "(1) The owner of property having thereon any dangerous agency, which is either attractive to children, or where he has knowledge that they resort to it for amusement, or otherwise, and he fails to use ordinary care under the circumstances to guard the same against injury to them, he must respond in damages for such neglect, irrespective of the fact that the danger is not adjacent to the highway."—quoting *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206; *Mackey v. Vickburg*, 64 Miss. 777; also, *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; and a long list of authorities cited by opposing counsel in case at bar. The opinion in the late Missouri case, however, after stating the facts, which are much more favorable to the plaintiff than the facts in the case at bar, since the pond is shown to have been only 20 feet away from a public street, and in a populous part of the city, uses this language: "The views expressed in *Overholt v. Vieths*, 93 Mo. 422, are applicable to the case at bar, and are not rendered inapplicable by the fact that in the former case the child entered onto the prem-

ises where he was drowned through adjoining private property. The same principle applies whether the unauthorized entry be made on private grounds . . . as applies where a public street is used for a like purpose. *Overholt's Case* has been recently and approvingly cited and followed in the quite recent cases of *Witte v. Stifel*, 126 Mo. 295, and *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847. Having fully discussed in these cases the subject here involved, it is needless to go over the same ground again. Abundant authorities in addition to those just mentioned have been collected by the industry of counsel, which fully maintained the same views as those already announced." The case of *Richards v. Connell*, 45 Neb. 467, was decided last year by the supreme court of Nebraska. The facts in that case are almost identical with those in this case. The action there, as here, was against the city of Omaha and the owners of certain uninclosed lots of ground. The petition there alleged that defendants had for a long time prior to the death by drowning of a boy of about ten years of age permitted the surface water to accumulate on the lots, thereby creating a deep and dangerous pond, and that defendants had failed and neglected to fence the lots, or erect any barrier to prevent children lawfully in the vicinity from falling into the pond; that the lots were in the vicinity of a public school, and adjacent to a street, and in a place much frequented by, and attractive to, children of tender years, who were accustomed to play about and upon the water. The boy was playing upon a raft floating upon the water, and fell in and was drowned. The case also approvingly cites and follows the *Overholt Case*, 93 Mo. 422, and distinguishes the facts treated in that case from what are commonly known as the "turntable cases." To the like effect see *Ratte v. Dawson*, 50 Minn. 450; *Charlebois v. Gogebio & M. River R. Co.* 91 Mich. 59; *Murphy v. Brooklyn*, 118 N. Y. 575; *Clark v. Manchester*, 62 N. H. 577; *Frost v. Eastern R. Co.* 64 N. H. 220; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339; *Benson v. Baltimore Traction Co.* 77 Md. 535, 20 L. R. A. 714; *Clark v. Richmond*, 83 Va. 355, and other cases.

The case of *Witte v. Stifel*, 126 Mo. 295, holds as follows: "The owner of a building in progress of construction in a city is not liable for injuries to a child playing thereat without his knowledge, and without any inducement or invitation, implied or otherwise, on his part to the child to go upon the premises. Plaintiff's son, seven years of age, went to one of the cellar windows of a building in process of construction in the city of St. Louis, which was about 3 feet from the street line, and sought to draw himself up by taking hold of a stone placed across the top of the window frame. The stone was not fastened, and fell and killed him. It did not appear that the owner of the building or the contractors knew of the dangerous position of the stone, or that children were in the habit of playing around the building. Held, 45 L. R. A.

that deceased was a trespasser, and that no inducement or invitation, implied or otherwise, having been held out to him to enter upon the premises, there could be no recovery for his death." In the case of *Murphy v. Brooklyn*, 118 N. Y. 575, this language is used: "This action was brought to recover damages for the death of M., plaintiff's intestate, a boy six years old, who was found drowned in a hole alongside a sewer constructed by defendant through private property, and that of the state, with the consent of the owner. It appeared that the sewer emptied into the bay. At high tide the sewerage was driven back up the sewer, causing the cavity in question. This was about 50 feet from one of defendant's streets, along which, forming the boundary of the adjoining premises, was an embankment faced by a wall, and on the top of this a fence or railing of posts and crossbars. At a point where it was supposed the intestate went upon the premises the crossbar was down, and the wall had given way. People going to the bay had occasionally crossed there, and the ground for 10 or 12 feet from the fence had the appearance of a path. It did not appear that any objection had been made by any person to the construction and maintenance of the sewer. Held, that no violation of any duty which the defendant owed to the decedent had been shown, and so it was not liable; as to him the construction of the sewer was not wrongful, nor its maintenance a nuisance; that defendant owed to him no duty of care to protect him while upon the premises, or to guard the hole, as it was not so close to the street as to make the latter unsafe. It seems that the owner of the premises could not have been charged with negligence in permitting the hole to remain." Distinguishing *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175. Quoting with approval *Hargreaves v. Deacon*; *Blyth v. Topham*, Cro. Jac. 158; *Hardcastle v. South Yorkshire & R. River Dun Co.* and many other authorities. In the case of *Hargreaves v. Deacon*, 25 Mich. 1, the rule is laid down as follows: Owners of private property are not responsible for injuries caused by leaving a dangerous place unguarded, when the person injured was not on the premises by permission or on business, or other lawful occasion, and had no right to be there. Where an injury arises to a person from the neglect of one, doing his lawful business in a lawful way, to provide against accident, the question arises at once whether he was under any obligation to look out for the protection of that particular person under the particular circumstances of the case; for the law does not require vigilance in all cases, or in behalf of all persons. If on the sidewalk, the duty of protection extends to all persons who have a legal right to go there, or, in other words, to the whole public, and it depends upon that right. On private property, not open of right to the public, it applies less generally, and only to those who have a legal right to go there and claim the care of the occupant for their security while on the premises against

negligence, or to those who are directly injured by some positive act involving more than passive negligence. We have found no cases which hold that an accident from negligence on private premises can be made a ground of damages, unless the party injured had been induced to come by invitation, or by employment which brings him there, or by resorting there as to a place of business, or a general resort held out as open to customers or others when lawful occasion may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely from motives of convenience, in no way connected with business or other relations with the occupant. In that case a little child of tender years had strayed upon the property of defendants, and had fallen into a pond which was open and unguarded. In *Ratte v. Dawson*, 50 Minn. 450, this language is used: "Where a child of tender years was taken by an older sister, to whose care it was intrusted, to vacant residence lots in a city for recreation and pleasure, and was accidentally knocked down and killed by the caving in of an embankment caused by excavations for sand, and which had been left unfenced,—held, that the landowner was not liable in damages, and that he owed no duty to persons coming upon the premises without his invitation to protect them from danger from excavations thereon." The court uses this language: "There is nothing to take the case out of the general rule that where the owner of land, in the exercise of his lawful dominion over it, makes an excavation therein so far from the street that a person coming onto the land without his invitation, and falling into it, would be a trespasser before reaching it, such owner is not liable to an action for the injury sustained. . . . There was nothing in the nature of the work going on upon the land, nor anything kept or used thereon which can be said to have been specially inviting or attractive to children, or calculated to entrap them into danger, so as to bring the case under the rule established in the 'Turntable Cases.' . . . The maxim *Sic utere tuo* has no application to such a case. It refers to acts, the effect of which extends beyond the limits of the property, and to neighbors who do not interfere with or enter upon it. If the rule were otherwise, a landowner could not sink a well or dig a ditch or open a stone quarry on his land, except at risk of being made liable for the consequential damages, which would unreasonably restrict its enjoyment." In *Peters v. Bowman*, 115 Cal. 345, we have a case very similar to the one at bar: Plaintiff brought an action for damages for the death of his infant son, drowned in a pond of water upon a lot owned by the defendant. The water used to run over the lot until the street was graded by the city of San Francisco on the side towards which the land sloped, since which time the water accumulated in the rainy seasons, forming a pond which disappeared during the dry season. The boy was drowned while playing on a raft

that was floating in the pond, and was eleven years of age. The general rule is that the owner of land is under no obligation to keep his premises safe for trespassers, whether children or adults, and governs this case. The rule of the turntable cases is not applicable. That rule is approved in this state (see *Barrett v. Southern P. Co.* 91 Cal. 296), but should not be carried beyond the class of cases to which it has been applied. It has been repeatedly held that damages cannot be recovered for the death of a child drowned in a pond on private premises, who had gone there without invitation,—quoting *Klis v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Overholt v. Vieths*, 93 Mo. 422; *Hargreaves v. Deacon*, 25 Mich. 1; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Richards v. Connell*, 45 Neb. 467. In response to a petition to rehear, the court entered very fully into the distinction between that case and the turntable cases, and showed to what absurdities the doctrine is carried that the landowner is liable for injuries to children who are attracted onto his premises, by instancing the case of the death of a child who, attracted by the tempting fruit, climbs into a tree, falls, and is killed. The court says: "With respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different" from where the danger exists naturally, and arises from natural causes. It distinguishes the Illinois case of *Pekin v. McMahon*, 154 Ill. 141, 27 L. R. A. 206, by showing that it was one where the city had made the dangerous excavation in a thickly peopled quarter, while in the case under consideration the pond on the owner's land, as in this case, was created by the city, without any fault on his part, and in this case without defendant's knowledge.

There is a late case, decided by the supreme court of Minnesota in July, 1898, which is directly in point. This is the case of *Dehanitz v. St. Paul* (Minn.) 76 N. W. 48. The syllabus is as follows: "Within the limits of the city of St. Paul, and between the banks of the Mississippi river is a slough more than a quarter of a mile in length, which during high water fills with water, and has no outlet. . . . In this slough is an open basin, from 60 to 75 feet across, which is contiguous to James street. For a long time the city of St. Paul has used this hollow basin as a place for dumping garbage and manure, and during high water it floats upon the water, and forms a crust, upon which grows vegetation similar to that upon the surrounding land. The plaintiff's intestate, D., a girl ten years old, left James street, upon which she had been traveling, and, either for convenience or pleasure, attempted to cross over this crust. . . . From the facts, it did not appear that the public had ever traveled over this dumping ground, or used it as an open common. Held, that the city owed no duty of protection or warning in respect to D.'s going over this dumping ground, or crust, as a traveler, and

hence was not liable in damages for her death." The opinion in this case concludes as follows: "However sad may be the untimely death of this young girl, yet, under the facts and the well-settled rules of law, the order denying the defendant's motion for a new trial must be reversed. We have not deemed it necessary to discuss the authorities cited by either counsel, as the facts clearly demand a reversal of the order. It is sufficient to say that the rule laid down in the well-known *Turntable Cases* has no application to the case at bar."

It will be seen that the authorities cited are in direct conflict upon what may be said to be the real issue in this case, but we hold, upon reason and weight of authority, that liability does not exist, even in the case of children, unless they are induced to enter upon the land by something unusual and attractive placed upon it by the owner, or with his knowledge, and permitted to remain there; and this is the doctrine of the *turntable cases*. Further than this the facts in this case do not warrant us in going. In the case at bar the proof wholly fails to show that the owner of this property caused the water to stand upon this lot in a pond, but this was done by the city. It wholly fails to show that the owner or his agents did anything to render the pond attractive, or that they placed any planks upon it; and the proof does show affirmatively that the owner did not know of the existence of the pond, or its dangerous character, and that he also, through his agents, looked after the property with as much diligence as should be required. It is impossible, therefore, upon any theory of the case, to find a ground of liability of the defendant. The leading cases relied on by plaintiff, cited above, have, as an important and essential feature, fixing the liability, the creation of the danger, or actual knowledge of it, by the owner,—neither of which features exists in this case. In *Clapp v. La Grill* (decided at the present term) 52 S. W. 134, it was held that if the premises were rendered dangerous by the acts of a third person, and the owner had no knowledge of it, and could not have known it by proper diligence, the owner would not be liable for injuries from the defects.

We have treated the case as though the special requests were made as the rule requires, but the record shows they were made before the main charge was delivered; and hence, under our rule, they could not be held as properly made. Still, the entire question is raised by objection to the charge as given, and we have used the request the more plainly to define the plaintiff's contention.

There are various errors assigned in the record, but not argued before the court, which we dispose of briefly.

The testimony of Miss Conway was objected to, so far as it sought to have her state the age of the children in school under 45 L. R. A.

her charge. The exception to this testimony is not properly made. The record fails to show how much of her examination made in the absence of the jury was read to them, after they returned, and it fails to show that any exception was taken to the action of the trial judge upon the final disposition of this matter. As to this feature the record is confused. In the view we have taken of the case, the evidence is immaterial.

It was not error to exclude the testimony of the same witness as to her opinion of what attracted the children to the water, nor John Appling's opinion as to whether boys like to ride on a plank in the water. The court rejected the testimony because it called for opinions merely, and there was no exception to the ruling, and what the answer would have been does not appear.

Mr. Wall was asked if he found, in his experience, that this pond, with planks in it, was an attractive place for children. This was objected to by counsel for defendant, and there was no answer or ruling by the court. It was, moreover, but an expression of opinion. As to the eleventh assignment, it called for a statement which the witness showed could only be given from hearsay, and it was properly excluded.

It is said the court excluded all the evidence tending to show that the pond was attractive to children. This is too general. It does not point out specific questions asked and answers given, and does not attempt to do so. We have already referred to several questions, and the action of the court thereon, bearing upon the question generally; but we cannot, on this general objection, look through the record to find what is referred to. But, upon an examination of the whole record, we are satisfied that nothing material to the real issue in the case was excluded. The ground of liability, if any existed at all, was that the pond was an attractive place to children. Witnesses were not allowed to give their opinions as to this feature, but they were allowed to state the situation of the pond, its size, character, and appearance, and what was on it to make it attractive and different from any other sheet or collection of water, and any facts from which the jury might have inferred and concluded that it was or was not attractive. The court did not specifically charge upon this feature whether the pond was attractive or not, and was not asked to do so,—probably because the proof did not call for it, as the only evidence of attractiveness was that a plank was floating on the surface of the water. But how long it had been there, or by whom it was placed there, did not appear, and it was affirmatively shown that the defendant had no knowledge of the plank, or the pond itself.

We find no reversible error in the record, and the judgment of the court below is affirmed with costs.

KANSAS CITY, MEMPHIS, & BIRMINGHAM RAILROAD COMPANY, *Pf. in Err.*,
v.

P. J. DELANEY.

(.....Tenn.....)

1. The delivery of a letter of recommendation for a former employee to a person who, by his authority, requested it, is not a publishing of any libel contained in it.
2. A statement in a recommendation of a former employee, that, "like many others, he left our service during the strike," is not libelous or actionable *per se*, so as to constitute a cause of action without special damages.

(April Term, 1899.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiff in an action brought to recover damages for alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

Messrs. Bell & Horne for plaintiff in error.

Mr. Wallace Pratt, with *Messrs. Adams & Trimble*, for defendant in error:

These words are not actionable in themselves, because they are not of a nature that "necessarily must or presumably will, as their natural and proximate consequence, occasion pecuniary loss, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication."

Pollard v. Lyon, 91 U. S. 227, 23 L. ed. 308; *Continental Nat. Bank v. Bowdre*, 92 Tenn. 736; *Pratt v. Pioneer-Press Co.* 35 Minn. 251; *Stewart v. Minnesota Tribune Co.* 40 Minn. 101.

Words which merely might tend to produce injury are not libelous in themselves.

Boynton v. Shaw Stocking Co. 146 Mass. 219.

Words used of a person's business are not necessarily libelous in themselves.

Achorn v. Piper, 66 Iowa, 694; *Continental Nat. Bank v. Bowdre*, 92 Tenn. 736; *Fry v. McCord Bros.* 95 Tenn. 679.

Where words are not libelous in themselves, it is necessary to allege and prove special damages.

Pollard v. Lyon, 91 U. S. 227, 23 L. ed. 308; *Lodge v. O'Toole* (R. I.) 39 Atl. 752; *Shattuck v. Allen*, 4 Gray, 540; *Odgers, Libel & Slander*, 25, 543; *Fry v. McCord Bros.* 95 Tenn. 679.

The delivery of the letter by Sullivan to Speed was no sufficient publication, because Speed was Delaney's agent and by importunity caused it to be written and delivered.

Odgers, Libel & Slander, pp. 129, 176; *Miller v. Donovan*, 16 Misc. 453; *King v. Waring*, 5 Esp. 15; *Smith v. Wood*, 3 Campb. 323; *Fonville v. McNease*, Dud. L. 303, 31 Am. Dec. 556; *Sutton v. Smith*, 13 Mo. 120; *Irish-American Bank v. Bader*, 59 Minn.

329; *Taylor v. Hawkins*, 16 Q. B. 307; *Weatherston v. Hawkins*, 1 T. R. 110.

The letter related to the character of a servant. It was therefore privileged.

White v. Nicholls, 3 How. 288, 11 L. ed. 601.

In such a case actual malice must be proved, though the letter may be false.

Ibid.; *Klinck v. Colby*, 46 N. Y. 427; *Taylor v. Hawkins*, 16 Q. B. 307.

In such a case as this, where a letter is written upon information believed to be true, there is no evidence of malice sufficient to sustain a verdict.

Missouri P. R. Co. v. Richmond, 73 Tex. 568, 4 L. R. A. 280.

The filing of the plea of justification in this case cannot be evidence of malice.

Klinck v. Colby, 46 N. Y. 427; *Cruikshank v. Gordon*, 118 N. Y. 178.

The publication not being libelous *per se* the plaintiff must prove as well as allege special damage, which was not done.

Fry v. McCord Bros. 95 Tenn. 678; *Woodruff v. Bradstreet Co.* 116 N. Y. 217, 5 L. R. A. 555; *Newbold v. J. M. Bradstreet & Son*, 57 Md. 52, 40 Am. Rep. 426; *Townshend, Slander & Libel*, §§ 146, 148; *Dicken v. Shepherd*, 22 Md. 399; *Dixon v. Smith*, 5 Hurlst. & N. 450; *Johnson v. Robertson*, 8 Port. (Ala.) 486; *Basel v. Elmore*, 65 Barb. 627.

The special damage meant is some pecuniary injury.

Wilson v. Goit, 17 N. Y. 442; *Achorn v. Piper*, 66 Iowa, 694; *Pollard v. Lyon*, 91 U. S. 237, 23 L. ed. 314; *Walker v. Tribune Co.* 29 Fed. Rep. 827.

The defendant is not liable for any publication of the letter that might have been made by Speed.

Burt v. Advertiser Newspaper Co. 154 Mass. 238, 13 L. R. A. 97.

Nor is it liable for any of the consequences of the act of Delaney after he received it in making its contents known to others.

Sylvia v. Miller, 96 Tenn. 94; *Wilcox v. Moon*, 64 Vt. 450, 15 L. R. A. 760.

Plaintiff was obliged to name some person who refused to employ him in consequence of the libel.

Fry v. McCord Bros. 95 Tenn. 679.

There was no evidence of malice sufficient to permit a charge of exemplary damages to the jury.

Missouri P. R. Co. v. Richmond, 73 Tex. 568, 4 L. R. A. 280; *White v. Nicholls*, 3 How. 287, 288, 11 L. ed. 600, 601; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; *Fowles v. Bowen*, 30 N. Y. 20.

Defendant is not liable for the act of Sullivan in writing the letter unless it was written within the scope of his authority.

Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; *Southern Exp. Co. v. Fitterer*, 59 Miss. 581, 42 Am. Rep. 379; *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418.

NOTE.—For some cases on the general question, What constitutes a publication of a libel?—see *State v. Armstrong* (Mo.) 13 L. R. A. 419, 45 L. R. A.

and note; *Wilcox v. Moon* (Vt.) 15 L. R. A. 760; and *Peterson v. Western U. Teleg. Co.* (Minn.) 40 L. R. A. 661.

McAlister, J., delivered the opinion of the court:

Delaney commenced this suit in the circuit court of Shelby county against defendant company to recover damages for an alleged libel contained in the following letter:

Kansas City, Memphis, and Birmingham Railroad Co. J. H. Sullivan, Superintendent.
Memphis, Tenn., May 16th, 1896.

To Whom It May Concern:

The bearer, J. P. Delaney, worked for the company as foreman of blacksmith shop, and was considered very competent. Like many others, he left our service during the strike. But I think he is thoroughly convinced that he got on the wrong track, and that no trouble from this source need be apprehended from him again. For his family's sake, I hope he may obtain employment, and I believe he will prove a faithful man hereafter.

J. H. Sullivan, Supt.

After setting out the letter, the declaration proceeded: "The aforesaid writing was known by the defendant to be false when it made and published the same. The plaintiff did not leave the service of the defendant during the strike, and this fact was well known to the defendant. Plaintiff took no part in said strike, and this fact was well known to the defendant. The aforesaid written and published false statement was made wilfully and maliciously, for the purpose of injuring plaintiff in his trade and calling." There was a demurrer to the declaration upon the ground that it did not make any sufficient averment of special damages suffered by the plaintiff in consequence of the libelous words spoken of and concerning him. The point of the demurrer was that, the words not being libelous *per se*, the action could not be maintained without an averment of special damages. The demurrer was overruled. The defendant pleaded "Not guilty," and justification. The latter plea, in full, is as follows: "It says that, at the special instance and request of the plaintiff, one R. A. Speed, acting as the plaintiff's friend and agent, went to J. H. Sullivan, who was employed by defendant company as superintendent of operating department of its railroad, and asked him to give him (Speed) a letter, addressed 'To Whom It May Concern,' recommending plaintiff, as well as the facts would justify, for employment; at the same time stating that he knew that said Sullivan could not give him a letter addressed to any railroad, because Delaney had been connected in some way with the strike. He further stated to said Sullivan that, if he would give him a letter of recommendation addressed as above, he thought Delaney could get employment with the L. & N. R. R., of Memphis. Accordingly, said Sullivan, with intent to aid and assist plaintiff, and without malice, wrote the letter dated the 16th day of May, 1896, declared upon, and delivered the same to said Speed, to be delivered by said Speed to said Delaney. The contents of said letter were made known by said Sullivan to said

Speed at the time said letter was delivered, and at his urgent request, but were made known, by defendant's or said Sullivan's acts, to no other person. Defendant avers that the contents of said letter are true in substance and in fact." On the trial below it was not controverted that the letter was written, but it was insisted that it was written at the request of plaintiff, and delivered to his agent, Mr. Speed. The latter went to Sullivan, superintendent of the Kansas City, Memphis, & Birmingham Railroad, to get a letter recommending Delaney to Capt. Slusser, of the Louisville & Nashville Railroad for employment. Sullivan refused to give a letter to Slusser. Thereupon Speed represented to Sullivan that Delaney was a poor man, had a large family, and would like a letter from him "To Whom It may Concern;" that it might do him some good. After some hesitation, Sullivan finally agreed to give such a letter, saying he felt sorry for Delaney, and would like to see him get something to do. Speed testified that he showed the letter to no one, and had not communicated its contents to anyone excepting Delaney. The record fails to show that this letter ever came to the knowledge of any persons other than Speed and Delaney. It does show that Delaney himself showed it to Capt. Slusser, master mechanic of the Louisville & Nashville Railroad at Memphis, for the purpose of securing employment.

There was evidence tending to show that on the 3d of July, 1894, a time long anterior, Delaney was working in the shops of defendant company at Memphis in the capacity of railroad blacksmith. On that day what was known as the "Debs Strike" was begun, and the shops of defendant company were immediately closed. Delaney, it appears, was a member of the American Railway Union, and, after the shops were closed, attended a meeting of that organization at the courthouse in Memphis, and, in a public speech, stated that, as the Kansas City Railroad Company had acceded to the demands of the strikers not to haul Pullman cars, he would have nothing to do with the strike. Delaney testified that he told Briggs, the master mechanic of defendant company, under whom he had worked, that he was ready and willing to work at any time; that Briggs asked him if he was a member of the American Railway Union, and, on his admitting that he was, Briggs discharged him. This was denied by Briggs. Evidence was introduced by the company tending to show that on the 5th or 6th of July, while the shops were still closed, it became necessary to have the rigging of a passenger coach repaired, and Briggs sent for Delaney to do the work. Delaney came, and, on being told what was wanted, said he would have to consult the Blacksmith's Union, whereupon Briggs discharged him. Sullivan, the superintendent, was afterwards told that Delaney had been discharged for refusing to do the work required. It is claimed by Sullivan that he was acting on this information when he stated in the letter that Delaney, "like many

others, left our service during the strike." It will be observed that this suit is not to recover damages for the breach of a contract, or for discharging Delaney from the service of the company, but is for the publication of a libel based upon the following language in the letter, namely: "Like many others, he left our service during the strike."

It will be remembered that this letter was written at the urgent solicitation of Mr. Speed, acting as the friend of Mr. Delaney. Neither Delaney nor Speed expressed any dissatisfaction with it at the time it was written, but received it and attempted to make use of it. The only publication of the letter was in making its contents known to Speed. No witness was produced who had refused to employ Delaney on account of the letter, nor were any special damages alleged or proved. There is no evidence of publication in this record. The proof is undisputed that this letter was written by Sullivan at the request of Mr. Speed, who was acting by authority of plaintiff. Speed accepted it, and delivered it to plaintiff, who used it in seeking employment. Under the authorities, the company is not liable for any of the consequences of the act of Delaney in making publication of the letter after it reached his hands. If a person receives a letter containing libelous matter, he will not be justified in publishing it. *Sylvia v. Miller*, 96 Tenn. 94; *Wilcox v. Moon*, 64 Vt. 450, 15 L. R. A. 760. In view of the facts of this case, was the delivery of the letter by Sullivan to Speed a publication? Unquestionably not. It was precisely the kind of letter that Speed expected to get, and he accepted it without objection or complaint. The court instructed the jury that the letter was not libelous or actionable *per se*, which we hold to be correct. But, when words are not libelous in themselves, it is necessary to allege in the declaration, and prove, special damages, as a condition of recovery. *Continental Nat. Bank v. Boudre*, 92 Tenn. 723; *Fry v. McCord Bros.* 95 Tenn. 679. The objectionable words are, "Like many others, he left our service during the strike." The court correctly instructed the jury that these words are not libelous or actionable *per se*, because they are not of such a nature that they "necessarily must or presumably will, as their natural or proximate consequence, occasion pecuniary loss, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication." *Pollard v. Lyon*, 91 U. S. 227, 23 L. ed. 310; *Continental Nat. Bank v. Boudre*, 92 Tenn. 736. The letter does not contain a charge which must necessarily occasion injury, and the law requires proof, and will not presume damages. It was therefore necessary to allege and prove special

damages. The allegation of damage is "that plaintiff has been greatly injured in his business, he has been unable to obtain employment, he has been deprived of the right to follow the vocation of his choice, to his great damage, \$10,000." This allegation is not sufficient. In *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 308, the words were not actionable *per se*. The allegation of damage was that plaintiff had been damaged and injured in her fame and name. The court said that in such cases the declaration must set forth precisely in what way the special damage resulted from the speaking of the words. The judgment in that case in favor of the plaintiff was arrested. In *Fry v. McCord Bros.* 95 Tenn. 678, the words were not actionable *per se*. The declaration in that case alleged that plaintiff was greatly injured in his good name and credit, brought into public scandal, infamy, and disgrace, and that he was prevented from getting any of the necessities of life, goods, wares, and merchandise; that "he has suffered great anxiety and pain of mind, and become incapacitated for business and hence is damaged \$5,000." The court said, *viz.*: "But there is no statement of any instance in which his credit was impaired or credit refused him, or in which he failed to procure the necessities of life, or any other particulars; nor any names of any persons given, nor any reason given for the failure to give names or identify persons."—citing *Newell, Defamation*, p. 867, § 41. The court held that, for want of proper allegation of special damage, the declaration was bad in substance, and reversed the ruling on demurrer, and dismissed the case. The present case is not at all analogous to the case of *Railroad Co. v. Johnson* (decided by this court at its April term, 1897). In that case the libel charged was "that plaintiff had been discharged for insubordination, as well as being at the head of a disreputable mob, not hesitating to do anything to the injury of the company's property," etc. The court held this language libelous *per se*, and that it was unnecessary to allege or prove special damages, since the charge was necessarily hurtful, and that, if false, plaintiff might recover general damages. In that case this court affirmed a judgment in favor of the plaintiff for \$1,500. This case does not present such language as constitutes a libel *per se*, and there being no special damages alleged, the action cannot be sustained.

The judgment of the Circuit Court is reversed, the demurrer sustained, and the suit dismissed.

McFarland, Special Judge, being disqualified, did not participate in the decision of this case.

UTAH SUPREME COURT.

B. L. SHORT, *Appt.*,

v.

BULLION, BECK, & CHAMPION MINING
COMPANY, *Respt.*

(.....Utah.....)

*1. The provisions of Utah Sess. Laws 1896, p. 219, chap. 72, and Rev. Stat. 1898, § 1337, apply with equal force to the employer and the employee, and a person who works for another, in a mill or reduction works, more than eight hours per day, cannot recover on a *quantum meruit* for his services during the overtime.

2. A limitation of the duration of a day's work in certain employments, known as the "Eight-Hour Law," is a valid exercise of the police power of the state, and creates for the employee a legislative protection which is without his power to waive.

3. A servant may claim neither an express nor an implied contract to pay for services rendered under a contract of employment which is in violation of laws fixing a penalty for doing the act upon which recovery is sought, and in no case can a contract be implied when the parties to it are *in pari delicto*, and where plaintiff, to make his case, must resort to the illegal transaction in proof and pleading.

(Baskin, J., dissents.)

(June 9, 1899.)

APPEAL by plaintiff from a judgment of the District Court for the Fifth District in favor of defendant in an action brought to recover compensation for overtime during which plaintiff was at work for defendant in addition to the hours designated by statute as a legal day. *Affirmed.*

The facts are stated in the opinion.

Messrs. James A. Williams and F. H. Holzheimer, for appellant:

The corporation after working its men twelve hours per day instead of eight, and after receiving and keeping the benefit of said service for four hours, cannot come into court and say: "You were a party with us in violating this statute; you are *in pari delicto* and cannot recover."

There is a distinction between contracts made about matters *mala in se*, and those made about matters which are not wicked and bad, but merely prohibited by statute.

It does not always follow that parties are *in pari delicto*, for there may be, and very often are, very different degrees in their guilt.

Ray, Contractual Limitations. 143; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319.

After such contracts are executed, the

*Headnotes by MINER, J.

party becomes entitled to claim the promise or payment due in respect to them.

2 Addison, Contr. Abbott's notes 1883, 732, note 1; *Schermerhorn v. Talman*, 14 N. Y. 93; *Tracy v. Talmage*, 14 N. Y. 163, 67 Am. Dec. 132; Clark, Contr. Hornbook Series, p. 491; *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 35 L. ed. 107; *Duval v. Wellman*, 124 N. Y. 156; *Mount v. Waite*, 7 Johns. 434; *Wheaton v. Hibbard*, 20 Johns. 290, 11 Am. Dec. 284; *Browning v. Morris*, 2 Cowp. 790; *Schroeppe v. Corning*, 6 N. Y. 107; *Manchester & L. R. Co. v. Concord R. Corp.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319; *Walter A. Wood Mowing & R. Mach. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641, 16 Am. L. Reg. N. S. 554, and note.

A loan made in violation of the charter of a bank or the statute law may be recovered.

Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211; *Vining v. Bricker*, 14 Ohio St. 331; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424; *O'Hare v. Second Nat. Bank*, 77 Pa. 96; *Bell v. Campbell*, 123 Mo. 1; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419.

The labor of a working man is his own capital, and no power on earth can prevent him from vending it in the markets.

Plaintiff was not *particeps criminis* with the defendant, and much less *in pari delicto* with it.

Keener, Quasi Contr. 272 *et seq.*; *Wood, Mast. & S.* §§ 206-209; *Bachelor v. Bickford*, 62 Me. 526; *Smith v. Cuff*, 6 Maule & S. 165; *Williams v. Hedley*, 8 East, 378; *Browning v. Morris*, 2 Cowp. 791.

Messrs. Ferguson & Cannon, for respondent:

Even if the statute were not prohibitory, there is no implied contract.

Wood, Mast. & S. § 86; *Guthrie v. Merrill*, 4 Kan. 187; *Luske v. Hotchkiss*, 37 Conn. 221, 9 Am. Rep. 314; *McCarthy v. New York*, 96 N. Y. 1, 48 N. Y. 601; *Helphenstins v. Hartig*, 5 Ind. App. 172.

The law will not imply a contract prohibited by the law.

Bank of United States v. Owens, 2 Pet. 538, 7 L. ed. 512.

An act done in disobedience to the law creates no right of action.

Miller v. Ammon, 145 U. S. 422, 36 L. ed. 761; *Wood, Mast. & S.* §§ 200, 207, 208; *Bernara v. Luppig*, 32 Mo. 241; *State v. Goff*, 20 Ark. 289; *McGrath v. Merwin*, 112 Mass. 407, 17 Am. Rep. 119; *Edgar v. Fowler*, 3 East, 225; *Biggs v. Lawrence*, 3 T. R. 454; *Camden v. Anderson*, 6 T. R. 730.

Services rendered in any business prohibited by statute cannot be recovered for.

De Begnis v. Armistead, 10 Bing. 107; *Badgley v. Beale*, 3 Watts, 263; *Wood, Mast.*

NOTE.—As to a statutory limitation of hours of labor, see *note* to *People v. Phyfe* (N. Y.) 19 L. R. A. 141; also *Low v. Rees Printing Co.* (Neb.) 24 L. R. A. 702; *Ritchie v. People* (Ill.) 45 L. R. A.

29 L. R. A. 79; *Holden v. Hardy* (Utah) 37 L. R. A. 103; and *State v. Holden* (Utah) 37 L. R. A. 108.

& S. § 211; *Bank of United States v. Owens*, 2 Pet. 538, 7 L. ed. 512; *Prescott v. Battersby*, 119 Mass. 285; *Smith v. Arnold*, 106 Mass. 270; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 674.

The consideration was illegal, and the alleged contract is *nudum pactum*.

2 Kent, Com. 597; 9 Am. & Eng. Enc. Law, p. 909; 6 Am. & Eng. Enc. Law, 2d ed. p. 757; *Raguet v. Roll*, 7 Ohio, pt. 1, p. 76; *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742, 769, note; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Ryan v. School Dist. No. 13*, 27 Minn. 433; *Gardner v. Tatum*, 81 Cal. 370.

Even if plaintiff was guilty of no crime, yet he must show a violation of the statute in order to maintain his action, and therefore he cannot recover.

Gray v. Roberts, 2 A. K. Marsh. 208, 12 Am. Dec. 383; *Storz v. Finklestein*, 46 Neb. 577, 30 L. R. A. 644.

Minor, J., delivered the opinion of the court:

Plaintiff claims in his complaint: "That between the 1st day of June and the 1st day of November, 1896, plaintiff was employed in a mill owned and operated by the said defendant at Eureka City, state of Utah, for the purpose of treating and reducing ore, by said defendant, at the rate of \$2.50 per day, and at defendant's request. (3) That the laws of the state of Utah found on page 219 of the Laws of Utah for 1896, and § 1337 of the Revised Laws of 1898,—an act regulating the hours of employment in underground mines,—made eight hours a day's labor in such places, which act is hereby made a part of this complaint. (4) That between the 5th day of June and the 1st day of November, 1896, plaintiff worked in said mill and reduction works, at the request of the defendant, twelve hours per day. That said services were not performed in cases of emergency, or when life or property was in imminent danger. (5) That the overtime worked of four hours each day amounted to fifty-nine and one-quarter days. (6) That said work and labor was reasonably worth the sum of \$2.50 per day; a total of \$148.15. (7) That the said \$148.15 has not been paid, nor any part thereof." The plaintiff also sets out twelve other causes of action of a similar character. The defendant filed a demurrer to each cause of action on the ground that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained. The plaintiff declined to amend his complaint, and elected to stand thereon. Thereupon the court dismissed the complaint, and rendered judgment against the plaintiff for costs. From this judgment plaintiff appeals, alleging that the court erred in sustaining the demurrer and in dismissing his complaint.

Plaintiff claims in his complaint that between the 5th day of June, and the 1st day of November, 1896, he worked in defendant's mill and reduction works, at defendant's re-

quest, twelve hours per day; that the overtime work of four hours per day amounted to 59¼ days; that said labor was reasonably worth \$2.50 per day, or a total of \$148.15, for overtime worked; that said sum of \$148.15 has not been paid. No promise is alleged on the part of the defendant to pay for the overtime worked. This court is asked to imply a promise to pay from the fact that plaintiff was requested to work twelve hours per day, which request plaintiff complied with. Chapter 72, p. 219, Sess. Laws 1896, and § 1337, Rev. Stat. 1898, which are pleaded and made a part of the complaint in force when the work was performed, read as follows:

"Sec. 1. The period of employment of workmen in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of workmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent, manager, or employer, who shall violate any of the provisions of §§ 1 and 2 of this act shall be deemed guilty of a misdemeanor."

Section 6, art. 16, of the Constitution of the state of Utah reads as follows: "Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county, or municipal governments; and the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines." The statute above referred to was held constitutional by this court in *State v. Holden*, 14 Utah, 71, 37 L. R. A. 103, and the Supreme Court of the United States affirmed such decision in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, holding that the act in question was a valid exercise of the police power of the state of Utah. By the provisions of this statute the period of employment of the plaintiff in defendant's mill and reduction works was eight hours of each twenty-four hours, and any person, body corporate, agent, manager, or employer, who violated the provisions of the act were deemed guilty of a misdemeanor. The word "employment," as used in the statute, has a plain and definite meaning. Webster defines it as follows: "Employment. The act of employing or using; also the state of being employed." The plaintiff claims that he was employed by the defendant to work for twelve hours per day, and that he worked for it twelve hours per day, or four hours more than the law allowed him to work. There could be no period of employment for the plaintiff, under his complaint, without an employer. The defendant could not well violate the law unless someone was employed and performed labor prohibited by the statute. When the plaintiff voluntarily performed services at the request of the defendant in the mill, and worked twelve hours instead of eight hours, there was a violation of the statute. Had he worked eight hours

each day there would have been no violation of the statute. When the defendant requested the plaintiff to work twelve hours each day, and plaintiff complied with that request, the law was violated by the act of each party. The penal provision of the statute applies, and was intended to apply, not to the employer alone, but to any person who shall violate its provisions. The penal provision was aimed at the employer, and to any person who shall violate its provisions. The language of the act does not authorize any inference that it was intended by it to confer any right upon the employee to work more than eight hours a day, and relieve him from any criminal responsibility therefor. Such an inference is clearly repelled by the express provisions of the act making any person liable who violates any of its provisions. Judge Higgins, before whom the case was tried, aptly discusses the question as follows: "The question is, however, whether, under this law, such a contract is invalid as to the employee. We think in law and in reason it is. It is void as to him: First, for the reason that he is impliedly forbidden to make such a contract; second, because when he enters into a contract of this nature he knowingly and voluntarily assists the employer to violate the law, he becomes in effect a *particeps criminis* with the employer, for it is patent that with no employee willing to make such a contract the employer is powerless to act. We are further of the opinion that the right to waive this legislative protection is without the power of the employee. This law is in the nature of a state police regulation. Its object is the good of the public as well as of the individual. The state, in this matter, has intervened in its own behalf. This protection to the state cannot, at will, be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public good is entitled to protection and consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good. As remarked by Mr. Justice Brown in the case of *Holden v. Hardy*, 169 U. S. 390, 42 L. ed. 790: 'But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere. . . . Where the public health demands that one party to the contract shall be protected against himself, the state still retains an interest in his welfare, however reckless he may be.' In the above case the law is sustained upon the broad principle that it is public policy to surround the employee with protection to health. Had the employee the right to waive this protection, both for himself and the state, it can readily be seen that it rests entirely with him to abrogate the operation of the law, and to cause it to become a dead letter. He may make the period of employment eight, ten, twelve, or any greater number of hours, at his option, with the result that the conditions relating to the period of employment

in mines and mills would now exist as before the enactment of this law,—a matter purely of contract between the parties. We are of the opinion, and so hold, that both parties are, under the above law, prohibited from enlarging by contract the period of employment." The complaint in this case, taken as true, shows that both the plaintiff and defendant, or the person acting in its behalf, were *participes criminis* in the violation of the statute. They were *in pari delicto*. By the plaintiff's act in rendering services prohibited by law at defendant's request both parties became amenable to the penal provision of the statute. The act in question was enacted as a police regulation, and for the public good, in the interest of public policy. The experience of the past few years in the business of mining and smelting and underground workings of mines shows that such business can no longer be carried on with due regard to the safety and health of those miners engaged in such business without special protection and restraint against the danger necessarily incident to such employment. For this purpose laws have been enacted in many states, including Utah, designed to meet such exigencies as may arise, and to secure the safety and health of persons who are peculiarly exposed to such dangers by inhaling unhealthy gases for an unreasonable time while engaged in their employment. The employment of operatives, when too long pursued, in smelters and underground mines, is considered by the legislature as detrimental to the health of the employees. If the legislature has power to adopt measures for the protection of the lives of its citizens when engaged in dangerous employment, as has been frequently held, it also has the power to provide precautions for the protection of the health and the morals of such employees. The state has a direct interest in the health, safety, and prosperity of its people, and it is as much for the interest of the state that public health should be preserved as that life should be secure. It was therefore considered that the employment of men in smelters and underground mines for a period of more than eight hours per day was detrimental to the health of such persons, and, as the state had an interest in the welfare of its citizens, such employment and labor for more than eight hours should be prohibited under penalty. *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780. Such overemployment therefore becomes an evil, and detrimental to public interest, and the statute was enacted as a remedy for such evil. In the case of *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, the complaint charged the defendant with having unlawfully required the employee to work ten hours each day, and the inference may be drawn therefrom that the employee was under duress when he performed the labor. In the present case it appears that the plaintiff voluntarily embarked in the unlawful employment. When in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, the Supreme Court of the United States, in referring to the employer, said, "who was apparently the only

one liable," it doubtless had reference to the charge made in the complaint. The question of the laborer's liability under the statute was not in issue in that case. The suggestion was doubtless a mere *dictum*, and not a part of the decision of the case.

In the present case both parties knew the law. They each agreed to take part in an illegal act. In no case can a servant claim under an express or implied contract for services when the contract under which it is claimed the services were rendered is in violation of the laws wherein a penalty is attached for the doing of the act upon which recovery is sought. In no case can such a contract be implied when the parties to it are *in pari delicto*, and where, in order to make out his case, the plaintiff is obliged to resort to the illegal transaction in proof and pleading. In *Wood, Mast. & S.* § 200, it is said: "But where the penalty attaches for doing the very act contracted for, the whole contract will be illegal, the rule being that, if a contract is in part connected with an illegal consideration, and grows immediately out of it, it is void *in toto*. But, if the contract is not entire, and is susceptible of division, and a portion rests upon a separate and distinct legal consideration, and forms no part of the consideration for the illegal portion of the contract, the court will uphold that part of it which is legal. But, if the consideration is entire, and the two elements are thus blended, the whole contract is void, and the law will not enforce any part of it; and the real test by which to determine whether or not a recovery may be had for a part performance of a contract tainted with illegality or immorality is whether the party requires any aid from the illegal transaction to make out his case. If he does not, he may recover; but if he does, in any, even a slight, degree, it is fatal to a recovery." *Pollock, Contr.* pp. 253-260; *Penn v. Bornman*, 102 Ill. 523; *Alexander v. O'Donnell*, 12 Kan. 608; *Wood, Mast. & S.* § 198. The case of *Müller v. Ammon*, 145 U. S. 421, 36 L. ed. 759, was where an ordinance prohibited, under penalty, the sale of liquors at wholesale, within the city of Chicago, without obtaining a license from the city. It was held that the ordinance was valid, and that liquor sold in violation of the ordinance could not be recovered for, and that a contract which is made in disobedience of law creates no right of action which courts of justice will enforce; that the general rule was that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. *Jones v. Surprise*, 64 N. H. 243; *Martin v. Hodge*, 47 Ark. 378, 58 Am. Rep. 763; *Tyler v. Larimore*, 19 Mo. App. 445. Ray on Contractual Limitations says (p. 139): "Parties to a contract which is void as against public policy cannot be relieved, one against the other, on the ground that the thing contracted for was lawful and beneficial in itself, and that one has received and retained the benefit under it. Nor will courts assist a person 45 L. R. A.

who has participated in a transaction forbidden by statute to assert rights growing out of, or to relieve himself from the consequences of, his own illegal act." *Gleason v. Chicago, M. & St. P. R. Co.* (Iowa) 43 N. W. 517; *Parsons v. Randolph*, 21 Mo. App. 353.

On page 146 Mr. Ray says: "If the plaintiff requires any aid from the illegal transaction in order to enable him to sue his claim, he cannot enforce it. Where a contract grows immediately out of, and is connected with, an illegal or immoral act, it will not be enforced. The test to determine whether the action arises *ex stirpe causa* is the plaintiff's ability to establish his case without any aid from the illegal transaction. If his cause or right to recover depends upon a transaction which is *malum in se*, or prohibited by law, and which he must prove in order to make out his case, he cannot recover." In this case the plaintiff relies upon and pleads the provision of the statute prohibiting and making unlawful the performance of services in smelters in excess of eight hours, and he seeks recovery for such services rendered in violation of the statute. In *Bank of United States v. Owens*, 2 Pet. 538, 7 L. ed. 512, it is said: "There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal." "It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void." [*Harris v. Runnels*, 12 How. 84, 13 L. ed. 903.] "In the light of these authorities the solution of the present question is not difficult. By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibitions. Nor, when we consider the subject-matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act. . . . There is therefore nothing in the language of the ordinance or the subject-matter of the regulations, which excepts this case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce." [*Miller v. Ammon*, 145 U. S. 427, 36 L. ed. 762]; *Camden v. Anderson*, 6 T. R. 728; *Biggs v. Lawrence*, 3 T. R. 459; *Wood, Mast. & S.* § 209-211; *Edgar v. Fowler*, 3 East, 225.

It appears to us that the consideration for the services rendered was illegal. In 6 Am. & Eng. Enc. Law, 2d ed. p. 757, it is said: "A contract founded upon a consideration which is illegal in whole or in part is, as be-

tween the parties and their privies, void, and of no effect, and a court of law or of equity will not entertain any suit brought in relation to it, but will leave the parties as it finds them. If the agreement be executed, the court will not rescind it. If it be executory, the court will not aid its execution." *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.* 53 Am. Dec. 742, and note, 11 Humph. 1; *Milton v. Haden*, 32 Ala. 30, 70 Am. Dec. 523; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Gardner v. Tatum*, 81 Cal. 370. In *Prescott v. Battersby*, 119 Mass. 285, the plaintiff was not allowed to recover the agreed price of lumber sold in violation of an ordinance requiring it to be marked, and providing a penalty therefor. A similar holding was made in *Smith v. Arnold*, 106 Mass. 270. In *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671, and note, the plaintiff was held not entitled to recover on a promissory note, the consideration of which was for bags sold which were not branded or stamped as required by law. The court said: "It would indeed be a strange anomaly if a contract made in violation of a statute, and prohibited by a penalty, could be enforced in the courts of the same country whose laws are thus trampled on and set at defiance." See also *Storz v. Finklestein*, 46 Neb. 577, 30 L. R. A. 644. In *Mexican International Bkg. Co. v. Lichtenstein*, 10 Utah, 338, this court held that where the plaintiff, a lottery company in Old Mexico, sent to defendant at San Francisco lottery tickets for sale, and to be accounted for, and to account for the proceeds, no recovery could be had for the proceeds of the sale of the tickets; that where both parties were *in pari delicto* the court would leave them in the same condition it found them; that, both parties being engaged in a criminal enterprise, both are principals, and both guilty, and that plaintiff was not entitled to recover. After a consideration of all the authorities, we are of the opinion that the plaintiff was not entitled to recover under the allegation in his complaint, and that the demurrer thereto was properly sustained.

The judgment of the District Court is affirmed, with costs.

Bartch, Ch. J., concurs.

Baskin, J., dissenting:

In this case it is admitted by the demurrer that the defendant employed the plaintiff, and was to pay him for each day's labor \$2.50; that at the time the plaintiff was employed and during the time he continued in the service of the defendant, by the provisions of the act of the legislature of 1896, eight hours' labor in the ore-reduction works of the defendant constituted a day's labor; that, at the request of defendant, the plaintiff, during the time he was in the employ of the defendant worked in said ore-reduction works, each day, four hours more than a day's labor of eight hours, which he had originally contracted to perform for \$2.50, and that such extra service was not performed in cases of emergency, where life or property

was in imminent danger. Where a party is employed by another to perform some specific act for a stipulated sum, and afterwards, at the request of the employer, something additional is done by the employee, without any express promise of payment, the law will imply a promise by the employer to pay what the additional service is reasonably worth, and the employee may recover on an implied assumpsit, by alleging, as has been done in this case, the facts from which the law implies a promise to pay. This is elementary and therefore reference to the authorities which support the principle is not necessary. The facts alleged in the complaint and admitted by the demurrer bring the case clearly within this general elementary principle and entitled the plaintiff to recover for the extra labor performed, unless, as asserted in the majority opinion, he is *particeps criminis* with the defendant in violating the provisions of the law of 1896. The terms of this law are so ambiguous and indefinite that resort to construction is required in order to ascertain its meaning and scope. The term "employment" used in the first and second sections of said act is defined by Webster as being "the act of employing or using;" also as "the state of being employed." The connections in which this term is used in both sections are as follows: "The period of employment of working men . . . [in certain specified occupations] shall be eight hours per day;" and it is provided in § 3 that "any person, body corporate, agent, manager, or employer, who shall violate any of the provisions of §§ 1 and 2 of this act, shall be guilty of a misdemeanor." If the term "employment" is used in §§ 1 and 2 in the sense of "the act of employing or using" then the gist of the offense is the employment or use by the employer of any of the workmen employed in the occupations specified for more than eight hours per day, and such employer, only, is subject to punishment under said act; and, if said term is used in the sense of "the state of being employed," then the gist of the crime consists of workmen engaged in the occupations specified laboring more than eight hours per day, and they alone are subject to punishment under said act. I am of the opinion that the term "employment" was used in the sense of the first definition of that term before mentioned, and it was not the intention of the legislature to punish the workman. The language of the 3d section indicates that the act was intended to apply only to the employers of workmen. That section specifically names the employer, and, if it had been intended to apply it to employees as well, the latter term, from the natural association of ideas, would have been inserted in said section after the term "employer." The fact that this was not done is significant of the intention of the framers of the act. It is true that the term "any person" is used in said section, but it is also true that, while the expression is broad enough to include employees, it is broad enough to include employer also, and its use does not

therefore explain why the former class was omitted and the latter class was expressly included, if it was the intention to embrace the former class; nor does its use indicate that it relates to employees, because, as before stated, the act was not intended to apply to workmen. In the case of *Holden v. Hardy*, referred to in the majority opinion, and which is reported in 169 U. S. 360, 42 L. ed. 780, Holden was charged with having, in violation of said act, unlawfully employed "one John Anderson to work and labor as a miner in the underground workings of the Old Jordan mine in Bingham cañon, in the county aforesaid, for the period of ten hours each day; and said defendant, on the date aforesaid and continuously since said time, has unlawfully required said John Anderson, under and by virtue of said employment, to work and labor in the underground workings of the mine aforesaid for the period of ten hours each day; and that said employment was not in case of an emergency, or where life or property was in imminent danger; contrary," etc. In the opinion in said case the court said, on page 397, 169 U. S., and page 792, 42 L. ed.: "It may not be improper to suggest, in this connection, that, although the prosecution in this case was against the employer of labor, who apparently, under the statute, is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." It is made still more apparent that under the statute in question, referred to by the Supreme Court in the language just quoted, the employer is the only one liable, when the history of this kind of legislation is considered. In 1802, Sir Robert Peel introduced in Parliament, and procured the passage of, a measure limiting the number of hours per day which an apprentice should be required by his master to labor, and making it an offense for the master to require the apprentice to work more hours than was fixed as the limit. In about fifteen years afterwards the same broad-minded and patriotic statesman, who was, be it said to his immortal honor, a large manufacturer himself, introduced and procured the passage of a like measure for the protection of young persons employed in manufacturing establishments. These measures were regarded by many persons as an unwarranted interference with free labor, and were bitterly opposed on that ground. The existing facts, however, conclusively showed that, even in the absence of any legal restraint, labor was not free, but was subjected to the demands

which necessity imposed,—a force frequently so overpowering as to make the will of employees subservient to the oppressive demands of avaricious masters. As a result of this subservience to such demands, thousands of apprentices and young people of both sexes, in England, were being dwarfed in both mind and body, and their health impaired, by the excessive hours of labor imposed upon them by their employers. The apprentice and factory acts were passed by Parliament to protect these laborers against such extortions, and not to punish them for yielding to the imposition thus imposed upon them. In 1842, to correct the evil arising from the employment of women and children in coal mines, an act of Parliament was passed prohibiting, altogether, the labor of women or children in coal mines, and punishing any owner of such mine who should permit such labor to be performed therein. To protect the laborers from similar impositions as these acts of Parliament were passed to prevent, acts have been passed elsewhere than in England. Even in our own free country it has become necessary to invoke the strong arm of the law to protect the laborer against the rapacity of his employer. I am not aware that it has ever been held, except in the case at bar, that under any of these acts, passed in this country or elsewhere, it was the intention to punish the laborer as well as his employer. The Supreme Court of the United States, in the case of *Holden v. Hardy*, expressed the opinion that the employer was the only one liable under the statute of Utah, and in that connection made the following terse statement of certain recognized facts, which, I think, show the reason why employees are exempted from liability, to wit: "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such case self-interest is often an unsafe guide, and the legislature may properly interpose its authority." As the plaintiff is not amenable under the statute, he was not, as asserted in the opinion of the majority of the court, *particeps criminis* in the violation of the statute. To deny the right of the plaintiff to recover the reasonable value of the extra labor performed at the request of defendant is to punish him whom the legislature intended to protect by said act, and reward the culpable party for an extortion which the act was passed to prevent. The demurrer was improperly sustained, and the judgment should therefore be reversed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John C. McELDOWNEY.

v.

J. N. WYATT, *Appt.*

(44 W. Va. 711.)

- *1. A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.
2. If the title of an act is broad enough to cover its enactment, and give fair and reasonable index to the purpose of the act, it need not descend to particulars of the enactment.
3. Where title to property has vested under the statute of limitations, no act can, by extending the statute or reviving the remedy, impair such title. It would be unconstitutional, because depriving one of
- *Headnotes by BRANNON, P.

NOTE.—*Vested right in defense of statute of limitations.*

I. Civil actions.

- a. Actions involving title to real or personal property.
- b. Actions not involving title to real or personal property.
- c. Revival of appeal or writ of error.

II. Criminal actions.

This note treats of the subject suggested by its title only so far as it affects the power of a state constitutional convention or legislature to revive a remedy, cause of action, or a criminal offense against which the bar of the statute of limitations has fallen.

I. Civil actions.

a. Actions involving title to real or personal property.

It is well established, so far as concerns real or personal property, that the fall of the bar of the statute of limitations creates a vested right which cannot be impaired without the consent of the owner.

Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, decided in 1885, while holding that the right to defeat a debt by the statute of limitations is not a vested right within the protection of the 14th Amendment to the Federal Constitution, providing that no state shall deprive one of his property without due process of law, distinguishes actions for debt from those to recover real or personal property, and extends the protection of the Amendment to the title to real or personal property acquired by lapse of time.

The statement in respect of actions involving title is also sustained by Pfall v. Vattler, 1 McLean, 146, Affirmed in 9 Pet. 405, 9 L. ed. 173; Tennessee Coal & I. Co. v. McDowell, 100 Tenn. 565; Hall v. Webb, 21 W. Va. 318; Sprecker v. Wakeley, 11 Wis. 432; Hill v. Kricke, 11 Wis. 443; Knox v. Cleveland, 13 Wis. 246; Parish v. Eager, 15 Wis. 533; Lindsay v. Fay, 28 Wis. 177.

The Massachusetts supreme court in Atty. Gen. v. Revere Copper Co. 152 Mass. 444, 9 L. R. A. 510, holds that a statute which provides that the statute of limitations shall not apply to the title or interest of the commonwealth in land below high-water mark cannot affect an individual's completed title by prescription. 45 L. R. A.

property without due process of law; but where the demand is on contract, or any class of action where the statute merely gives a defense, and does not vest property, there is no vested right to such mere defense, and the legislature may, by repeal of the statute or otherwise, revive the action, and deprive one of such defense.

(April 9, 1898.)

APPEAL by defendant from a decree of the Circuit Court for Wetzel County enjoining him from levying for the collection of certain back taxes. *Reversed.*

The facts are stated in the opinion.

Messrs. Wiley & Keifer, for appellant:

Contracts are either executory or executed. An executory contract is one whereby a party takes upon himself the obligation to do or abstain from doing a particular thing.

The opinion in Shriver v. Shriver, 86 N. Y. 580, states that the right in real property, if perfected by the lapse of the full statutory time, cannot be affected by subsequent legislation; but the point was not involved.

Kipp v. Johnson, 31 Minn. 360, distinguishes between cases in which all, and those in which but part, of the remedies for the recovery of real property are barred by the lapse of the full statutory period, holding that in the former the "right" is extinguished and a title vested, but that in the latter there is no extinction of right or vesting of title, and consequently as to that class of cases the remedy that has been lost may be restored. The distinction was applied to the case at bar, and the repeal of a statute limiting the time for a particular form of remedy against defective tax deeds was held to apply to a case in which the full statutory period had elapsed, on the ground that the deed at the time of the enactment of the repealing statute was subject to other remedies.

Whitney v. Wegler, 54 Minn. 235, makes the same distinction, but holds that a limitation of time against attacks on tax sales was intended to confirm the sale and the rights acquired under it, and that the repeal of the statute could not affect a case against which the bar had already fallen.

Martin v. Martin, 35 Ala. 560, holds that an amendment of a statute limiting claims for dower to three years by restricting the statute to cases where the land has been aliened by the husband does not, and cannot, apply where the bar had fallen before its adoption.

Cox v. Berry, 13 Ga. 306, holds that an act authorizing the recommencement, without prejudice from the statute of limitations, of an action in ejectment within six months after dismissal, does not disturb a vested right or impair the obligation of a contract when applied to a case where the original action was pending when the act was passed, the period of limitation having expired in the interval between the commencement of the original action and the passage of the act.

There are a number of cases in Texas holding that the declaration in the Constitution of 1869, of the suspension of the statute of limitations during the war and reconstruction period, applied retrospectively to actions for the recovery of real property, although the full statutory period had elapsed. Moseley v. Lee, 37 Tex.

An executed contract is one whereby an obligation assumed is performed and the transaction perfected.

Cooley, Principles of Const. Law, 3d ed. 329.

It involves, therefore, first, the promise or assurance of the party, and, second, the sanction of the law, whereby the promise or assurance becomes an effectual contract.

Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Ogden v. Saunders*, 12 Wheat. 213, 259, 302, and 318, 6 L. ed. 606, 621, 636, and 642.

A statute, public or private, is not a contract. It is an expression in due form of the will of the state as to what shall be the law on the subject covered by it, and the state would be deprived of its sovereignty and crippled in the exercise of its essential functions, if it were not at liberty to change its laws at discretion.

Cooley, Principles of Const. Law, 3d ed. 331.

479; *Bentlinc v. Franklin & G. City Co.* 38 Tex. 458; *Wood v. Welder*, 42 Tex. 396; *Rivers v. Washington*, 34 Tex. 267; *Grigsby v. Peak*, 57 Tex. 142.

These cases purport to follow *Bender v. Crawford*, 33 Tex. 479, 7 Am. Rep. 270 (see *infra*), which, however, did not involve the title to property.

They may, perhaps, be reconciled with the prevailing doctrine by treating the constitutional provision merely as a declaration of a suspension which had already resulted from the unsettled condition of the country during the war and reconstruction period; and *Grigsby v. Peak* plainly proceeds upon such theory, as the opinion states that if, under existing laws considered in reference to the condition of the country during and after the war, a right of property had vested, it could not be divested (citing a number of cases that so hold), but holds, in view of the unsettled condition of the country, that the statute of limitations was suspended during that period, and refers for support of that theory to the recital in the preamble of the reconstruction act of 1867 that "no legal state government or adequate protection of life or property now exists in . . . Texas." The opinion also states that the decisions in the other cases were undoubtedly influenced by the unsettled condition of the country during such period.

The North Carolina supreme court, however, in *Hinton v. Hinton*, 61 N. C. (Phill. L.) 410, holds that an act giving a widow six months to dissent from her husband's will is a statute of limitations, and that a statute declaring that the period covered by the war shall not be included in computing the statutory period applies to a case in which the widow was already barred when the statute was adopted. This position was challenged as interfering with vested rights, but the court says that the lapse of the statutory period did not extinguish the widow's right of dower, but merely suspended her remedy.

Power v. Telford, 60 Miss. 195, a replevin action, is not opposed to the doctrine of vested rights so far as concerns personal property, but makes the same distinction as *Kipp v. Johnson*, 31 Minn. 360, and *Whitney v. Wegler*, 54 Minn. 235, between the loss of all and the loss of only part of the remedies, and holds that so 45 L. R. A.

The object of the constitutional provision is the maintenance of good faith in stipulations of parties against state interference, and if no assent is given to a transaction no faith is pledged, and there would be no room for the operation of the constitutional provision.

McAfee v. Covington, 71 Ga. 272, 51 Am. Rep. 265; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Amy v. Smith*, 1 Litt. (Ky.) 326; *Thayer v. Seavey*, 11 Me. 284.

Those rights which the law gives, or obligations which it imposes upon persons independently of any stipulation which the parties themselves have made, are not within the protection of the constitutional provision.

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. 420, 9 L. ed. 773; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876.

A tax duly assessed is not a contract.

Augusta v. North, 57 Me. 392, 2 Am. Rep. 55; *Shaw v. Peckett*, 26 Vt. 482; *Lane Coun-*

long as there remains any remedy the legislature may give a new remedy or restore an old one which has been lost by time. It holds that the action of replevin, though barred, could be revived, since the defendant always remained liable to be deprived of her possession by detinue.

b. Actions not involving title to real or personal property.

There is great conflict of opinion upon the question whether the fall of the bar against an action not involving the title to real or personal property vests a right to immunity from liability, of which the defendant cannot be deprived without his consent.

Most of the cases decided before *Campbell v. Holt* hold the affirmative of the proposition, and the subsequent cases have by no means uniformly followed the prevailing opinion in that case upon the point that in such cases there is no vested right beyond legislative control.

The dissenting opinion of *Bradley, J.* (*Harlan, J.*, concurring), in *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, rejects the distinction made in the prevailing opinion, and holds that the completed bar is equally a vested right whether the action is for debt or for the recovery of property.

The United States Supreme Court prior to that decision had apparently recognized the vested character of such right by holding in *United States v. Buford*, 3 Pet. 30, 7 L. ed. 591, that a transfer of a claim to the United States, after the bar had fallen, could not be taken out of the statute; and by affirming, in *Horn v. Lockhart*, 17 Wall. 570, 21 L. ed. 687, though without discussing the question of limitation, the decision of the United States circuit court in *Lockhart v. Horn*, 1 Woods, 628 (an action to recover a distributive share in a decedent's estate), that an ordinance passed by the constitutional convention in Alabama, declaring the suspension of the statute of limitations during the war period, was invalid as applied to causes against which the bar had fallen upon the ground that it interfered with vested rights.

Couch v. McKee (1846) 6 Ark. 484, and *Moore v. McLendon* (1850) 10 Ark. 512 (actions on notes), while construing an act extending the period of limitations not to be retrospective, intimate that if it were it would be

ty v. Oregon, 7 Wall. 71, 19 L. ed. 101; *Peirce v. Boston*, 3 Met. 520.

Taxes are imposts levied by the authority of the government on its subjects for public purposes. They are not founded on contract, but operate *in invitum*.

Cabin Creek Dist. Bd. of Edu. v. Old Dominion Iron Min. & Mfg. Co. 18 W. Va. 444; *Camden v. Allen*, 26 N. J. L. 398; *Hinchman v. Morris*, 29 W. Va. 673; *McInerny v. Reed*, 23 Iowa, 410; *Crapo v. Stetson*, 8 Met. 394; *Packard v. Tisdale*, 50 Me. 376; *Carondelet, Use of Reuter, v. Picot*, 38 Mo. 125; *Alexander v. Helber*, 35 Mo. 334; *Cooper v. Savannah*, 4 Ga. 69; *Heine v. Leves Comrs.* 19 Wall. 659, 22 L. ed. 225; *Bennett v. McWhorter*, 2 W. Va. 441.

The form of procedure to collect as a debt does not change its character.

Lane County v. Oregon, 7 Wall. 80, 19 L. ed. 105, Chase, Ch. J.

The act of the legislature of 1897, upon which the decree complained of is based, is

unconstitutional so far as it revived actions already barred.

Bradford v. Shine, 13 Fla. 393, 7 Am. Rep. 239, decided before *Campbell v. Holt*, holds that a note which had become barred under a statute providing that a claim against a decedent's estate shall be "barred", unless exhibited within two years, could not be revived by an ordinance of the constitutional convention suspending the statute during the war period, but the court evidently distinguishes between such a statute of "non claim" and the ordinary statute of limitations, since it states, *arguendo*, that the legislature may, by the repeal of a statute of limitations, take away the right to interpose the same as a defense. Both these points, however, seem to be *obiter dicta*, as the court held that the constitutional convention in adopting the ordinance exceeded the purpose for which it was convened, namely, to conform the Constitution to the existing political conditions.

The point was not involved in *Brian v. Banks* (1868) 38 Ga. 300 (an action on a note), but the court suggests a doubt whether the declaration of the constitutional convention that the statute of limitations was suspended during a certain period could be upheld if applied to a right against which the bar had fallen.

Naught v. Oneal, 1 Ill. 2d ed. 36 (an action for slander), holds that the repeal of a statute of limitations does not affect rights already barred; and *Normal School Dist. Bd. of Edu. v. Blodgett* (1895) 155 Ill. 441, 31 L. R. A. 70, repudiates the distinction suggested in the prevailing opinion in *Campbell v. Holt*, and holds that a right of defense against a money demand arising from the complete running of the statute of limitations is within the protection of the 14th Amendment; and that case is followed by *Fish v. Farwell*, 160 Ill. 236.

To the same effect are *Stipp v. Brown* (1851) 2 Ind. 647; *Right v. Martin*, 11 Ind. 123; *McKinney v. Springer* (1847) 8 Blackf. 506; *Norris v. Slaughter*, 1 G. Greene, 338 (*obiter*).

Thompson v. Read, 41 Iowa, 48, applied the same rule to an amendment taking cases arising within the state out of a provision of the statute of limitations, to the effect that the bar of the statute of defendant's residence shall prevail in Iowa, where an attempt was made to apply the amendment to an action already barred by the statute of defendant's residence, 45 L. R. A.

valid and constitutional, it is only directory to officers in the discharge of their duties as such, and, being merely directory, constitutes no part of a contract.

Com. v. Holmes, 25 Gratt. 775; *United States v. Kirkpatrick*, 9 Wheat. 720, 736, 737, 6 L. ed. 199; *United States v. Vanzandt*, 11 Wheat. 184, 6 L. ed. 448.

Messrs. Hall & Hall, also for appellant:

A court of equity should not interfere to prevent a creditor from seizing and selling under an execution any property which he may think liable to it, unless the property be of such character that the owner cannot be fully compensated by the verdict of a jury giving him its fair market value; and this can only be where property is of such a nature that it may fairly be supposed to have a peculiar and additional value in the estimation of the owner, the *pretium affectionis*.

2 Rob. Pr. (old ed.) 225; *Randolph v. Randolph*, 3 Munf. 99; *Wilson v. Butler*, 3

and so by the existing statute of Iowa when the amendment was adopted.

Morrison v. Kendall, 6 Ind. App. 212, is to the same effect.

McCracken County v. Mercantile Trust Co. (1886) 84 Ky. 344 (an action to enforce a tax lien), and *Lawrence v. Louisville* (1895) 96 Ky. 595, 27 L. R. A. 560 (an action *ex delicto* against a city), hold that the statute of limitations not only bars the remedy, but takes away the legal right, and that such right cannot be revived by subsequent legislation. The latter case states that such right is within the protection of the provision of the Kentucky Constitution, that all "rights" shall continue valid.

Hagerstown v. Sehner, 37 Md. 180 (an action against a town to recover for damages by a mob), does not affirm the power of the legislature to revive, as between private individuals, a cause of action completely barred by the existing statute, though it states that it is not clear that the Maryland decisions justify a contrary holding; but it holds that a municipal corporation, at least, cannot acquire any vested right under the statute of limitations not subject to legislative control. But see, with reference to the latter point, *Lawrence v. Louisville* (1895) 96 Ky. 595, 27 L. R. A. 560.

The Massachusetts supreme court in *Wright v. Oakley* (1843) 5 Met. 400, holds that a provision of the Revised Statutes, excluding the period of nonresidence in computing the limitation period, did not apply to a case already barred, and intimates that it would be questionable whether it could constitutionally so apply.

In *Brigham v. Bigelow* (1847) 12 Met. 268, the court says the defendant has no vested right in any particular limitation,—at least before the statute of limitations in force at the time of the repealing act has actually run. The time in that case had not fully run.

In *Prentice v. Dehon* (1865) 10 Allen, 353, and *Ball v. Wyeth* (1868) 99 Mass. 338, the court expresses doubt whether the legislature has authority to revive an action for the recovery of a debt already barred under the general statute of limitations, but the point was not involved in either case.

Bigelow v. Bemis (1861) 2 Allen, 496, states, *arguendo*, that the legislature cannot remove the bar of the statute of limitations after it has fallen, and in *Loring v. Boston* (1858) 12

Munf. 599; *Scott v. Halliday*, 5 Munf. 103; *Sampson v. Bryce*, 5 Munf. 175; *Bowyer v. Creigh*, 3 Rand. (Va.) 25; *Allen v. Free-land*, 3 Rand. (Va.) 175; *Randolph v. Randolph*, 6 Rand. (Va.) 198; *Sims v. Harrison*, 4 Leigh, 346; *Kelly v. Scott*, 5 Gratt. 479; *Summers v. Bean*, 13 Gratt. 417.

This rule applies as well to sales under distraint for taxes as a levy under an execution. The principle is the same.

Baker v. Rinehard, 11 W. Va. 244.

A bill to enjoin the collection of taxes must allege that the taxes have been paid off and discharged.

White v. Stender, 24 W. Va. 615, 49 Am. Rep. 283; *Cooley*, Taxn. p. 713; *Lewis v. Spencer*, 7 W. Va. 689, 23 Am. Rep. 619.

The bill makes no allegation of irreparable damage from the sale of the property "about" to be levied upon.

Barton, Ch. Pr. p. 431.

Wyatt is not estopped from proceeding un-

der the act of February 25, 1897, because he had previously undertaken to collect same by action in assumpsit.

The rule requiring consistency of action before the courts is no arbitrary rule, but one demanded by the very object of courts of justice. Where, then, no wrong would be done to the court or to other parties to a cause by permitting a change of position, a change should in principle, and will in fact, be allowed.

Bigelow, Estoppel, p. 604.

The legislature has the constitutional right to extend the statute of limitation in any case, where it has not fully run, unless there be a constitutional provision prohibiting the passing of any retrospective law. Our Constitution has no such prohibition.

Hall v. Webb, 21 W. Va. 318; *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Huffman v. Alderson*, 9 W. Va. 616; *Keller v. McHuffman*, 15 W. Va. 88; *Campbell v. Holt*,

Gray, 209, and *Kinsman v. Cambridge*, 121 Mass. 558, it is distinctly held that a statute extending the time for applying for an assessment for damages for land taken to widen a street cannot constitutionally be construed retrospectively so as to revive a claim already barred.

It is not competent for the legislature to revive the state's lien for taxes after it has been extinguished by lapse of time. To do so would be to deprive one of his property without due process of law. *Kipp v. Elwell* (1896) 65 Minn. 525, 33 L. R. A. 435.

Davis v. Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325 (an action in assumpsit), holds that the right to set up the completed bar is a vested right which cannot be destroyed by subsequent legislation. The court construes a statute extending the period of limitation not to apply to cases already barred, but states that if it did it would be retrospective and repugnant to the spirit of our institutions.

Woart v. Winnick, 3 N. H. 473, 14 Am. Dec. 384 (an action on a note), *Rockport v. Walden*, 54 N. H. 167, 20 Am. Rep. 131, and *Ryder v. Wilson*, 41 N. J. L. 9 (the two latter cases applying the rule to acts attempting to revive claims against decedent's estates after they have been barred by failure to present them within the statutory time), hold that the fall of the bar creates a vested right beyond legislative control.

Johnson v. Winslow, 63 N. C. 552, states, *arguendo*, that the legislature has no power to revive a right of action after it is barred; a query as to the existence of such power is raised in *Pearsall v. Kenan*, 70 N. C. 472; and the question determined adversely to its existence in *Whitehurst v. Dey*, 90 N. C. 542, which holds that the legislature cannot expose a debtor to an action by an act passed after the statutory bar has become a full defense.

Schnell v. Jay, 4 Okla. 157, holds that when the full time has not expired the legislature may extend it, implying that if it had expired it could not be extended.

Baldro v. Tolmie, 1 Or. 176, without discussing the question, holds that the repeal of a statute of limitations does not remove a completed bar, and there is an intimation to the same effect in *Pitman v. Bump*, 5 Or. 17, in which, however, the terms of statute enlarging the period of limitations were construed not to apply to actions already barred.

Robb v. Harlan, 7 Pa. 292 (assumpsit), while 45 L. R. A.

not denying, except in a case of right of re-entry, the power of the legislature to restore a right of action barred by a statute of limitations, (which, it states, operates, not on the right, but on the remedy), says that nothing less than plain and unequivocal language will give a statute such effect.

Girdner v. Stephens (1870) 1 Helsk. 280. 2 Am. Rep. 700 (trespass for assault and bat-tions (which, it states, operates, not on the completed bar of the statute of limitations as a defense is a vested right and cannot be disturbed by subsequent legislation, and that the amendments of the Constitution and certain statutes are void so far as they authorize suits on demands *ex contractu* and *ex delicto* already barred.

The doctrine announced in *Girdner v. Stephens* was attacked, but reaffirmed, in *Yancy v. Yancy*, 5 Helsk. 353, 13 Am. Rep. 5; *Mynatt v. Mynatt*, 6 Helsk. 311, and *Mynatt v. Hubbs*, 6 Helsk. 320.

Harrison v. Henderson, 7 Helsk. 315. does not affirm, in contradiction to *Girdner v. Stephens* and the other cases in Tennessee to the same effect, that the legislature has power to revive a right already barred, but holds that the suspension and closing of the courts and practical cessation of all civil remedy for the enforcement of legal rights of themselves operated to stop the running of the statute of limitations, and, in effect, that the provision of the Constitution as to the suspension of the statute was merely declaratory of a result already accomplished. The court says that in the opinion in *Girdner v. Stephens* it was very decidedly maintained that the effect of the war and the closing of the courts did not prevent the running of the statute, but that the question was not authoritatively decided in that case, and its decision was expressly waived.

Wires v. Farr, 25 Vt. 41 (assumpsit), holds that an act which suspends the statute of limitations while defendant is out of the state, though by its terms covering prior cases, cannot by retrospective operation defeat any rights completed by the fall of the bar. See also *Bradford v. Brooks*, 2 Alk. (Vt.) 284, 16 Am. Dec. 715.

Bowman v. Colfax, 17 Wash. 344, holds that the legislature cannot revive a right to enforce a lien for a street improvement after the bar has fallen.

The Wisconsin cases cited under the first subdivision of the note involve the title to real

115 U. S. 620, 20 L. ed. 483; Joynes, Limitations, p. 15; *Sturm v. Fleming*, 22 W. Va. 404, 31 W. Va. 701.

The legislature by a special act passed March 1, 1865, extended the time to the sheriff of Randolph county to distrain and collect taxes, and the same was passed after the sheriff's right to distrain had expired. This act was held valid.

Bennett v. McWhorter, 2 W. Va. 441.

Hessrs. Robert McEldowney and Thomas P. Jacobs, for appellee:

The courts of equity are resorted to at all times to restrain a threatened trespass. If Wyatt was about to levy that was sufficient.

So much of chapter 63, Acts 1897, as is intended to apply to the sheriffs who went out of office in 1892, is unconstitutional.

When such sheriffs went out of office the law relative to their unfinished business was (Code, § 11, chap. 30, p. 200): "No distress shall be made for taxes where the sheriff or collector has had more than two years to col-

lect the same, unless it be for taxes returned delinquent and sent out by the auditor for collection as provided by law. But a sheriff or collector of a former term may, notwithstanding the expiration of his term of office, by himself or deputies, have the same powers of distress and sale as he possessed before said term expired, and which right of distress and sale shall continue for the term of two years from the time such right accrued; but no deputy shall be permitted to qualify for such collections after the principal's office has expired."

Section 11, art. 3, W. Va. Const. says: "Nor shall any person be deprived by law of any right or privilege because of any act done prior to the passage of such law."

The two years expired on the 31st of December, 1894, and after that he could not make distress. More than two years passed after the expiration of the two years' extension before the passage of the act of 1897, and during all this time he could make no

property, but do not insist upon the distinction afterwards made in *Campbell v. Holt*, though *Sprecker v. Wakeley*, after citing a number of cases from other states which are cited under this subdivision in support of the doctrine of vested right even as applied to cases not involving the title to real or personal property, says that if it can be maintained that when the remedy on a contract is gone there is a vested right to set up the bar, *a fortiori*, should a party's interest or right in real property acquired by lapse of time be a vested right.

But the applicability of the doctrine in Wisconsin to actions not involving title to real or personal property is placed beyond question by *Brown v. Parker*, 28 Wis. 21, which refers to the fact that former cases involved such title, but says no sound distinction can be based on that fact, and *Elmgartner v. Illinois Steel Co.* (Wis.) 79 N. W. 433 (an action for personal injuries), which says that the statute of limitations when fully run against a claim, whether it relate to the title to real or personal property or a money demand on contract or sounding in tort, creates a vested right within the protection of the Constitution.

The former of these two cases merely involved the question whether a warrant of attorney in a note to confess judgment survived the statutory period, and the latter, whether two citizens of another state could maintain an action in Wisconsin upon a claim for personal injuries barred by the statute of their domicile. The principle involved, however, is the same as that treated in the note.

The courts of Kansas, Texas, and West Virginia have decided in cases in which the point was directly involved that the fall of the bar against an action not involving title does not create a vested right beyond legislative control, and that side of the question has the support of intimations in some of the New York cases, and of the *dictum* in *Bradford v. Shine*, 13 Fla. 393, 7 Am. Rep. 239, with reference to the ordinary statute of limitations.

Such seems also to be the effect of the decision in *Bates v. Cullum*, 177 Pa. 633, 34 L. R. A. 440, although the fact that the bar of the statute had become complete in that case was not discussed by the court.

Morton v. Sharkey, *McCahon*, 113 (an action on a note), expresses the opinion that a contract which is already barred by existing laws 45 L. R. A.

cannot be revived, but the decision in that respect is *obiter*, since the note in suit was not barred when the new statute was passed; but in *Swickard v. Bailey* (1866) 3 Kan. 507 (an action to recover a debt), it was held, contrary to the *dictum* in *Morton v. Sharkey*, that a right may be revived by repeal of the statute after the bar has fallen. This case, though decided before *Campbell v. Holt*, makes the same distinction between actions for debt and actions to recover real or personal property, and holds that the statute of limitations, except where the title to real or personal property is acquired, operates only on the remedy, and not on the right.

The question seems never to have been decided by a case directly in point in New York, except as concerns the right of appeal (see *Burch v. Newbury*, 10 N. Y. 394, *infra*), although there are intimations in favor of both sides. *Re Latz*, 33 Hun, 618, states *arguendo*, that the weight of authority is to the effect that the right of defense derived from the bar of the statute of limitations is in the nature of a vested one, and effective as against subsequent legislation; and, on the other hand, *People v. Starkweather*, 10 Jones & S. 325, says that it is not claimed that the legislature has no power to give by statute a remedy by action for a cause that has been barred; and *Huibert v. Clark*, 128 N. Y. 205, 14 L. R. A. 59, states, *arguendo*, that the statute of limitations does not, after the prescribed period, destroy, discharge, or pay the debt, but simply bars the remedy thereon, and that the right and obligation to pay the same remain, and the legislature may repeal the statute and restore the remedy,—citing *Campbell v. Holt*, 115 U. S. 620, 20 L. ed. 483.

Bender v. Crawford, 33 Tex. 745, 7 Am. Rep. 270, held that an amendment of the Constitution declaring that the statute of limitations was suspended during the war and reconstruction period applied to a note barred when the amendment was adopted. This action was one for recovery on a note, but it does not advert to the distinction subsequently made by *Campbell v. Holt*, and has been cited by later Texas cases as authority for the position that even an action involving the title to property could be revived after the full statutory period. That case is followed by *Lewis v. Davidson*, 51 Tex. 251 (an action on account), and *Landa v.*

distress whatever. During this period the plaintiff acquired a permanent vested right to have his property exempt from any distress or levy.

The said J. N. Wyatt having elected to bring suit against J. C. McEldowney for the said taxes, and the said J. C. McEldowney having pleaded nonassumpsit, denying the averment of the declaration as well as filing a set-off, the status of the parties to this controversy was already fixed by themselves, and cannot be changed by enactment of any law while suit is pending.

The legislature cannot create any new ground for the support of an existing action, nor any legal bar which goes to deprive a party of his defense.

Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438; *Fisher v. Dabbs*, 6 Yerg. 119; *Tucker v. Burns*, 2 Swan, 35; *State ex rel. Circuit Atty. v. Cape Girardeau & S. L. R. Co.* 48 Mo. 488. See also *Cooley*, Const. Lim. 5th ed. p. 449.

Where a remedy has been fully barred by the statute of limitations, the legislature cannot give a new remedy on a defunct cause of action.

Wood, Limitations of Actions, 336;

Memphis v. United States, 97 U. S. 293, 24 L. ed. 920; *Ludwig v. Stewart*, 32 Mich. 27; *Nash v. Fletcher*, 44 Miss. 609; *Cooley*, Const. Lim. 448; *Newby v. Blakey*, 3 Hen. & M. 57.

Brannon, P., delivered the opinion of the court:

J. N. Wyatt was sheriff of Wetzel county, and, as such, held tax bills, for the years 1889, 1890, 1891, and 1892, against John C. McEldowney, and the right to levy had become barred by lapse of time. Wyatt instituted an action of assumpsit in the circuit court to recover the taxes, and later the legislature passed chapter 63, Acts 1897, giving sheriffs whose terms expire in December, 1892 and 1896, further time until 31st December, 1899, to levy unpaid taxes for the years 1889 to 1892, inclusive. After this act, Wyatt dismissed the action in court "without prejudice." Later McEldowney obtained an injunction against Wyatt to restrain him from a meditated levy and collection of said taxes, which having been perpetuated, Wyatt appeals. The case turns upon the question whether said act of the legislature is constitutional. It is claimed that it is unconsti-

Obert, 78 Tex. 33 (an action not involving title to property). The latter case cites *Campbell v. Holt*, and recognizes the distinction there made. To the same effect are *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270; *Huffman v. Alderson*, 9 W. Va. 616, which intimates that the rule would be different in respect of detinue or ejectment; *Keller v. McHuffman*, 15 W. Va. 64, which recognizes the distinction, and the principal case.

Jones v. Jones (1850) 18 Ala. 248, which holds that the completed bar of the statute in the state in which a contract was made is not a defense in another state in which the action is brought, says that the bar of the statute does not extinguish or discharge a contract, but merely takes away the remedy.

c. Revival of appeal or writ of error.

The right to revive a right of appeal or the right to a writ of error after the same has been barred by the existing statute is denied in *Bond v. First Nat. Bank*, 5 Colo. 83; *Lewis v. Webb*, 3 Me. 326; *Willoughby v. George*, 5 Colo. 80; *Atkinson v. Dunlap*, 50 Me. 111; *Woodman v. Fulton*, 47 Miss. 682; *Burch v. Newbury*, 10 N. Y. 394 (the latter case stating that the revival of such a right would violate the provision of the New York Constitution that no one shall be deprived of property without due process of law); *Germania Sav. Bank v. Suspension Bridge*, 159 N. Y. 362; *Trim v. McPherson*, 7 Coldw. 15; *Story v. Runkle*, 32 Tex. 398; *Bates v. Kimball*, 2 D. Chip. (Vt.) 77; and is affirmed in *Alvord v. Little*, 16 Fla. 158; *Davis v. Ballard*, 1 J. J. Marsh. 563. The latter case does not concede that the same rule would not apply to an ordinary statute of limitation, but distinguishes a provision limiting the time for appeal from such a statute.

II. Criminal actions.

There are but few cases directly in point on the question whether a criminal offense against which the bar of the statute has fallen may be revived by a repeal of the statute or an enlargement of the limitation period.

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The New Jersey supreme court held in *Moore v. State*, 43 N. J. L. 203, that a statute extending the time for the prosecution of a certain class of offenses was not *ex post facto* as applied to a crime already barred according to the pre-existing statute of limitations; but this case was reversed by the court of errors and appeals, the chancellor and five of his associates holding that the act as so applied was *ex post facto*, and the chancellor and six of his associates, that, as so applied, it was invalid as devastating a vested right.

The dissenting opinion of Van Syckle, J., accepts as exhaustive the definition of *ex post facto* laws given by Blackstone and explained by Mr. Justice Chase, in *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648, and holds that the case at bar does not come within such definition. The prevailing opinion, however, holds that the definition is not exhaustive, and that the case comes within the prohibition of *ex post facto* laws when construed in view of the reasons prompting its adoption. With reference to the other point taken by the prevailing opinion, the dissenting opinion holds that the expiration of the statutory period confers no vested right to immunity from punishment.

State v. Sneed, 25 Tex. Supp. 66, holds that an offense barred by the statute of limitations when the Code went into effect was not revived by the Code, and that the Code, if construed to apply to such an offense, would be *ex post facto*.

Thompson v. State, 54 Miss. 740, holds, without discussion, that the repeal of a statute limiting the time for a criminal prosecution does not apply to prior offenses already barred.

People v. Lord, 12 Hun, 282, simply construes a statute extending the time for finding an indictment not to apply to past offenses before barred, and does not pass upon the question as to the constitutionality of a statute applicable to such offenses.

Com. v. Duffy, 96 Pa. 506, 42 Am. Rep. 554, is not in point, since the time had not expired when it was extended.

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tutional, because it is special legislation; but as it applies to sheriffs of all counties, and such taxes therein, it does not seem so to me. The act, it is true, applies only to certain claims of sheriffs and taxes; but, surely, the legislature can select all of a class which may, in its judgment, call for legislation. It may select certain trades, vocations, or men as distinguished from women, or minors as distinguished from adults, or sane people as distinguished from the insane, and enact such legislation as may, in its judgment, be a requisite for them, without the enactment falling under the inhibition of the Constitution relating to special legislation. "A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special." Sutherland, Stat. Constr. p. 149; *Wheeler v. Philadelphia*, 77 Pa. 338; *Ex parte Lichtenstein*, 67 Cal. 359. This act operates uniformly on all persons and things of a class.

It is said that the title of the act is bad, as it does not fully specify its object. The title is "An Act Extending the Time in Which Distringment and Sale may be Made for Taxes," and the enactment in the act relates only to certain sheriffs and taxes for certain years. It is plain that what the act does enact is covered by the title, as the enactment is narrower than the title. Its enactment contains nothing not contained in the title. The Constitution does not require that "the subject of the bill shall be specifically and exactly expressed in the title; hence we conclude that any expression in the title which calls attention to the subject of the bill, although in general terms, is all that is required." Sutherland, Stat. Constr. p. 96. The same book tells us that the title "may be general, but must be specific enough to answer reasonably the purpose for which the subject is required to be expressed in the title. When the subject is stated in the title, the Constitution is so far complied with that no criticism of the mode of statement will affect the validity of the act. The statute is valid in such a case. The degree of particularity in expressing the subject in the title is left to the discretion of the legislature. No particular form has been prescribed in the Constitution for expressing the subject or purpose of a statute in its title. It need not index the details of the act, nor give a synopsis of the means by which the object of the statute is to be effectuated by the provisions in the body of the act." See *State v. Mines*, 38 W. Va. 125.

The main question, however, is whether the act is invalid because it revives the remedy of levy after it had been barred by limitations. It is contended that, while the legislature may extend the statute of limitations as to actions not yet barred, it cannot renew a barred remedy. Where, under the statute, title to property, real or personal, has vested, it is just as good a title as if conferred by

grant or will (*Parkersburg Industrial Co. v. Schultz*, 43 W. Va. 470), and retroactive legislation cannot destroy that title (*Hall v. Webb*, 21 W. Va. 318); but retroactive legislation, merely because it is retroactive, is not unconstitutional or void, unless it impairs contracts or right of property, and there is no vested right in a mere defense to a personal demand, and statutes of limitations relate only to the remedy, and may revive a remedy once barred, as held in this state in *Huffman v. Alderson*, 9 W. Va. 616, and *Keller v. McHuffman*, 15 W. Va. 64. Perhaps the weight of authority elsewhere is the other way; but Wood, Limitations of Actions, 41, though contending that wisdom would dictate to the contrary, admits that the decision of the United States Supreme Court in *Campbell v. Haverhill*, 155 U. S. 620, 39 L. ed. 283, that in actions upon contract, or in any class of actions in which a party does not become invested with the title to property by the statute of limitations, the legislature may, by repealing the statute, even after the right of action is barred, restore to the plaintiff his remedy, and devert the other party of the statutory bar, is based on correct reasoning. If even the demand in this case were based on contract, these principles would apply, but taxes are not a contract or debt. *Hinchman v. Morris*, 29 W. Va. 673. Were it a contract, it might with more force be said that the law in force when the contract was made would be part of it; but, being a mere tax, there can be no plausibility or color for saying that the act is unconstitutional as affecting a contract.

There is another reason against the injunction. The sheriff had not levied on anything. The taxes were not illegal, but admitted to be legal. In *White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 283, it is held that injunction does not lie to prevent sale of personalty levied on for taxes, unless it be of peculiar value, as full remedy exists by suit at law. How can we assume in advance that the sheriff would levy on property of such peculiar value that an action at law would not give indemnity for it? I do not see how the action for the taxes is material. It was dismissed "without prejudice;" but, if it had not been, Wyatt had a right to the remedy afterwards given him by the legislature, and could adopt either he chose.

Therefore we reverse the decree, and dismiss the bill and injunction, but without prejudice to McEldowney's right to an action at law upon the sheriff's bond or otherwise to recover moneys alleged to be due him from Wyatt as sheriff, for fee bills and other claims placed in the hands of said sheriff by McEldowney, as he alleges. They cannot be allowed as set-off on payments against taxes, for reasons stated in *Miller v. Wisener*, 45 W. Va. 59 (decided this term).

Rehearing denied.

WISCONSIN SUPREME COURT.

Frank B. LAWTON, *Respt.*,
v.
E. A. CHILTON *et al.*, *Defts.*,
and
Robert A. WAITE *et al.*, *Appts.*

(.....Wis.....)

1. A subcontractor who has agreed with the contractor to carry mails in accordance with the contract between the United States and the contractor, in which the latter assumes liability to any person aggrieved by his defaults, is not liable upon his contract to a postal employee for personal injuries caused by the subcontractor's negligence.
2. A subcontractor for transportation of mails is liable in tort for negligence resulting in damages to a postal employee, who is a stranger to the contract, but who is being carried in compliance with the contract.
3. The doctrine that a servant cannot recover for the negligence of a coemployee applies only in an action between the master and the servant, and is no defense in an action between two servants.
4. The legislature has power to alter a statute of limitations as to existing causes of action.
5. A general enactment by the legislature not referred to in the title of the chapter containing it, is not repugnant to Const. art. 4, § 18, as the latter refers solely to private and local bills.

(May 16, 1899.)

APPEAL by defendants Waite *et al.* from orders of the Circuit Court for Waukesha County overruling demurrers to a complaint filed to hold defendants liable under their contract to carry the United States mail for injuries caused to plaintiff while upon the mail wagon in the performance of his duty. *Reversed in part; affirmed in part.*

Statement by **Dodge, J.:**

Appeal from order overruling demurrer to a complaint, which alleges that the defendants E. A. Chilton, as principal, and J. E. Chilton and R. S. Carr, as sureties, entered into a contract with the United States, whereby it is agreed that they will carry the mails from the stations to the postoffice in the city of Milwaukee from July 1, 1895, to June 30, 1899, in a safe and secure manner, free from wet or other injury, in wagons of a style and design to be prescribed by the postmaster general, and, by the fourth clause, will be accountable and answerable in damages to the United States or any person aggrieved for faithful performance by the said

NOTE.—The decision in the above case is a novel one.

On the question of the liability of a servant to third persons for his own negligence or nonfeasance, see *note to Mayer v. Thompson-Hutchinson Bldg. Co. (Ala.)* 28 L. R. A. 433, and *Durkin v. Klugston Coal Co. (Pa.)* 29 L. R. A. 808, 45 L. R. A.

contractor of all duties and obligations herein assumed, or which are now or may hereafter be imposed by law in this behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor, and to whom the said contractor shall commit the care and transportation of the mails, and the faithful performance of the duties which are or may by law be imposed upon such person or persons in the care and transportation of said mails. The same paragraph also prohibits the employment of subordinates under sixteen years of age, of bad morals, or who have not taken the oath required by law. The fifth paragraph requires contractor to discharge any driver or other employee when required by the Postmaster General, and also prohibits the carriage of parcels except as contained in the mail; and the ninth: "To convey, whenever requested so to do, one railway postoffice clerk, a substitute, or a messenger, on the driver's seat of each wagon." A series of general stipulations and agreements follow, providing for changes in service, and that for any failure in certain details of carrying of the mails, "or for any other delinquency or omission of duty under this contract," the contractor shall forfeit, and there may be withheld from his pay, such sum as the Postmaster General may impose as fines or deductions; and further providing for annulment in case of repeated breaches or violations of the postal laws, and that such amendment shall not impair the right of the United States to claim damages under the contract, but such damages may, for the purpose of set-off or counterclaim, be assessed and liquidated by the auditor of the treasury for the postoffice department, and that the contract is to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post roads,—for which the government was to pay Chilton \$6,666 per year. On February 23, 1895, the defendant Robert A. Waite, as subcontractor, and defendants Alexander McWhorter and J. A. Waite, of Waukesha, as sureties, entered into a written agreement with E. A. Chilton, wherein said Waite, together with his sureties, undertook and bound themselves, for \$4,800 per annum, "to transport the United States mail on said route from July 1, 1895, to June 30, 1899, at such times and upon such schedule as the Postmaster General may direct, and in full compliance with the postal laws and regulations, and subject to, and in compliance with, all of the requirements of said party of the first part under said contract with the United States, for \$4,800 per annum." It was agreed that liability for all fines and deductions imposed by the Postmaster General should be assumed by the subcontractor, and that, in case of any failure or refusal by the party of the second part to perform the mail service therein pro-

vided for, then the sum stipulated should become immediately due and payable to the party of the first part as liquidated damages. Upon the back of this subcontract were printed numerous provisions, described as the principal requirements of the contract between the United States and the principal contractor, to which contract such subcontract was subject. Those specifications reiterated many of the requirements as to the manner of carrying the mail; kind of wagons to be used; taking of oath by every employee; carriage of one railway postal clerk, a substitute or messenger, on the driver's seat; that employees shall be over sixteen years of age, of good moral character, and able to read and write, and must take oath and wear regulation cap; and that the principal contractor agrees "to be accountable in damages to the United States, or any person aggrieved, for any failure to faithfully perform the obligations assumed by the contractor, or imposed by law on him or the persons employed by him, in the care, transportation, or custody of the mails." The complaint then goes on to allege that the plaintiff was a railway postal clerk, required by his duty to ride from the Chicago & Northwestern Railway station, in Milwaukee, to the postoffice with the mails, in defendants' wagon, and was so riding on April 1, 1897; that on said day the defendants failed to use in said service a first-class horse, but knowingly used, attached to said wagon, a vicious, kicking, runaway horse, unsuitable and dangerous; that they failed to have or keep wagon, horse, and harness in good order and appearance, so as to perform the service safely, or without injury to the plaintiff, but, on the contrary, that the wagon was out of repair, furnished with no brake, the horse was vicious, kicking, and a runaway, and unsuitable, the harness was not in good order, but old, weak, and out of repair, too large for the horse, and the hold-back straps were not of sufficient strength to be used on said wagon to keep it from running on the horse, and were broken, and that the defendants failed to furnish a proper, safe, or competent driver for the service aforesaid, but, on the contrary, furnished a driver who was a cripple, and wholly incompetent, unsafe, and unsuitable for the service,—all to the knowledge of the defendants; that on the way to the postoffice, coming to a decent in the street, the wagon, by reason of the aforesaid defects in, and unsuitableness of, said harness and wagon, and incompetency and unsuitableness of the driver, commenced to run against the horse, which commenced to kick, whereupon the driver, by reason of his incompetency and unsuitableness, was unable to hold the horse, and carelessly and negligently dropped the reins, so that the horse was free to and did run away, and collided with an express wagon, tipping over the mail wagon, and injuring the plaintiff who was in the exercise of due and proper care and diligence, and guilty of no negligence contributing to the injury. The complaint concludes with the allegation that said 45 L. R. A.

injuries were caused solely by reason of the defendants' failure to perform and discharge the duties and obligations which they had assumed under and by virtue of said contracts. The original contractor and sureties were not served. Robert A. Waite, the subcontractor, by himself and his two sureties together, served separate general demurrers, which were overruled, from which orders separate appeals were taken.

Messrs. D. S. Tullar and H. C. Waite, for appellants:

Where a contractor does work under the direction of an employee or his agent and subject to his control, the contractor is a mere servant of his employer. And this, too, although the employer should never exercise such control.

Hughbanks v. Boston Investment Co. 92 Iowa, 267; *Waters v. Greenleaf, Johnson Lumber Co.* 115 N. C. 648; *Jensen v. Barbour*, 15 Mont. 582; *Cincinnati v. Stone*, 5 Ohio St. 38; *Speed v. Atlantic & P. R. Co.* 71 Mo. 303; *Annett v. Foster*, 1 Daly, 502; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495.

As to the effect of reserving the right to dismiss any of the contractor's servants it is held that a contractor under such restriction is a servant.

Chicago v. Joney, 60 Ill. 383; *Larson v. Metropolitan Street R. Co.* 110 Mo. 234, 16 L. R. A. 330; *Blum v. Kansas*, 84 Mo. 112, 54 Am. Rep. 87; *Faren v. Sellers*, 39 La. Ann. 1011.

Servants who are employed and paid by one person may nevertheless be *ad hoc* the servants of another in a particular transaction, and that, too, even where their general employer is interested in the work.

Oil Creek & A. River R. Co. v. Keighron, 74 Pa. 316; *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *King v. New York C. & H. R. R. Co.* 66 N. Y. 181, 23 Am. Rep. 37; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Atwood v. Chicago, R. I. & P. R. Co.* 72 Fed. Rep. 447.

The true test of a contractor would seem to be that he rendered the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

Kuehn v. Milwaukee, 92 Wis. 263; *Harper v. Milwaukee*, 30 Wis. 365; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Robinson v. Webb*, 11 Bush, 464; *Andrews v. Boedcker*, 17 Ill. App. 213; *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829.

He may be a contractor as to part of the work and a servant as to part.

McCarthy v. Second Parish, 71 Me. 318, 36 Am. Rep. 320; *Hale v. Johnson*, 80 Ill. 185.

The plaintiff has shown the driver of the wagon to be his fellow servant, and the horse, harness, and wagon wherein he alleges negligence were all within the immediate supervision, control, and approval, and under the direction, of their common master, the United States government.

Kuehn v. Milwaukee, 92 Wis. 263; *Harper v. Milwaukee*, 30 Wis. 365.

Plaintiff was not a passenger or stranger on the mail wagon, but it was part of his official duty to be there and accompany the mails in the wagon from the depot to the postoffice.

This brings the case within the rule laid down in *Vick v. New York C. & H. R. R. Co.* 95 N. Y. 267, 47 Am. Dec. 36, and the plaintiff upon his own showing is not entitled to recover.

The title of chapter 380 is "An Act to Provide for the Immediate Taking Effect of Certain Sections of the Statute of 1898, as Reported by the Revisers and the Joint Committee on Revision, and to Amend Chapter 288, Laws of 1897," etc. Nothing contained in the title to this act in any manner intimates any repeal or amendment of chapter 304, Laws of 1897.

A statute can never have an operation beyond the purpose set forth in the title.

Bates v. Nelson, 49 Mich. 459; *Booth v. Eddy*, 38 Mich. 245; *Re New York*, 99 N. Y. 577; *Relyea v. Tomahawk Pulp & Paper Co.* (Wis.) 78 N. W. 412.

The breach of an indemnity bond occurs only when the injured party has recovered judgment against the principal obligor, in this case E. A. Chilton.

Gilbert v. Wiman, 1 N. Y. 550, 49 Am. Dec. 359.

The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract.

Hopewell v. McGrew, 50 Neb. 789; *DeCamp v. Bullard*, 22 Misc. 441; *Union Bank v. Cloosey*, 10 Johns. 271.

Messrs. Bird, Rogers, & Bird, for respondent:

Whenever any person enters into a contract with the state or United States whereby he obligates himself to the performance of certain duties in which the public are interested, he is liable to any person sustaining damages in consequence of a breach of such contract, and such injured person may maintain an action to recover the same, although not a party named in the contract.

Shearm. & Redf. Neg. 5th ed. § 118; *Felious v. Gilman*, 4 Wend. 414; *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648; *McMahon v. Second Ave. R. Co.* 75 N. Y. 231; *Jones v. New Haven*, 34 Conn. 1; *State, Baltimore, v. Norwood*, 12 Md. 194; *State v. Wood*, 51 Ark. 206; *Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433; *Tardos v. Bozant*, 1 La. Ann. 199.

Where one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the promisor for breach of the engagement.

McDowell v. Laev, 35 Wis. 171; *Bassett v. Hughes*, 43 Wis. 319; *Johannes v. Phenix Ins. Co.* 66 Wis. 50, 57 Am. Rep. 248; *Grant v. Diebold Safe & Lock Co.* 77 Wis. 72; *Larson v. Cook*, 85 Wis. 564.

Whenever one owes another a duty, 45 L. R. A.

whether such duty is imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action, irrespective of any special relations between the parties.

Cooley, Torts, 654; Shearm. & Redf. Neg. §§ 4, 8, 13; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Pauley v. Steam Gauge & Lantern Co.* 131 N. Y. 90, 15 L. R. A. 194; *Knisley v. Pratt*, 148 N. Y. 378, 32 L. R. A. 387; *Huda v. American Glucose Co.* 154 N. Y. 481, 40 L. R. A. 411.

Persons under contract with the government for carrying mails are not officers of the government in the sense of being exempt from liability for defaults of their subordinates, but simply contractors, and are liable to third persons for injuries sustained through the negligence or default of their agents or employees, even without specific stipulations to that effect in their contract.

Mechem, Agency, § 594; Mechem, Pub. Off. § 416, 664; Wharton, Neg. § 296; *Old Colony R. Co. v. Slavens*, 148 Mass. 363; *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Hale v. Grand Trunk R. Co.* 60 Vt. 605, 1 L. R. A. 187; *Ford v. Parker*, 4 Ohio St. 576; *Collett v. London & N. W. R. Co.* 16 Q. B. 984; *Bishop v. Williamson*, 11 Me. 495; *Coleman v. Frazier*, 4 Rich. L. 146, 53 Am. Dec. 727; *Christy v. Smith*, 23 Vt. 663.

Dodge, J., delivered the opinion of the court:

1. The complaint is very long, and somewhat ambiguous, as to whether it is founded on contract or tort. While many acts which might constitute negligence are alleged, they are not characterized expressly as either wrongful or negligent, and they are all asserted to constitute breaches of one or the other of the two contracts, which are not set out *in extenso*. Again, the sureties are joined as defendants, and judgment demanded against them jointly with their principal. Such demand can, of course, be supported only on the ground that their principal has breached some requirement of the contract, performance of which the sureties have guaranteed. They have no other connection either with the plaintiff or with the acts and events out of which his claim arises. Their liability must arise, if at all, from the strict words of the written contract which they have signed. Considering, then, first, whether a cause of action *ex contractu* is set forth against these demurring defendants, it must be observed that many of the contractual undertakings alleged in the complaint have no application to them, but only to the other defendants, who executed the original contract with the United States. The demurrant's duty and liability must be found in the subcontract, which it will be noted is much narrower than the original. Its undertaking is at a considerably less price, and to perform only a part of the duties assumed by the original contractor. He agreed to carry the mails; to account for and pay over any moneys of the United States coming to

his possession; to carry postoffice blanks, mail bags, and all other postal supplies; to convey on driver's seat of each wagon a postal employee; that his contract might be extended additional six months, in discretion of Postmaster General; and that he would be answerable to the United States or any person aggrieved for performance of all the duties and obligations therein assumed. The subcontractor only agreed to carry the mails, and that for failure therein he should be liable to the original contractor for certain liquidated damages. Nowhere in this subcontract is there assumption of any liability to anyone except the other party, nor any duty save to him and to the United States. If the original contractor assumed liability for damages to others than the United States, he has not by the subcontract required the subcontractor to do so. He has adopted another method of securing indemnity to himself for any liability that may fall on him by reason of failure of the subcontractor. The plaintiff urges that, because certain of the terms of the original contract are notified to the subcontractor by printing them on the back of his contract, the latter is deemed to have assumed them. This position is not tenable. They are not printed as a part of the subcontract, but merely as information of the terms of the original, and they are assumed by the subcontractor only to the extent specified over his signature, and that is only so far as they regulate his undertaking to carry the mails. Indeed, the very notification with reference to Chilton's liability to persons aggrieved limits it to damages for failure in the care, transportation, or custody of the mails. We think it plain, therefore, that no privity of contract between the demurrants and the plaintiff is shown. They contracted alone with E. A. Chilton, and not with the plaintiff nor even with the United States, and only contracted for transportation of the mails, in which contract the government primarily, and individuals only indirectly, have any interest. The situation is closely analogous to that presented in *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48, where the defendant failed in its duty by contract with the city to furnish water for extinguishment of fires, whereby great loss fell on plaintiff. In that case it was held that no privity of contract existed, notwithstanding the fact that plaintiff might be greatly benefited by its performance or injured by breach, but that to recover he must point to a duty resting on defendant by law, breach of which would constitute a tort. Most of the authorities cited by respondent to support recovery, under similar circumstances, repudiate the contract liability, or rest on a duty imposed by law as a result of the situation. *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445; *Hale v. Grand Trunk R. Co.* 60 Vt. 605, 1 L. R. A. 187; *Collett v. London & N. W. R. Co.* 16 Q. B. 984; *Mellor v. Missouri P. R. Co.* 105 Mo. 456, 10 L. R. A. 36; *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 45 L. R. A.

47 Am. Rep. 75. We conclude, therefore, that the complaint fails to set forth any right of action in the plaintiff upon the contract made by the demurring defendants. As no other connection of the sureties, Alexander McWhorter and J. A. Waite, existed, their demurrer should have been sustained.

2. As to the subcontractor, Robert A. Waite, however, a different question arises. By reason of the fact that the plaintiff was a lawful passenger upon the vehicle owned by such defendant, and driven by his servant, within the scope of the latter's employment, there existed a duty, not needing to be based upon any contract, but which the law imposes upon every person when another is lawfully in a position to be affected by his acts or conduct. He owed to the plaintiff the duty of ordinary care, and was liable for any injury of which his negligence might be the proximate cause. The case of *Collett v. London & N. W. R. Co.* 16 Q. B. 984, is extremely analogous to this. There the injury was to a postal employee whom the defendant, as a carrier of mails, was obliged to carry, and liability to him for an injury resulting from negligence was contested on the ground that there was no privity of contract with him. The court held the contrary, and repudiated the idea that only the Postmaster General, with whom the contract was made, could bring the suit as for breach of it, saying, Lord Campbell, Ch. J.: "The allegation that it was the duty of the company to use due and proper care and skill in conveying is admitted [by demurrer]. That duty does not arise in respect to any contract between the company and the persons conveyed by them, but is one which the law imposes." Patterson, J.: "The plaintiff's right to sue arises, not from any particular contract with the defendants, but from their general duty to carry the mails and officers. . . . Such injury is properly the subject of an action on the case by the plaintiff." In *Sawyer v. Corse*, 17 Gratt. 230, 99 Am. Dec. 445, plaintiff sued a mail contractor for loss of a letter through negligence of the defendant's employee carrying mail bags, the contract being set out somewhat as in the present case. The court held that it was an action on the case; that it could only be sustained by proof: First, of defendant's own negligence in carrying the letter; second, his negligence in employing a known incompetent person; or, third, negligence of his agent in the scope of his employment. In *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75, a railway postal employee traveling on defendant's road in care of the mails, in pursuance of the usual statute, was held entitled to recover in tort for an injury from negligence. The court held that the action did not depend on the contract relation, further than that established the lawfulness of his presence on the train; whereupon the common-law duties of the defendant to him as to any other passenger arose. In *Brewer v. New York, L. E. & W. R. Co.* 124 N. Y. 59, 11 L. R. A. 483, plaintiff's intestate was being carried by the defendant as an express

messenger under a contract with the express company whereby the express company assumed all responsibility for risks of transportation. The defendant was held liable, the court saying: "The negligence of the defendant was the violation of its duty. It was the want of the care to which the plaintiff's intestate was entitled for his protection. This duty and such right did not depend or rest upon the contract, but upon the relation as carrier of the plaintiff, and the care which the defendant, as such, was required to exercise. It is violated duty that furnishes the ground of an action for negligence." To the same view may be cited *Houston & T. C. R. Co. v. Hampton*, 64 Tex. 427; *Mellor v. Missouri P. R. Co.* 104 Mo. 455, 10 L. R. A. 36; *Robinson v. Rohr*, 73 Wis. 436, 2 L. R. A. 366; *Britton v. Green Bay & Ft. H. Waterworks Co.* 81 Wis. 48. The rule of liability for negligence resulting in injury to another lawfully in a situation to be dependent on the defendant's conduct is, however, too elementary to need extended citation of authority. Upon a careful examination of the complaint, in the light of the command of § 2668, Rev. Stat., that the allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties, we may read all of the extended narrative with reference to these two contracts as but alleging the ultimate fact that plaintiff was lawfully and rightfully a passenger on defendant's wagon, although something more than thirty printed pages are used to accomplish such allegation. *Nelson v. Harrington*, 72 Wis. 591, 597, 1 L. R. A. 719. The complaint, then, alleges a series of acts of the defendant and his employee which undoubtedly constitute negligence, although no such conclusion is stated. The knowingly supplying a vicious, kicking, and runaway horse, unsuitable for the service, defective harness and wagon, and incompetent driver, are alleged; also that the vice of the horse, the defects of the vehicle and harness, and the incompetence and negligence of the driver, caused the plaintiff's injury, without fault or negligence on his part. Thus construed, the complaint contains all the essential elements to set forth a cause of action in tort for damages to the plaintiff from the negligence of the defendant Robert A. Waite, independently of the consideration whether he had contracted with the plaintiff for any particular line of conduct.

3. It is contended on behalf of the appellants that no liability can exist, for the reason that the plaintiff, the defendant Robert A. Waite, subcontractor, and his employee the driver of the wagon, were all coemployees of the United States, and therefore liability cannot exist. This position involves a strange confusion of ideas as to the doctrine of nonliability for negligence of coemployees. That doctrine applies only to protect the employer, and exempt him, under certain circumstances, from liability for injuries resulting to one employee from the negligence of another. When it is said that an employee assumes the risk from the negligence

of his coemployee, it means only that he assumes it *quoad* his employer, but not as against his coemployee. If one by his negligence injures another, it is no defense, in a suit against him, to assert that they are both employed under one master, but such is the substance of the contention here. The suit is not against the United States, but by the plaintiff, an employee thereof, against the defendant, who, according to this contention, is another employee. Nor can any such relation be urged to exempt defendant Waite from liability to plaintiff for negligence of the former's servant, for the plaintiff was not an employee of the defendant.

4. It is further objected to the maintenance of this action that chapter 304, Laws 1897, prohibits it, for the reason that no notice was served upon the defendants, as therein required. That statute was an amendment to § 4222, Rev. Stat. 1878, prescribing the limitation of time for bringing various actions, and added thereto the provision that no action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damages, notice in writing, etc., shall be served upon the person or corporation by whom it is claimed such damage is caused. That act was approved April 23d, and took effect, by publication, April 28, 1897. It was followed by chapter 380, enacted August 20, 1897, at the special session of the same legislature, being entitled "An Act to Provide for the Immediate Taking Effect of Certain Sections of the Statutes of 1808 as Reported by the Revisers and the Joint Committee on Revision, and to Amend Chapter 288, Laws 1897, Relating to the Establishment of Garbage-Reducing Works," etc. The latter act comprehended a large number of the new provisions included in the revision enacted at the same session, among others § 4222, as amended by chapter 304, Laws 1897, to which, however, the following proviso was added: "Provided, that the provision herein requiring notice of one year shall not apply to any event causing damage which happened before the 28th day of April, 1897, nor shall that part of § 5 of chapter 304 of the Laws of 1897 relating to such notice apply to any such event." The appellants contend that this later legislation was ineffective, and that the requirements of chapter 304, Laws 1897, are still in force, and have not been complied with. This legislation has very recently received consideration in *Relyea v. Tomahawk Paper & Pulp Co.* (Wis.) 78 N. W. 412. It was there substantially held that chapter 304, Laws 1897, was one limiting the time of bringing actions. It is therefore subject to the power of the legislature to change or repeal statutes of limitation with respect to existing causes of action before the right of action is wholly barred and destroyed. *Oberreich v. Fond du Lac Co.* 63 Wis. 216, 221; *Relyea v. Tomahawk Paper & Pulp Co.* (Wis.) 78 N. W. 412. Obviously, the present cause of action, which is alleged to have accrued April 1, 1897, was not barred at the time of the pas-

sage of the latter act in August of that year. Appellants, however, contend that such an enactment, being entirely foreign to the title of chapter 380, is not valid. We are at a loss to understand upon what appellants predicate such conclusion. Acts of legislature are not to be held void unless clearly in violation of some direct prohibition of the Constitution. *Northwestern Nat. Bank v. Superior* (decided April 25, 1899) (Wis.) 79 N. W. 54. No such prohibition is pointed out, and we know of none, unless, indeed, appellants' counsel have in mind § 18 of article 4 of the Constitution, which, however, is confined by its terms to private and local bills. The very existence of that express re-

quirement, with reference to such bills, implies the absence of any similar restriction upon public and general acts. Our conclusion is therefore that no cause of action is stated against the demurring sureties, but that the complaint states facts sufficient to constitute a cause of action in tort, for negligence, against their principal.

On the appeal of Robert A. Waite, the order overruling his demurrer is affirmed.

On the appeal of Alexander McWhorter and J. A. Waite, the order overruling their demurrer is reversed, and the cause remanded, with directions to sustain their demurrer.

VIRGINIA SUPREME COURT OF APPEALS.

James M. TAYLOR, Appt.,
v.

MUTUAL RESERVE FUND LIFE ASSOCIATION of New York et al.

(.....Va.....)

1. The provision for service of process on foreign insurance companies, made by act of assembly May 18, 1887, by requiring the appointment of an attorney or agent to acknowledge service or on whom it may be made, does not deprive the corporation of the right to plead a want of jurisdiction on the ground that the subject-matter of the suit, or the remedy sought, is beyond the reach of the court, or not within the sovereign power of the state from which the court derives its authority.
2. An injunction to prevent a foreign assessment insurance company from taking any proceedings to have a certificate of membership or policy of insurance declared lapsed or forfeited for failure to pay an alleged illegal and extortionate assessment cannot be granted, for the reason that it could not be enforced and would be an attempt to control and overhaul the management of a corporation in another jurisdiction.
3. An attempt to investigate, overhaul, and control the management of the internal affairs of a corporation domiciled in another state, by compelling it to exhibit its books, papers, and vouchers, and furnish a list of policy holders for inspection, and to determine questions of fraudulent misappropriation of assets and the reasonableness of a rate of assessments, is beyond the jurisdiction of the court.
4. The court has no power to construe a contract so as to make its decision *res judicata* when the case made and the relief sought are beyond its jurisdiction.

(April 6, 1899.)

A PPEAL by plaintiff from a decree of the Law and Equity Court of the City of Richmond dismissing his bill filed to enjoin defendants from enforcing a certain assess-

ment upon plaintiff as the holder of a benefit certificate. *Affirmed.*

The facts are stated in the opinion.

Mr. W. L. Royall for appellant.

Messrs. Frank R. Lawrence, Charles S. Stringfellow, L. L. Lewis, and George Burnham, Jr., for appellees:

In charging fraud, a mere general averment, without setting out the facts upon which the charge is predicated, is insufficient.

Dickenson v. Bankers' Loan & Invest. Co. 93 Va. 498; *Jordan v. Liggan*, 95 Va. 616; *Clodfelter v. Hulett*, 72 Ind. 137; *Fogg v. Blair*, 139 U. S. 118, 35 L. ed. 104; *Dillon v. Barnard*, 21 Wall. 437, 22 L. ed. 673; *Bailey v. Birkenhead, L. & C. Junction R. Co.* 12 Beav. 433.

The bill is obnoxious to the objection that it seeks judicial interference with the discretion of the managing agents of the defendant company as to acts *intra vires*.

2 Cook, Stock & Stockholders, § 684; *Bailey v. Birkenhead, L. & C. Junction R. Co.* 12 Beav. 433; *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Dimpfell v. Ohio & M. R. Co.* 110 U. S. 210, 28 L. ed. 122; *Taylor v. Holmes*, 127 U. S. 489, 32 L. ed. 179; *Mount v. Radford Trust Co.* 93 Va. 427; *Oglesby v. Attrill*, 105 U. S. 605, 26 L. ed. 1186; *Wenzel v. Palmetto Brewing Co.* 48 S. C. 80; *Republican Mountain Silver Mines v. Brown*, 19 U. S. App. 203, 58 Fed. Rep. 644, 7 C. C. A. 412, 24 L. R. A. 776.

When an actual contract has been shown, the enforcement of its performance by a court of equity is not a matter of absolute right, but rests in sound judicial discretion. The contract must be perfectly fair, equal and just in its terms, free from fraud, mistake, and illegality, or any other inequitable feature; and the court, in judging of its fairness, and the propriety of compelling its performance, will look at all the surrounding circumstances.

Augsburg Land & Improv. Co. v. Pepper, 95 Va. 93; *Cox v. Cox*, 26 Gratt. 308; *Wood v. Dickey*, 90 Va. 163; *Duwall v. Myers*, 2 Md. Ch. 401; *Rider v. Gray*, 10 Md. 282, 69 Am. Dec. 135; *Rutland Marble Co. v. Ripley*, 10

NOTE.—For cases similar to the above, see also *Clark v. Mutual Reserve Fund Life Assn.* (D. C.) 43 L. R. A. 390; and *Condon v. Mutual Reserve Fund Life Assn.* (Md.) 44 L. R. A. 149. 45 L. R. A.

Wall. 359, 19 L. ed. 961; *Central Land Co. v. Johnston*, 95 Va. 224; 3 Pom. Eq. Jur. § 1405.

The courts of this state have no jurisdiction of the subject-matter of this action.

This can only be done by the tribunals of the state of the domicile of the corporation in the mode prescribed by the laws of that state.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. 655, 65 Am. Dec. 254; 1 Bl. Com. 480, 481; 2 Kent, Com. 300, 304; *Hotchkiss v. Middlekauf*, 96 Va. 649, 43 L. R. A. 806; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Shaw v. Quincy Min. Co.* 145 U. S. 444, 36 L. ed. 768; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Rece v. Newport News & M. Valley Co.* 32 W. Va. 164, 3 L. R. A. 572.

Service of process on an agent under the statute brings what may be called the person of the corporation into court as fully as if the process had been lawfully served on the corporation itself. But it by no means follows that it is brought into court for any other purpose than to answer in suits on debts incurred, or on contracts of insurance made, in this state.

Cowardin v. Universal L. Ins. Co. 32 Gratt. 445; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Murfree, Foreign Corp.* §§ 191, 226 *et seq.*; 6 Thomp. Corp. § 7904; *Wilkins v. Thorne*, 60 Md. 253; *Williston v. Michigan S. & N. I. R. Co.* 13 Allen, 406; *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 534; *Gregory v. New York, L. E. & W. R. Co.* 40 N. J. Eq. 38; *Stafford v. American Mills Co.* 13 R. I. 310; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378; *Berford v. New York Iron Mine*, 24 Jones & S. 236; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179; *House v. Cooper*, 30 Barb. 157; *Chase v. Vanderbilt*, 5 Jones & S. 334.

Within the meaning of the authorities, the present bill and the relief prayed for in it called upon the court to interfere with the internal affairs of the association.

North State Copper & Gold Min. Co. v. Field, 64 Md. 151; *May, Ins.* 3d ed. § 548; *Riddle, Ins.* §§ 47, 48; *Cooke, Life Ins.* § 8; *Lake v. Minnesota Masonic Relief Assn.* 61 Minn. 96; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179; *Prouty v. Michigan S. & N. I. R. Co.* 1 Hun, 655; *Ives v. Smith*, 19 N. Y. S. R. 556.

State legislation in regard to foreign corporations may be divided into two classes. 45 L. R. A.

In the first class are all statutes which impose on foreign corporations seeking to do business within the borders of the enacting state the condition that they shall, in substance, become domestic corporations of that state. The second class includes all statutes which simply recognize foreign corporations and their continuance and existence as such, and permit them as foreign corporations to conduct their operations upon complying with certain conditions relating generally to the appointment of a resident agent upon whom process may be served.

Whether a given statute, relating to the status of a foreign corporation, falls within the first or second class is purely a question of legislative intent, to be decided as a matter of construction.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Uphoff v. Chicago, St. L. & N. O. R. Co.* 5 Fed. Rep. 545; *James v. St. Louis & S. F. R. Co.* 46 Fed. Rep. 47; 6 Thomp. Corp. § 7890.

To make such a company a corporation of another state, the language used must imply creation or adoption, in such form as to confer the power usually exercised over corporations by the state, or by the legislature, and such allegiance as a state corporation owes to its creator.

Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83.

There is a total absence from the Virginia statute of any such language as is referred to.

6 Thomp. Corp. §§ 7890-7892.

The common example of the second class is a statute permitting a foreign corporation to do business within the state, upon condition that it will appoint a resident agent for the service of process upon it as such.

See *Goodlett v. Louisville & N. R. Co.* 122 U. S. 391, 30 L. ed. 1230; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *North State Copper & G. Min. Co. v. Field*, 64 Md. 151.

The Virginia act of assembly simply recognizes foreign insurance companies and associations upon the assessment plan as such, and permits them to carry on their business within the state, upon condition that they appoint an agent for the service of process, and this act does not domesticate such foreign corporations or make them residents of the state.

Cowardin v. Universal L. Ins. Co. 32 Gratt. 445; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Bowler v. Huston*, 30 Gratt. 266, 32 Am. Rep. 673; *Gregory v. New York, L. E. & W. R. Co.* 40 N. J. Eq. 38.

The New York statute, Sess. Laws 1890, chap. 400, provides that "no order, judgment, or decree providing for an ac-

counting or enjoining, restraining, or interfering with the prosecution of the business of any life or casualty insurance company, association, or society of this state, or appointing a temporary or permanent receiver thereof, shall be made or granted otherwise than upon the application of the attorney general, on his own motion, or after his approval of a request in writing of the superintendent of the insurance department, except in an action by a judgment creditor or in proceedings supplementary to execution."

Sloan v. Mutual Reserve Fund Life Assn. 155 N. Y. 9.

This statute is to be regarded as in effect an amendment of the charter of the defendant company, and therefore, like its charter, the statute accompanies the company into every state in which it does business.

Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; *Bockover v. Life Assn. of America*, 77 Va. 85.

The construction of the New York statute by the highest court of that state is a controlling authority in the present case.

Supreme Council, A. L. of H. v. Green, 71 Md. 263; *Robinson v. Hurst*, 78 Md. 59, 20 L. R. A. 761.

The members of a mutual assessment insurance association are bound by the statutes of the state where it was organized.

Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557; *Wanschaff v. Masonic Mut. Ben. Soc.* 41 Mo. App. 206; *McCracken v. Haycard*, 2 How. 608, 11 L. ed. 397; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Assn. v. Robinson*, 147 Ill. 138; *Cooke, Life Ins.* (1891) § 11; *Joyce, Ins.* (1897) § 194; *Emerigon, Ins.* Meredith's ed. 1850, 49, 555, chap. 2, § 7; *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421.

The complainant's rights have not, in fact, been violated.

In order to ascertain the contract between the defendant association and its members, regard must be had to the nature of the association, and the relation which necessarily exists between it and the individual member.

May, Ins. 3d ed. 146; *Joyce, Ins.* (1897) § 340; *Lake v. Minnesota Masonic Relief Assn.* 61 Minn. 98, 52 Am. St. Rep. 543-578, note.

Being members of the association, the constitution and by-laws thereof, and the amendments thereto, lawfully made from time to time, form a necessary part of the contract between a mutual insurance company and its members, whether referred to in the certificate or not.

Sulz v. Mutual Reserve Fund Life Assn. 145 N. Y. 563, 28 L. R. A. 379; *Re Equitable Reserve Fund Life Assn.* 131 N. Y. 354; *Miller v. Hillsborough Mut. Fire Assur. Assn.* 42 N. J. Eq. 459, 47 N. J. L. 393; *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409; *Hass v. Mutual Relief Assn.* 118 Cal. 6.

This is true whether or not such constitution and by-laws are referred to in the certificate or application for membership. 45 L. R. A.

Barbot v. Mutual Reserve Fund Life Assn. 100 Ga. 681; *Hass v. Mutual Relief Assn.* 118 Cal. 6; *May v. New York Safety Reserve Fund Soc.* 14 Daly, 389; *Woodfin v. Asheville Mut. Ins. Co.* 51 N. C. (6 Jones, L.) 558; *Bliss, Life Ins.* 2d. ed. 426; *Joyce, Ins.* § 188.

The members of this association are bound by and conclusively presumed to know its constitution and by-laws, and contract with reference thereto.

Nickels v. People's Bldg. Loan & Sav. Assn. 93 Va. 387; *Whitehurst v. Whitehurst*, 83 Va. 155; *Bocock v. Alleghany Coal & I. Co.* 82 Va. 919; *Haden v. Farmers' & M. Fire Assn.* 80 Va. 683; *Miller v. Hillsborough Mut. Fire Assur. Assn.* 42 N. J. Eq. 458; *Supreme Lodge, K. of P. v. Knight*, 117 Ind. 489, 3 L. R. A. 409; *May v. New York Safety Reserve Fund Soc.* 14 Daly, 389; *Poulitney v. Bachman*, 31 Hun. 49; *Stohr v. San Francisco Musical Fund Soc.* 82 Cal. 557; *Fullenwider v. Supreme Council of Royal League*, 73 Ill. App. 321.

The assessment complained of was made under the broad discretionary powers of the board of directors, in whom substantially all corporate powers are vested.

Nor, if there had been a violation of the contract would the plaintiff be remediless. On the contrary he would have his remedies.

Haues v. Oakland, 104 U. S. 450, 26 L. ed. 827; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020; *Relfe v. Rundle*, 103 U. S. 226, 26 L. ed. 339; *Bockover v. Life Assn. of America*, 77 Va. 85.

Buchanan, J., delivered the opinion of the court:

The bill in this case was filed against the Mutual Reserve Fund Life Association, its officers, and directors, by the appellant, who sued in behalf of himself and all other policy holders in that company similarly situated who would come into the suit, and contribute to its prosecution.

The bill was afterwards amended for the purpose of giving the names of the president and directors of the association, which were not given in the original bill because unknown, and of making a statute of the state of New York an exhibit with the bill.

The allegations of the bill are, in substance, that in the year 1882, when the complainant was sixty years of age, he insured his life in the sum of \$5,000 for the benefit of his wife, who has since died, in the Mutual Reserve Fund Life Association, a corporation chartered under the laws of the state of New York, then and now doing business in the state of Virginia; that the association had an agent in this state upon whom process could be served, and had deposited with the auditor the securities required of a foreign insurance company doing business here, as provided by statute; that the defendant association was a mutual assessment company, having no capital stock, and its policy holders were members of the association; that each policy holder paid an admission fee, annual dues on each \$1,000 of in-

insurance, and bimonthly mortuary assessments; that 75 per cent of these assessments, under the charter, went into the death fund, from which all death losses were paid, and 25 per cent into the reserve fund, which belonged to members of the association, except certain death losses which were to be paid from it; that after an expiration of each period of five years while a certificate of membership or policy of insurance remained in force a bond was to be issued to the holder of the certificate of an equitable proportion of the reserve fund, bearing 4 per cent interest annually, the principal of which bond after ten years became available towards paying future dues and assessments under the certificate; that this was the general plan for insurance upon which the association was organized, and upon which it had been conducting its business until a comparatively recent period, when it had wholly departed from that plan to the great injury and loss of the complainant and many others.

It is further alleged that when the defendant company commenced business all its policies or certificates of membership represented upon their face that, when the death fund was insufficient to meet losses by death, an assessment would be made upon the entire membership in force at the date of the last death to recover losses, and that such assessment would be apportioned among all the members according to a most reasonable table, which was printed upon the certificate of membership; that, while some of the policies subsequently issued did not set out that agreement as explicitly as did the earlier policies, yet there was an implied agreement in all of them that no assessment would be made while there was money enough in the death fund to meet all death losses, and that, when an assessment was made, it would be upon all the members of the association, according to the scale established, or according to a just and reasonable scale; that, in addition to the express or implied agreements to that effect contained in the policies issued, the association authorized its agents all over the United States to make express representations to that effect to persons who were solicited to insure, and that its agents did actually assure many such persons that the company would never make any assessments greater than those printed upon the certificate of membership; that it is true that the first policies issued contained a few words of doubtful meaning, hidden away at the end of a clause relating to a wholly different subject, that might possibly be held to authorize assessments at the discretion of the managers, and that later policies assert such right in bolder language, but their later assertions were not made until after a general belief had grown up everywhere by reason of its long-continued public representations that no assessment would be made except of the smallest and most reasonable character, and which would be ratable upon all members of the association; that the complainant so understood and was justified in so understanding its plan of assessment when he insured in the association; that, notwithstanding its said assurances and representations, the association gradually increased the rate of assessment over that in force in the year 1882, which was \$90 a year on his policy of \$5,000, until it was \$169.20 in the year 1894, \$360.90 in the year 1895, and would be \$707.70 for the year 1898, according to the bimonthly assessment made in February of that year; that this increase in its assessments was not a fair and reasonable use of its power, even if the power to increase existed, as claimed by the association, but was extortion and robbery, imposed upon the complainant and all others situated like him to coerce him and them into abandoning their policies, and forfeiting all that they had paid into the treasury of the association; that these increased assessments were in violation of the express and implied agreements made with the complainant and other policy holders when they were insured, and were wholly unnecessary, unless the association had been for years making false statements of its condition; that its annual reports filed under the provisions of the statutes of this state showed that in the year 1893 it had over 82,000 policies of insurance, aggregating over \$260,000,000, and that its losses for that year were less than \$4,000,000; that in 1894 it had over 96,000 policies of insurance, amounting to over \$293,000,000, and that its losses for that year were a little over \$4,000,000; that for 1895 its policies were over 105,000, insurance over \$308,000,000, and losses a little less than \$5,000,000; that in 1896 its policies were over 118,000, insurance over \$325,000,000, and losses less than \$5,000,000; that the report for 1897 had not been filed, but in the address of the president of the association it was stated that its business for that year was as satisfactory as for any previous year; that, if these statements of its auditor were true, there was no excuse for making any extraordinary assessments on its policy holders, but, if there was any necessity for such increased assessments, it was because there had been a fraudulent misappropriation of the resources of the association; that the complainant, upon information and belief, charged that there had been such fraudulent misappropriation by its officers and agents, and that this fact could be demonstrated if the court would require the company to exhibit its books, papers, and vouchers for inspection and examination.

It was further alleged that the explanation of the extortionate assessment which the association had made for the year 1898 was explained by the fact that, two years or more before, those who managed the affairs of the association determined, in violation of its charter and the contracts it had made with its policy holders, to change it from the basis of a mutual assessment company to the basis of what is called a "level premium" company; that, accordingly, a very attractive policy of the level premium character

had been prepared, and its agents directed to use that policy in effecting all new insurance; that this new policy provided for the ordinary annual premium, which was reasonable, and was to remain the same as long as the policy was in force, and contained other provisions which made it a very desirable policy; that, notwithstanding its attractive features, the association had outstanding a vast body of insurance under its old plan, which could not be converted into a company upon the level-premium plan until the old policies were gotten in; that its agents were therefore instructed to offer the new policy to the holders of the old with full explanation of its advantages, and to threaten that, unless an exchange was made, the holders of the old policies would be assessed so immoderately that they would find it burdensome to carry them; that the association denied the advantages of the new policy to all persons over the age of sixty years, including the complainant, and had enticed or bullied out of the class that had insured up to 1897 all good risks that could get out, and had refused to allow the old and infirm risks of that class to come out of it upon any terms, yet proceeded to assess them with a sum that it knew that they could not pay, and threatened, if that assessment was not sufficient to make them abandon their policies, that it would be so increased thereafter as to compel them to do so, and thus confiscate all that they had paid to the association; that the complainant had refused to pay the unreasonable and extortionate assessment made upon him in February, 1898, and that, in consequence thereof, the association had threatened that it would declare his policy lapsed and forfeited unless he paid that assessment on or before the 3d day of March, 1898, and, if it was permitted to do this, it would inflict upon him irreparable injury; that complainant had demanded redress of his grievances at the hands of the association, its officers and manager, but they had refused to give him any relief whatever. It was further alleged that the association had estate and debts due it in the city of Richmond.

The prayer of the bill was that the association, its agents and officers, be enjoined and restrained from taking any proceeding whatever to make the complainant's certificate of membership or policy of insurance in the association declared lapsed or forfeited; that they be required to make an exhibit of the association's books, papers, and vouchers to the court, so that it could determine what would be a reasonable rate of assessment upon the complainant, and when such reasonable rate of assessment had been determined by the court, that it should decree that the association should receive that assessment, give receipts therefor to the complainant, and keep his certificate or policy of insurance in force and effect, or issue to him one of the new policies of the association; that they be required to exhibit a list of all its certificates or policy holders in force

January 1, 1895, at what age each was issued, the date and amount of each policy, to require the defendants to produce here for the inspection of the complainant all the books, papers, and vouchers of the association which might be necessary to enable him to ascertain the manner in which it had been conducting its business, and whether any of its resources had been fraudulently misappropriated; and for general relief.

Process was served upon the agent of the association as provided by statute. The association appeared by counsel, and demurred to the bill. Its demurrer was sustained, and the bill dismissed. From that decree this appeal was allowed.

Several grounds of demurrer are relied on, but the principal objection urged to the bill is that the case made and the relief sought would require the court to interfere with the internal management of a foreign corporation, a subject-matter over which the court has no jurisdiction. If this objection is well founded, it is decisive of the case, and will render it unnecessary for us to consider the other grounds of demurrer. It seems to be well settled that courts will not interfere with the management of the internal affairs of a foreign corporation. Such questions are to be settled by the tribunals of the state which created the corporation. The reasons for such a rule are apparent. Courts other than those of the state creating it, and in which it has its habitat, have no visitatorial powers over such corporation, have no authority to remove its officers, or to punish them for misconduct committed in the state which created it, nor to enforce a forfeiture of its charter. Neither have they the power to compel obedience to their orders nor to enforce their decrees. *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151; *Condon v. Mutual Reserve Fund Life Assn.* (Md.) 44 L. R. A. 149; 6 Thomp. Corp. § 8011.

There is nothing in the act of assembly approved May 18, 1887, entitled "An Act in Relation to Insurance Companies and Associations upon the Assessment Plan" (Acts Ex. Sess. 1887, p. 348, chap. 271), which changes the general rule upon the subject, and gives to the courts of this state the right to control or interfere with the management of the internal affairs of a foreign corporation doing business here. Section 3 of that act provides, among other things, that no insurance company or association organized upon the assessment plan shall transact business in this state by an agent, unless it shall first authorize some person who is a resident of this state "to act as its attorney, and to acknowledge service of process, or upon whom process may be served for and on behalf thereof, which service shall be taken and held to be as valid as if served upon such corporation or association according to the laws of this or any other state."

The object of that provision of the act was to secure the residents of this state the benefit and protection of its own laws, and to confer upon its own courts jurisdiction to

determine and enforce their rights where the subject-matter of the litigation was within their jurisdiction, or the remedy sought was within their reach. It provides how the corporation can be brought into court, but it does not confer upon the courts, nor does it require such corporations to concede, any right to exercise authority over the organization, the corporate functions, nor the relations between the corporation and its members, nor to determine the rights and duties of the corporation or its members arising under the law of the state of its creation, and depending upon its local laws, nor deprive it of the right to plead a want of jurisdiction on the ground that the subject-matter of the suit, or the remedy sought, is beyond the reach of the court, or not within the sovereign power of the state from which the court derives its authority. *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Clark v. Mutual Reserve Fund Life Assn.* 14 App. D. C. —, 27 Wash. L. Rep. 114, 43 L. R. A. 390; and *Condon v. Mutual Reserve Fund Life Assn.* (Md.) 44 L. R. A. 140. See Story, *Confl. L.* § 543.

The next question to be considered is whether or not the acts complained of are so distinctively acts pertaining to the management of the internal affairs of the association that they can only be inquired into by the courts of the state creating it.

It is sometimes difficult to determine what acts of a corporation relate to its internal management and what do not. The cases are not entirely agreed upon this question.

In the case of *North State Copper & Gold Min. Co. v. Fields*, 64 Md. 151, which has been cited with approval by many courts, and may be regarded as the leading case upon this subject, the line of distinction is stated as follows: "That where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction, whenever the cause of action arises here."

The defendant corporation is an assessment company. It has no capital stock, and he who takes out a policy of insurance in it becomes a member of the body corporate, clothed with the rights and subject to the liabilities of a stockholder. He is at once insurer and insured. 2 May, Ins. § 548. His liabilities and his rights depend entirely upon the conditions and obligations of his membership. Those obligations and conditions are evidenced by his certificate of membership, the charter, constitution, and by-laws of the corporation, and the statutes of the state creating it. *Niblack, Mut. Ben. Soc.* 45 L. R. A.

§ 136; 2 May, Ins. § 552; *Bacon, Ben. Soc.* § 161.

The wrongs complained of by the appellant in his bill, briefly stated, are the imposition of illegal assessments upon him and other members of the association over sixty years of age; the adoption of a new plan of insurance without authority, the advantages of which are denied to him and those of his class; the unlawful action of the association in inducing by persuasion and threats the young members of the association to give up their old policies, and to take out policies under the new plan, thereby increasing the burdens of the appellant and the old members, and thus compelling them either to pay exorbitant assessments, or leave the association, and lose all that they have paid; and the fraudulent misappropriation of the assets of the association by its officers and agents. All these alleged acts of misconduct affect the appellant in his capacity as a member of the association.

The counsel of the appellant insists that by the terms of his policy of insurance it was agreed that the rate of assessment "should always be what they were at the time of insurance, to be raised in emergencies according to a scale applied to all in the same way," and that any change in the rates of assessment was a violation of his contractual rights.

If it were true, when the appellant became a member of the association, that he contracted with it that the rate of assessment should never be changed, we do not see how that could affect the question under consideration. The bill charges that the rates of assessment have been increased in violation of the appellant's rights. The question is not how those rights were acquired, but whether the violation of those rights affects him in his capacity as a member of the association, and do not affect merely his individual rights.

The appellant has rights which rest upon his contract of insurance, and not upon his contract of membership in the society (*Niblack, Mut. Ben. Soc.* § 136), and for a violation of those rights he is entitled to redress. The mere fact, as was said in *Condon's Case*, 44 L. R. A. 149, that "he is a member of the corporation, does not preclude him from asserting against the corporation any right arising out of his contract; but the character of the remedy invoked may measure the limits of the jurisdiction of the tribunal appealed to when the domicile of the corporation is considered. It is therefore entirely possible that a state of facts which would authorize a court, in the exercise of its visitatorial power, to inquire into the validity of acts affecting the rights of a policy holder, when done by a corporation located within the jurisdiction of the court, would, as respects a foreign corporation, be wholly insufficient to confer upon the same court jurisdiction to act at all."

Not only are the acts complained of acts which relate to the internal management of

the association, but the relief sought, if granted, would require the courts of this state to control and overhaul that management.

The first prayer is that the association be enjoined and restrained from taking any proceedings to have the appellant's certificate of membership or policy of insurance declared lapsed or forfeited. This prayer is based upon the allegation that the association had threatened to declare it forfeited if he did not pay what is charged to be an illegal and extortionate assessment.

If the court were of opinion that the assessment was invalid, how could it restrain and control the association at its home office in the state of New York, where the assessments were to be paid? It would have no power to enforce its restraining order if the association refused to obey it. It is clear that an injunction ought not to be granted which cannot be enforced. *Condon v. Mutual Reserve Fund Life Asso.* 44 L. R. A. 149; *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. —, 27 Wash. L. Rep. 114, 43 L. R. A. 390.

Another prayer of the bill is that the association be required to exhibit its books, papers, and vouchers, and furnish a list of its policy holders, for the inspection of the appellant, in order that he might ascertain from them whether or not there had been any fraudulent misappropriation of the assets of the association by its officers and agents, and in order that the court could determine what would be a reasonable rate of assessment upon the appellant, and, when it had determined what would be a reasonable rate, to decree its payment, require the association to receive it, give receipts therefor, and to keep his policy alive, or to issue him one of its new policies. In order to grant such relief, it would be necessary for the court to investigate, overhaul, and control the management of the internal affairs of the association. It is manifest that the courts of no state other than that of the domicile of the foreign corporation ought to attempt to exercise any such power over it. To do so would render it dangerous, if not impossible, for a corporation to do business beyond the limits of the home state. Its books and papers might be required at the same time in the courts of many or all of the states in which it was doing business. Each of these courts, after overhauling its internal management, to see what would be a reasonable rate of assessment, might determine that question differently, thus leading to confusion and injustice in the administration of the internal affairs of the corporation. Courts, even if they had such power, would be slow to exert it when its exercise would lead to such results, but would leave the parties to litigate their rights in the courts of the state under whose laws the corporation had been created, and where such matters could alone be properly settled.

In *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, the foundation of the complaint was that the foreign corporation

had imposed an illegal and void assessment upon its stockholders, and had declared Field's stock forfeited by reason of his non-payment of the assessment upon him. The object of his suit was to compel the company to reinstate him as a stockholder on the books of the corporation, but the court refused to grant the relief, because to do so would be interfering with the management of the internal affairs of the foreign corporation.

In *Clark's Case*, 14 App. D. C. —, 27 Wash. L. Rep. 114, 43 L. R. A. 390, which was a bill filed against the appellee association by one of its members, as is this, and based largely upon the same allegations of fact, and seeking in the main the same character of relief, it was held that a court of equity of the District of Columbia had no jurisdiction to enjoin the association from enforcing or attempting to enforce certain assessments made upon one of its members and policy holders, or adjudge and decree as null and void certain changes and increase in the rate of assessment from the rate fixed in the certificate issued to him, or to determine what would be a proper rate of assessment upon its members, or to require a production of its books and papers for an accounting. This decision was based upon the ground that the acts complained of affected the plaintiff in his rights as a member of the association, and were the acts of the corporation performed in the administration of its corporate affairs.

In *Condon's Case* (Md.) 44 L. R. A. 149, which was also a suit against the appellee association, brought by one of its members in behalf of himself and others similarly situated, the allegations of the bill and the relief sought were substantially the same as in the *Clark Case*, and a like conclusion was reached by the court of appeals of Maryland. *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34.

We are of opinion that the subject-matter of this suit is not within the jurisdiction of the courts of this state, and that the remedy sought is beyond their reach. The demurrer to the bill was therefore properly sustained.

The counsel for appellant insists that, although this court may not be able to grant all the relief prayed for, it ought to construe appellant's contract with the association, and determine what his rights are under it, and thus render those questions *res judicata*. This contention cannot be sustained. The case made and the relief sought not being within the jurisdiction of the court, it has no power to construe the contract. Whenever a court determines that it has no jurisdiction of a case, it should express no opinion upon the merits of the controversy. The only course which a court can rightfully pursue in such a case is to decline to speak at all where it cannot speak by the law.

We are of opinion that *there is no error in the decree complained of, and it must be affirmed.*

Cardwell, J., absent.

UTAH SUPREME COURT.

H. Parley KIMBALL, *Respt.*,
v.
GRANTSVILLE CITY *et al.*, *Appts.*

(.....Utah.....)

- *1. Article 5 of Amendments to the Constitution of the United States is a restriction upon the legislative functions of the Federal government, not of a state government.
2. Section 22, art. 1, of the Constitution of Utah is not a limitation on the taxing power of the state, but is a limitation on the exercise of the power of eminent domain.
3. The whole lawmaking power of a state, except such as is reserved by the state or Federal Constitution, having been committed to the legislature, in the absence of any constitutional restraint, express or implied, the legislature may act upon any subject within the sphere of the government; and if, in the absence of any constitutional restriction, it makes a law, there is no authority in the government which can declare it void, and no court has power to arrest its execution.
4. Although, in the passage of laws, there may have been an abuse of the taxing power, unless some constitutional provision is violated courts have no authority to prevent their execution.
5. Under § 5, art. 13, Const., the legislature is prohibited from imposing a tax upon property within any city for municipal purposes, but is given the right to delegate that power to the municipality; under § 10, Id., property subject to taxation is limited to real or personal property within the limits of the authority levying the tax; and, the extent of the territorial limits of a municipality being a matter of legislative discretion, the exercise of such discretion is not a subject of judicial revision.
6. The rule of stare decisis is not always inflexible, and when there has been but a single decision, which is clearly erroneous, or where the questionable matter was not necessarily involved in the case, or where the points involved were decided contrary to well-established legal principles, or where it appears that facts and conditions were materially different, or where it is manifest that the law has been erroneously decided, the doctrine ought not to be applied. *Kaysville City v. Ellison*, 18 Utah, —, 43 L. R. A. 81, overruled.

(April 29, 1899.)

A PPEAL by defendants from a judgment of the District Court for Tooele County in favor of plaintiff in an action brought to restrain the collection of taxes levied on plaintiff's property for the alleged reason that it

*Headnotes by BARTCH, Ch. J.

NOTE.—On the question of the municipal taxation of rural lands within the limits of the corporation, see *note* to *Briggs v. Russellville* (Ky.) 34 L. R. A. 193. See also *Farwell v. 45 L. R. A.*

was unlawfully included within the limits of the defendant corporation. *Reversed.*

The facts are stated in the opinion.

Messrs. Rawlins, Thurman, Hurd, & Wedgwood, for appellants:

Under the express terms of the statutory provisions all property within the corporate limits is subject to the payment of city taxes.

The statutory provisions requiring the payment of city taxes upon all property within the corporate limits do not violate any provisions of the state or Federal Constitutions, but are a valid and lawful exercise of the legislative functions, and should be given full force and effect.

Taxation is not the taking of property without due process of law.

People v. Daniels, 6 Utah, 288, 5 L. R. A. 444; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, Affirming 85 Pa. 170, 27 Am. Rep. 633; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544; *Cooley*, Const. Lim. 5th ed. pp. 437 *et seq.*

The constitutional prohibition against taking private property without just compensation is not a limitation upon the taxing power.

2 Dill. Mun. Corp. § 738; *Desty*, Taxn. pp. 30, 31; *Hare*, Am. Const. Law, 332; *Potter's Dwar. Stat.* 404 *et seq.*; *Cooley*, Const. Lim. 5th ed. p. 620; *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Mobile County v. Kimball*, 102 U. S. 691, 702, 26 L. ed. 238, 241.

The doctrine of stare decisis cannot be logically applied in the case at bar, and even if it could be, there are certain limitations to the doctrine which this court is in duty bound to consider.

26 Am. & Eng. Enc. Law, p. 36; *Bane v. Wick*, 6 Ohio St. 14; *Gwin v. McCarroll*, 1 Smedes & M. 371; *McFarland v. Pico*, 8 Cal. 631; *San Francisco v. Spring Valley Water-works*, 48 Cal. 509; *Aud v. Magruder*, 10 Cal. 291; *Hardigree v. Mitchum*, 51 Ala. 151; *Linn v. Minor*, 4 Nev. 462; *Hollinshead v. Von Glahn*, 4 Minn. 190; 1 Kent, Com. 477; *Pratt v. Brown*, 3 Wis. 609; *Butler v. Van Wyck*, 1 Hill, 459; *Oallender v. Keystone Mut. L. Ins. Co.* 23 Pa. 474.

Courts will not determine a statute to be unconstitutional unless it is plainly and palpably in contravention of the fundamental law.

Cooley, Const. Lim. 6th ed. pp. 216, 217.

If the constitutional and unconstitutional parts of a statute are so connected and blended together in subject-matter and construction that the unconstitutional portion cannot be separated so as to leave the valid portion full and complete, the whole will be declared unconstitutional.

Des Moines Brick Mfg. Co. (Iowa) 35 L. R. A. 63; and *Kaysville v. Ellison* (Utah) 43 L. R. A. 81, which is overruled in the above case.

Cooley, Const. Lim. 6th ed. p. 211.

If the city of Grantsville has not the power to tax all the real and personal property within the city for municipal purposes, then clearly it has not the power of taxation at all.

Mr. James A. Williams, for respondent:

The city is compelled to ask this court to overrule all the following cases:

Salt Lake City v. Wagner, 2 Utah, 400; *People v. Daniels*, 6 Utah, 288, 5 L. R. A. 444; *Ellison v. Linford*, 7 Utah, 166; *Cook v. Crandall*, 7 Utah, 344; *Kaysville City v. Ellison* (Utah) 43 L. R. A. 81.

The constitutional provision should be applied to the appropriation of private property to public use in the form of money, under the right of taxation, as well as the appropriation of real estate or other property to such use under the right of eminent domain.

People v. Daniels, 6 Utah, 297, 5 L. R. A. 444; *Ellison v. Linford*, 7 Utah, 166; *Cook v. Crandall*, 7 Utah, 344; *Kaysville City v. Ellison* (Utah) 43 L. R. A. 81; *Nicholasville v. Rarick*, 19 Ky. L. Rep. 1415.

It is better that the law be settled than that it always be right.

Wells, *Res Adjudicata & Stare Decisis*, 578.

The legislature considered that the law was settled upon this subject when it enacted chap. 15, Utah Rev. Stat. 1898, 150, which provides how citizens living in these outlying districts, but within the city limits, may proceed to have such adjacent territory cut off from the city proper.

Philadelphia Baptist Asso. v. Hart, 4 Wheat. 2, 4 L. ed. 499; *Vidal v. Philadelphia*, 2 How. 129, 11 L. ed. 206.

Bartch, Ch. J., delivered the opinion of the court:

This action was brought to restrain the collection of a city tax levied upon the property of the respondent for the year 1897 by the local authorities of Grantsville City. It appears that Grantsville City is a municipal corporation of the third class, incorporated by act of the territorial legislature (Utah Comp. Laws 1888, § 1511), and its name and boundaries were "perpetuated" under § 311, Rev. Stat. 1898. The city's charter provides for a city government with power, among other things, to levy and collect taxes for city purposes, on all taxable property within its corporate limits. Utah Comp. Laws 1888, §§ 1512 *et seq.* The area of the city is about $4\frac{1}{2}$ miles square, and has a population, as appears from the findings of fact, of about 1,000. The lands on which the tax in controversy was levied are situate about $1\frac{1}{2}$ miles from the platted and built-up portion of the city, and are used for agricultural purposes. At the trial a portion of these lands were held to be within the range of municipal benefits, subject to city taxation, while the remaining portion was held to be without the range of such benefits, and therefore not subject to such taxation, although all these lands lie within the territorial limits of the city. The ques-

tion of paramount importance presented on this appeal is whether the several statutory provisions relating to Grantsville City, and requiring the payment of city taxes upon all property within the corporate limits of the city, are violative of any provision of the state or Federal Constitutions, since such provisions of statute authorize the taxation, for city purposes, of lands lying outside the platted and improved portion of the city, and used only for the business of agriculture; in other words, is such taxation a lawful exercise of the legislative functions of the state? To burden such lands or property with city taxes is not inhibited by the provision of article 5 of Amendments to the Constitution of the United States, that private property shall not be taken "for public use without just compensation," because that article is a restriction upon the legislative functions of the Federal government, and has no application to such functions of a state government. *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658. The appellants insist, and the respondent concedes, that the exercise of such legislative power by the state is not in violation of § 1, art. 14, U. S. Const., wherein it is provided that no state shall deprive any person of his property "without due process of law." We need, therefore, give these provisions of the Constitution of the United States no further consideration in the disposition of this case. It is insisted, however, that a portion of the lands are situate beyond the range of municipal benefits, and that, as to such lands, a tax for city improvements and expenses is inhibited by § 22, art. 1, of the Constitution of this state, which provides: "Private property shall not be taken or damaged for public use without just compensation." The question is, Does this provision of the Constitution relate only to the right of eminent domain, or does it also limit the power of taxation? Private property may be taken constitutionally for public use, both by the right of eminent domain and by taxation. The right of eminent domain and the right of taxation are both founded in necessity. They are rights reserved by the people, in their collective capacity, over the property of individuals, and therefore are powers inherent in the sovereignty itself. The power of the state over the property of its subjects extends, not only to taxation and eminent domain, but also to public morals, public health, police, and probably other public interests, and may be exercised by resuming a portion of such property whenever public exigencies demand it. All such governmental rights have their foundation in the social system, and are necessary for the public weal. Hence the government has power to compel the relinquishment of individual interests when it becomes necessary for the benefit of all. While it is true that eminent domain and taxation rest substantially on the same foundation, and that by either right private property may be taken for public use, there are, nevertheless, important distinctions between the two rights. The power of eminent domain operates on real property principally, and seldom, if

ever, even in time of war, are the exigencies of government such as to require the taking of money by virtue of this power, and never in time of peace. This, however, seems to result from the title to the landed property being in the body politic, as distinguished from the derivative title of the subject to his property. The doctrine that the nation or the people in their organized capacity own the soil had its origin in antiquity. This prevailed under the feudal system, which seems to have originated from the military policy of the Celtic nations, who, at the declension of the Roman Empire, migrated into all the European regions, and, to secure their new acquisitions, obtained by right of conquest, continued in their respective colonies. The lands were allotted by the conquering general to the superior military officers, and by them again parceled out to the inferior officers and most deserving soldiers as a reward for services, conditioned, however, that the possessor would faithfully perform certain stipulated service to his lord. "Allotments thus acquired mutually engaged such as accepted them to defend them, and as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers, as well as receivers, were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous, irregular way, government, and, to that purpose, subordination, was necessary." 2 Bl. Com. 45. The fundamental maxim of feudal tenure was that the titles to landed property were originally granted by the sovereign, and were therefore held, either directly or indirectly, of the Crown. The dominion or ultimate property of the feud remained in the King or grantor, and the title of the grantee or vassal was subject to such dominion. In the process of time the feudal system came to be regarded more in the light of a civil establishment than in that of a military plan, and the title of the grantee became more certain; but still the rights of the Crown in the landed property, for the purpose of government, remained supreme. So, in the United States, the land almost, if not quite, exclusively was originally granted by the King, the proprietaries whom he enfeoffed, the states which succeeded to the proprietary rights, or the Federal government. It is because of such ownership that one government may, under circumstances requiring it, exclude the subjects of another, to prevent injustice to its own subjects, and protect the nation from "peaceful invasion which, under the guise of emigration, would subvert its religion, institutions, and laws." 1 Hare, Const. Law, 334. From the same source comes the right of eminent domain, and it enables the state to resume such portions of the landed property as may be needed for public use, in improvements and salutary measures, which concern the people as a whole. This power operates upon property to appropriate it specifically to some and which cannot be attained in any other way, and divests the individual wholly of his title, and reverts it in the sovereignty; thus pre-

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venting the individual owner from thereafter making any use of it whatever. The property so taken may be, and generally is, by the state turned into an entirely different use from that in which it was employed by the former owner; or it may be damaged, or destroyed altogether, as the exigencies of the public may require. And, when property is taken or destroyed by virtue of this right, there is no thought of just contribution, by the owner, of his share of the public burden, for such is not the case, since the value of the property taken is so much beyond his share. Nor is it material whether any other owner is likewise or at all deprived of his property. Under the power of eminent domain the owner may be compelled to surrender his residence, or farm, or the very property which long enjoyment and use have most endeared, without any other compensation than the fair market value thereof; and such compensation, and only such, he is entitled to by virtue of the provision of the Constitution here under consideration. That provision relates to the right of eminent domain, and prevents the damaging or taking of any private property by the sovereignty without just compensation. Therefore, when the state exercises the right, it becomes a debtor for the property so taken or damaged. The taking of private property under the right of eminent domain may also be likened to a sale by the owner, differing therefrom only in that the transfer of the title may be compelled by the government, and the price determined by proper officers or a jury. Such are some of the incidents connected with the exercise of the right of eminent domain. 1 Hare, Const. Law, 331-333; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

Now, of the right of taxation. It operates upon all persons, and upon all private property, for the benefit of all. It exacts money or services according to some rule of apportionment, as contribution from individuals for improvements, and for the support of the government, without any thought of compensation, except that the objects of public utility promoted thereby are supposed to return to the individual benefits equal in value to the amount of his tax or contribution to the public burden. Taxation, however, does not divest the owner of his title to property except in case of failure to pay the tax. Nor does it prevent the owner from enjoying it, or making any use of it. Nor does it injure or destroy it. This power simply imposes a burden, which is supposed to fall equally upon all, for the maintenance of the government, and improvements that are supposed to enhance the interests of all. The obligation of such burden is discharged by the payment of money, or, in some instances, by service; as, for instance, in the building of roads, bridges, and the like. Taxation, therefore, will always provide the government with money, but not with any other property, and without the power to compel contributions for public use in money no government could exist. *Potter's Dwarrr. Stat.* 403-405.

From the foregoing observations, it seems

clear that there are material distinctions between the right of eminent domain and the right of taxation, although both originated in political necessity, and rest substantially on the same foundation. The former, as we have seen, divests title of owner, and prevents further use or enjoyment of the property by him; the latter does not affect title of, nor use, nor enjoyment by the owner. The former makes direct, actual compensation for the property taken or damaged; the latter, theoretical or indirect compensation for the tax,—such as is supposed will be received by the taxpayer on account of benefits. So the former operates upon the property of an individual without reference to that of others, not to enforce a ratable and equitable portion of a contribution to the public burden, but to obtain for public use so much beyond; the latter operates upon all private property, whether it belongs to individuals or corporations, to compel a proportionate contribution for the use of the government. The surrender of landed property may be compelled by the right of eminent domain, but not by taxation, and money may always be obtained by taxation, but not by eminent domain. Thus, from these considerations, and in view of the incidents peculiar to each of these powers of the government, it is difficult to perceive how the provision of the Constitution that private property shall not be taken or damaged for public use without just compensation, can be interpreted to be a limitation upon the taxing power of the state. It is true that money is private property and that taxation takes money for public use, and thus may be said to take private property for such use without direct, actual compensation, or any compensation except such as results from the public benefit, in which all are supposed to have an interest. If, therefore, this should be so rigidly interpreted as to make it fall within that constitutional inhibition, it would be a menace to the very existence of the government, because of its susceptibility to use as an instrument to arrest all governmental operations, for upon every occasion of the levying of a tax upon the private property in the state or in a district the owners thereof, or any of them who felt themselves aggrieved, might, on the ground, real or supposed, that the tax was in excess of the benefits, and therefore its exaction a taking of private property without just compensation, prevent, by proceedings in court, the collection of the tax until a decision could be obtained. Interminable litigation, endless delay in the collection of taxes, and interference with improvements and administration of the government, would be the natural sequence. No such results were intended by the framers of the Constitution, nor should they be aided by judicial construction. We are therefore of the opinion that the constitutional provision prohibiting the damaging or taking of private property for public use without just compensation is not a limitation on the taxing power of the state, but is a limitation on the exercise of the power of

eminent domain, and this we conceive to be in accord with the weight of authority.

In 1 *Desty*, Taxn. p. 30, the author says: "Private property may be taken for public use either by the power of taxation or the power of eminent domain; but, while the right to take private property for public use under the power of eminent domain is conditioned upon just compensation, the taxing power is not thus limited." So, in *Potter's Dwarrr. Stat.* 404, it is said: "The restriction on taking private property without compensation does not apply to the power of taxation." In *Cooley, Const. Lim.* 613, it is observed: "When the Constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain." In *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238, Mr. Justice Field, delivering the opinion of the court, said: "The expenses of the work were, of course, to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution. Taxation only exacts a contribution from individuals of the state or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But, when private property is taken for public use, the owner receives full compensation." So, in *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305, Mr. Justice Swayne, delivering the opinion, said: "The objection that these acts take private property for public purposes without compensation, and hence are within the prohibition of the state Constitution upon that subject, is also without foundation. That clause of the Constitution refers solely to the exercise by the state of the right of eminent domain." In the leading case of *People, Griffin, v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 286, Mr. Justice Rugles expressed the opinion that money could not be exacted by the government by right of eminent domain, excepting, perhaps, for the direct use of the state at large, and where the state at large was to make the compensation, and then observed: "The exigencies of a state government can seldom require the taking of money by virtue of this power, even in time of war, and never in time of peace. The framers of the Constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary. Money can always be had by taxation; lands cannot; and therefore lands may be taken by right of eminent domain, but money may not." And in *Stewart v. Polk County Supers.* 30 Iowa, 9, Mr. Justice Miller, speaking for the court, said: "While the right to take private property for public use is conditioned upon making compensation, the taxing power is not thus limited.

Indeed, the very idea of taxation implies the power to collect levies of money from the people without making any direct pecuniary compensation. The only revenue possessed by the state is derived from taxation, and it would be absurd to say that she should compensate the citizen for taxes collected. It is well settled that this clause of the Constitution requiring compensation to be made where private property is taken for public use is not a limitation upon the taxing power." Dill. Mun. Corp. § 738; Cooley, Taxn. 237; *People, Crowell, v. Lawrence*, 41 N. Y. 137; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Guilford v. Cornell*, 18 Barb. 615; *M'Masters v. Com.* 3 Watts, 292; *Williams v. Detroit*, 2 Mich. 560; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *Schenley v. Allegheny*, 25 Pa. 128; *Com. v. Alger*, 7 Cush. 53; *Clarke County Ct. Justices v. Paris, W. & K. River Turnp. Co.* 11 B. Mon. 143; *Extension of Hancock Street*, 18 Pa. 26; *Booth v. Woodbury*, 32 Conn. 118; *Norris v. Waco*, 57 Tex. 635; *Aurora v. West*, 9 Ind. 74.

Having determined that the constitutional inhibition against the taking or damaging of private property for public use without just compensation has no application to the taxing power of the state, we come now to the inquiry whether, notwithstanding such determination, the tax in controversy is a lawful exercise of the power of taxation; in other words, whether the statutes hereinbefore referred to, which fix the boundaries of Grantsville City so as to include large portions of agricultural land, and provide for the taxation, for municipal purposes, of all property within the territorial limits, are such enactments as are within the legislative functions of the state government. The powers of the state government were, by the organic law, divided into three distinct departments,—the legislative, executive, and judicial,—and no person or persons whose duty it is to exercise the functions of one department can exercise any power belonging properly to either of the others, except in cases expressly authorized by the Constitution. The legislative power was vested exclusively in the legislature, and it is within its sphere to make the laws for the government of the state. The power to execute the laws was referred to the executive department, and the power to declare what are the laws to the judiciary. The departments are all upon the same plane; all are co-ordinate branches of the same government; each absolute within its sphere, except as limited or controlled by the Constitution of this state or of the United States. The apportionment of distinct power to one department of itself implies an inhibition against its exercise by either of the other departments. The state having thus committed its whole lawmaking power to the legislature, excepting such as is expressly or impliedly withheld by the state or Federal Constitution, it has plenary power for all purposes of civil government. Therefore, in the absence of any constitu-

tional restraint, express or implied, the legislature may act upon any subject within the sphere of the government. It may enact laws affecting the state at large, and all its people; and for the purpose of creating local jurisdictions it may establish districts, provide for the incorporation of towns and cities, and enact laws for the government of such districts and municipalities. So, the legislature may, when independent of any prohibition, expressly made or necessarily implied, make special laws relating to any municipality, section, or district within the state; and, whenever an inquiry is directed questioning the constitutionality of a legislative enactment, it is for him who asserts its invalidity to show that it is forbidden. It is wholly within the discretion of the legislature to determine whether, concerning any subject, such conditions or such facts and circumstances exist as to warrant it to act. It is the sole judge as to whether an exigency or such cause exists as requires the enactment of a law, and, in the absence of any constitutional restriction, if it makes a law, there is no authority in the government which can declare it void. Independently of any repugnance between a legislative act, and any constitutional limitation or restriction, a court has no power to arrest its execution, however unwise or unjust, in the opinion of the court, it may be, or whatever motives may have led to its enactment. So, likewise, it is within the power of the legislature to establish administrative boards in local jurisdictions, and distribute to them such administrative functions as, in its judgment, it may deem necessary and convenient for the public welfare, and may retain others of such functions to be exercised by the central power; and such arrangements it may change from time to time, as, in its discretion, the public welfare may require. In *Bank of Chenango v. Brown*, 26 N. Y. 467, Mr. Justice Emott, speaking for the court, said: "The legislature of this state possess the whole legislative power of the people, except so far as they are limited by the Constitution. In a judicial sense, and so far as courts are concerned with its application and construction, their authority is absolute and unlimited, except by the express restrictions of the fundamental law. The power to pass a general act for the incorporation of villages does not result from the directions contained in the Constitution that the 'legislature shall provide for the organization of cities and incorporated villages,' or that 'corporations may be formed under general laws,' but from the general authority of the legislative body." *People, Wood, v. Draper*, 15 N. Y. 532; *Turner v. Althaus*, 6 Neb. 54. There is, without doubt, plenty of room, within the pale of the Constitution, for ill-advised legislation and bad government, and it is not strange that such is the fact, because all human institutions are imperfect. None are perfect. The provisions of the Constitution for frequent renewals of the legislature, however, tend to restrain bad legislation by placing the positions of legislators in the

hands of their constituents, and afford a better remedy than any which the judiciary can provide. This is true as to legislation for revenue as well as for any other purpose. The taxing power of the state is lodged absolutely in the legislature, and, as the responsibility of enacting laws devolves exclusively upon that branch of the government, whether the right of taxation has been exercised justly or unjustly, wisely or unwisely, it is not for the judiciary to inquire. That is a matter between the people and their representatives. So, even though in some instances there be an abuse of the taxing power. Unless such laws are in conflict with some constitutional provision, either expressly or by implication, the courts have no authority to prevent their execution. On this subject Mr. Chief Justice Marshall, in *M'Culloch v. Maryland*, 4 Wheat. 316, 428, 4 L. ed. 579, 606, says: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state therefore give to their government a right of taxing themselves and their property, and, as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative to guard them against its abuse." And, again he speaks of it as unfit for the judicial department to inquire "what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." In *Providence Bank v. Billings*, 4 Pet. 514, 562, 7 L. ed. 939, 956, the same eminent jurist observes: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that portion must be determined by the legislature. This vital power may be abused, but . . . the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security . . . against unjust and excessive taxation, as well as against unwise legislation." Accepting this as sound doctrine, as we safely may, would not the judicial department itself be guilty of transcending its constitutional

power were it to inquire into the expediency, wisdom, or justice of the legislation in question in this case? Would not this department likewise transcend its power if it would undertake to inquire into the conditions and facts on which the legislature acted in creating the municipality of Grantsville City, fixing the boundaries, and providing for the raising of revenue to maintain the municipal government and defray its expenses, and then substitute our judgment as to the sufficiency of such conditions and facts to warrant the legislation, which has resulted in the imposition of the tax complained of, for that of the legislature? Yet this is substantially what we are asked to do. This, in itself, would be an abuse, because it would be a usurpation of power by one department of the government which the people absolutely vested in another. We are aware of no limitation or restriction, and none has been pointed out by counsel, which authorizes us to set aside the legislation in question. But, notwithstanding the validity of the statutes under which the tax in dispute was levied it appears to be maintained that the municipality had no right to tax a certain portion of respondent's land, because it is used only for agricultural purposes, is situate without the improved and platted portion of the city, and beyond the range of municipal benefits, although within the territorial limits of the municipality. The position here assumed and contended for appears to be that the theory of repayment to the owner of the property taxed in benefits and improvements in which he is supposed to have an interest applies only as to property situated within the corporate limits, which is actually, not in theory, benefited because of the local government. But who, it may be asked, is to determine the range of municipal benefits? Who is to establish the line beyond which no benefits accrue to the owner of property because of the public improvements and maintenance of the municipal government? To determine where the exact location of such a line is,—where municipal benefits cease,—is a question of fact upon which, without doubt, persons would differ widely. Some would probably assert that municipal benefits are confined to a circle embracing the improved portions of the city, where the police patrol and the firemen ply their avocations; others might insist that it included the platted portion of the city; and yet others might maintain, with much plausibility, that agricultural lands, for a considerable distance from the improved portion of the city, receive benefits in enhanced value and convenience to the owner because of the local government. Again, the facts might be sufficient to convince some minds, notwithstanding that the owners of property in the business portion of a city are benefited most by the municipal government, that those remote from such business portions receive some benefit,—less, it is probably true, as the distance from the center of the city increases,—and justify such taxation on the ground that, while the benefits to property remote-

ly situated were less, the valuation on which the assessment would be made would also be less, in proportion as the distance from the center of the city increased. Since, therefore, the question of the range of municipal benefits is one based on facts, and as there is room for a wide difference of opinion respecting it, would not, even if the judicial department could and were disposed to assume control of the matter of establishing the boundaries of municipalities, a judicial inquiry into the facts, after the usual method in courts, and a decision based upon the statements of witnesses, be likely to prove quite as unsatisfactory as the conclusion of legislators reached from personal knowledge and investigation, which they are supposed to possess and make? Would not the action of the legislature be more conclusive, more certain and reliable, more consistent with reason and sound policy, than any decision of a court could be? Take, for instance, the case at bar, where the court below decided that some of respondent's land was within and some without the range of municipal benefits. Suppose this court were to affirm the judgment, who can say that next year there would not be another suit to enjoin the collection of a similar tax on the same property on the ground of a change in the range of municipal benefits, and so on from year to year? The results would be fruitful sources of litigation, constant delay in the collection of taxes, and arrest of governmental operations. To obtain these results, and finally establish and settle this doctrine in this state, it would be necessary for us either to declare the statutes which created the municipality and fixed its boundaries unconstitutional, although in conflict with no constitutional limitation or restriction, and thus destroy the tax district itself, or assume the role of legislators, and, under the guise of judicial decision upon questions of fact absolutely within the scope of the legislature, change the laws so as to conform to our notions of the range of municipal benefits. Were the doctrine here contended for finally to prevail, it would place the power of the judicial department above that of the legislative in matters affecting, not only the vital interests, but the very existence of the government. If the doctrine obtains as to towns and cities, it obtains with equal force as to other districts, for who can say that property situate within a remote part of a county, without even a public road to it, is actually benefited by the county government. It assumes that the judiciary, instead of the legislature, is to be the final arbiter of taxation; that taxation is to be regulated by judicial, instead of legislative, discretion. It makes actual, instead of probable or supposed, benefits the test, and clothes the judiciary with power to try the validity of a tax by a test neither defined nor prescribed by the Constitution. It would obstruct the exercise of powers by the legislature, which are inherent in that department, and restrain that branch of the government from action in cases in which the organic law has left it free.

to act, and yet afford no security against abuse of the taxing power.

Again, the Constitution has imposed upon the legislative department the duty of exercising the taxing power in wisdom and justice, and so as to prevent abuses. To assume, as this doctrine would indicate, that such duty has been neglected, is a denial of that reasonable confidence which one co-ordinate branch of the government should always entertain towards the others. That occasionally abuses occur in taxation, and that occasionally agricultural lands are included within the corporate limits of towns and cities, and taxed unjustly for municipal purposes, can scarcely be doubted, and it may be true that the tax in question herein is an unjust burden on the owner of the property, but, however this may be, as we have seen, the taxing power of the state has been referred exclusively to the legislature, and therefore, as the laws under which the tax was imposed are not in conflict with any constitutional prohibition expressly made or necessarily implied, we can grant no relief. In such case the legislature alone can afford a remedy. The judicial department cannot arrogate to itself power not within its province. Nor can it legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the Constitution. With respect to incorporated towns and cities, "whenever the corporate boundaries are established, it is to be understood that whatever property is included within those limits has been thus included by the legislature, because it justly belongs there, as being within the circuit which is benefited by the local government, and which ought consequently, to contribute to its burdens." *Cooley, Const. Lim.* 620. "And an act for levying taxes and providing the means of enforcement is, as we have seen, within the unquestioned and unquestionable power of the legislature." *Cooley, Taxn.* 48.

In *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, where the limits of a city were extended so as to include agricultural land, Mr Justice Miller, delivering the opinion of the court, said: "It is not denied that the legislature could rightfully enlarge the boundary of the city of Pittsburgh so as to include the land. If this power were denied, we are unable to see how such denial could be sustained. What portion of a state shall be within the limits of a city, and be governed by its authorities and its laws, has always been considered to be a proper subject of legislation. How thickly or how sparsely the territory within a city must be settled is one of the matters within legislative discretion. Whether territory shall be governed for local purposes by a county, a city, or a township organization, is one of the most usual and ordinary subjects of state legislation." And, again, he said: "It may be true that he does not receive the same amount of benefit from some or any of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust

relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it or can insure in this respect absolute equality of burdens, and fairness in their distribution among those who must bear them? We cannot say judicially that Kelly received no benefit from the city organization." Mr. Justice Gibson, in *Kirby v. Shaw*, 19 Pa. 258, discussing the question of taxation, observed: "If equality were practicable, in what branch of the government would power to enforce it reside? Not in the judiciary, unless it were competent to set aside a law free from collision with the Constitution, because it seemed unjust. It would interpose only by overstepping the limits of its sphere, by arrogating to itself a power beyond its province, by producing intestine discord, and by setting an example which other organs of the government might not be slow to follow. It is its peculiar duty to keep the first lines of the Constitution clear; and not to stretch its power in order to correct legislative or executive abuses. Every branch of the government, the judiciary included, does injustice for which there is no remedy, because everything human is imperfect. The sum of the matter is that the taxing power must be left to that part of the government which is to exercise it." So, in *Washburn v. Oshkosh*, 60 Wis. 453, Mr. Chief Justice Cole said: "It may be unwise, even unjust, to include within the limits of a city or village lands used for agricultural purposes, and impose upon them the additional burdens of such municipalities. But where is the remedy? Certainly not in the courts. Confessedly, the legislature has power, under the Constitution, to provide for the organization of cities and incorporated villages, which carries with it the power to fix the territorial boundaries of such public corporations. If the legislature sees fit to include agricultural lands within the boundaries, what right have the courts to control or review that legislative discretion? Can the courts say to the legislature it must not annex this territory or that to the municipality; that it has not ample power to prescribe the extent of the city or village limits? It seems to us a very plain proposition that such matters rest entirely within the discretion and under the control of the legislature." *Cooley, Taxn.* 47, 149, 157; 2 *Kent. Com.* 306; 15 *Am. & Eng. Enc. Law*, p. 1013; *Cooley, Const. Lim.* 623; *Dill. Mun. Corp.* §§ 185, 735, 737; *Linton v. Athens*, 53 Ga. 588; *Turner v. Althaus*, 6 Neb. 54; *Kelly v. Pittsburgh*, 85 Pa. 170, 27 *Am. Rep.* 633; *People v. Crowell v. Lawrence*, 41 N. Y. 137; *Pence v. Frankfort*, 19 Ky. L. Rep. 721; *People v. Griffin v. Brooklyn*, 4 N. Y. 419, 55 *Am. Dec.* 266; *Hewitt's Appeal*, 88 Pa. 55; *Burnett v. Sacramento*, 12 Cal. 84, 73 *Am. Dec.* 518; *Frankfort v. Scott*, 19 Ky. L. Rep. 1068; *Nicholasville v. Rarick*, 19 Ky. L. Rep. 1415; *Cary v. Pekin*, 38 Ill. 154, 30 *Am. Rep.* 543; *Madry v. Cox*, 73 Tex. 538; *Giboney v. Cape* 45 L. R. A.

Girardeau, 58 Mo. 141; *St. Louis v. Allen*, 13 Mo. 400; *Hammett v. Philadelphia*, 65 Pa. 146, 3 *Am. Rep.* 615; *Washington Avenue*, 69 Pa. 352, 8 *Am. Rep.* 255; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 561; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544; *Logansport v. Seybold*, 59 Ind. 225.

While we think there can be no doubt of the validity of tax in this case upon principle, sound reason, and the authority of adjudged cases and text writers, still the constitutionality of the statutes hereinbefore considered, and the power of the municipality to tax all the property within the corporate limits of the city, will become yet more manifest by further reference to the Constitution. Section 5, art. 13, provides: "The legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by law, vest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporation." This section expressly prohibits the legislature from imposing a tax for municipal purposes on the property situate within any city, and then authorizes that body to empower the municipality to assess and collect taxes for all purposes of the corporation. Clearly, the legislation in question herein, which gives such authority to the local government, is in accord with this provision of the organic law. And § 10 of the same article provides: "All corporations or persons in this state, or doing business herein, shall be subject to taxation for state, county, school, municipal, or other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." Under this provision, all property, real and personal, situate "within the territorial limits of the authority levying the tax," is subject to taxation for "municipal or other purposes." When, therefore, as in the case at bar, a city has been incorporated, and a local government established, such government is an "authority" to levy a tax. There is no limitation as to the extent of the "territorial limits" of a municipality or taxing district, and therefore, as we have noticed, the fixing of the boundaries of a city or taxing district, and amount of area it shall contain, is wholly a matter of legislative discretion, and the exercise of such discretion is not a subject of judicial investigation or revision. We are clearly of the opinion that Grantsville City has the right to tax all private property within its territorial limits.

Counsel in behalf of the respondent invokes the doctrine of *stare decisis*, and cites several cases decided by the supreme court of the late territory of Utah, and one decided by this court since statehood. We do not agree that this is a case to which that doctrine should be applied. Nor do we dispute the efficacy of the general maxim, *Stare decisis, et non quieta movere*. When a point has once been decided by an appellate court, the decision forms a precedent which should not ordinarily be departed from, and never

on any slight grounds; but courts occasionally find it necessary to overrule decisions which have been made contrary to principle and the law of the land, as established by statute, judicial decision, and the Constitution. It must be admitted that it should require strong and controlling considerations to induce a court to depart from a former decision to lay again the foundation of a law; and when there has been a series of decisions settling a question of law, and a change would seriously affect business interests established and acquired under the existing law, the rule of *stare decisis* becomes impregnable, and the law will not be changed, unless by legislative enactment. Where, however, there has been but a single decision, which is clearly erroneous, and important private or public rights are concerned, or where the questionable matter was not necessarily involved in the case or cases, or where the points involved were decided contrary to the well-established legal principles which ought to have governed, and injustice or hardship would result, or where it appears that the facts which impelled the former decisions and the conditions under which they were made were materially different from those in the case under consideration, or where it is manifest that the law has been erroneously decided, and no material property rights or business rules have been established thereunder, the doctrine of *stare decisis* ought not to be applied, so as to prevent a reconsideration of the former. Would it not be an open violation of the rule to declare that a decision, however erroneous, however opposed to legislative enactments or constitutional provision, is nevertheless conclusive evidence of the law, and that the courts make the law as well as define its application? That doctrine is founded on public policy, and is the only practical one respecting the weight and conclusiveness of judicial decisions. It is not an arbitrary rule of positive law, which forbids any thought of questioning, under any circumstances, what has once been decided, or any judicial discretion in relation thereto. It expresses our reverence for civil authority, and our demands for obedience to such authority, and presents the injunction that courts shall not, for light reasons, abandon the principles announced under solemn judgment, by their predecessors or themselves, nor without due consideration of public and private interests; but the rule does not prevent the use of judicial discretion, in a proper case, where the law has been misconceived or violated; nor does it demand that what is not law shall become the law; rather, it induces the court, if it has digressed from, to return to, well-established principles. Chancellor Kent, speaking on this subject, observed: "If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for

very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law. . . . But I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are more than one thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions, and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it." 1 Kent, Com. 476, 477. In *Callender v. Keystone Mut. L. Ins. Co.* 23 Pa. 471, where a previous decision was attached on the ground that it was not supported by the cases on which it was based, Mr. Justice Lowrie delivering the opinion, and speaking of the duty of the court to correct errors when practicable, said: "Do we violate the doctrine of *stare decisis* by now correcting the mistake, and going back to the well-established doctrine which that case has disturbed? If we do, we commit a greater error than the one we have felt bound to correct; for that doctrine, though incapable of being expressed by any sharp and rigid definition, and therefore incapable of becoming an institute of positive law, is among the most important principles of good government. But, like all such principles, in its ideal it presents its medial and its extreme aspects, and is approximately defined by the negation of its extremes." 23 Am. & Eng. Enc. Law, pp. 36, 37; Wells, Res Adjudicata, §§ 588, 613; *Linn v. Minor*, 4 Nev. 462; *Pratt v. Brown*, 3 Wis. 603; *Bane v. Wick*, 6 Ohio St. 13; *McFarland v. Pico*, 8 Cal. 626; *Aud v. Magruder*, 10 Cal. 282; *San Francisco v. Spring Valley Waterworks*, 48 Cal. 493; *Duff v. Fisher*, 15 Cal. 376; *Cluff v. Day*, 141 N. Y. 560; *Bird v. Sellers*, 122 Mo. 23; *Central Branch Union P. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163.

It will thus be seen from the foregoing considerations and authorities that the doctrine of *stare decisis* is not an inflexible rule, and that there are occasions where it becomes the duty of the court to re-examine questions involved, and again subject them to judicial scrutiny. Upon examination of the facts and conditions under which the cases cited by the respondent, and because of which he invokes that doctrine, were decided, it will become apparent that the rule cannot be logically applied to the case at bar. Reference to those cases shows that

four of them were decided by the territorial supreme court, before the adoption of the Constitution, and consequently none of the constitutional questions hereinbefore considered were involved; and the essential facts therein were materially different from those herein. It is clear, therefore, that they cannot be regarded as controlling precedents. The remaining one—the case of *Kaysville City v. Ellison*, 18 Utah, —, 43 L. R. A. 81,—was decided since the adoption of the Constitution. Neither § 5 nor § 10, art. 13, Const., was considered by the court, nor does it appear from the briefs in that case that attention was called to those sections. The court, however, did consider § 22, art. 1, Id., and held it to be a limitation upon the taxing power, as well as upon the right of eminent domain, contrary to the views hereinbefore expressed. In construing this section, the court followed the case of *People v. Daniels*, 6 Utah, 288, 5 L. R. A. 444, which is one of the cases decided before statehood; and in support of its position that the constitutional provision, "Private property shall not be taken or damaged for public use without just compensation," applies to taxation, cited *Bradshaw v. Omaha*, 1 Neb. 16, several Iowa and Kentucky cases, and *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627. The Nebraska case, it appears, was overruled in *Turner v. Althaus*, 6 Neb. 54. In the Missouri case the court simply held that the legislature of that state could not authorize a municipal corporation to tax, for its own local purposes, lands lying beyond the corporate limits. The law of Missouri respecting the subject of taxation appears to be in harmony with the views herein expressed. *Giboney v. Cape Girardeau*, 58 Mo. 141. In reference to the Iowa and Kentucky cases it may be said that, while some of the decisions were made by very eminent judges, it seems difficult to harmonize them with the conceded principles which govern the law of taxation. They appear to be at variance with nearly, if not quite, all the other American courts. Observes Judge Cooley, in his work on Constitutional Limitations, 6th ed., on page 621: "The rule of apportionment must be uniform throughout the taxing district, applicable to all alike; but the legislature have no power to arrange the taxing districts arbitrarily, and without reference to the great fundamental principle of taxation that the burden must be borne by those upon whom it justly rests. The Kentucky and Iowa decisions hold that, in a case where they have manifestly and unmistakably done so, the courts may interfere, and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all. It must be manifest, however, that the effect of the decisions in the states last referred to is to establish judicially two or more districts within a municipality where the legislature has established one only; and 45 L. R. A.

as this is plainly a legislative function, it would seem that the legislature must be at least as competent to establish them directly as any court can be to do the same thing indirectly." See also Cooley, Taxn. 158, 159; *Turner v. Althaus*, 6 Neb. 54; *Giboney v. Cape Girardeau*, 58 Mo. 141. Since the adoption of the new Constitution by the state of Kentucky, with provisions, respecting the subject of taxation, very like those in our own Constitution on the same subject (Ky. Const. §§ 171, 174), the supreme court of that state, in considering the precise question, respecting the taxation by a municipality of agricultural land situate within its territorial limits, which had on numerous previous occasions been before that court, has declared the tax valid, and refused to follow the earlier decisions. In *Nicholasville v. Rarick*, 19 Ky. L. Rep. 1415, the court said: "It is our opinion when taxes are imposed by municipalities they shall be levied and collected on all property situated within the territorial limits of such municipalities, except it be exempted from taxation in virtue of the provisions of the Constitution. When taxes are imposed by proper authority in the state, county, or any subdivision thereof, or taxing district, they shall be levied and collected on all property situated within the territorial limits of the authority levying them, except it be exempted by the Constitution." *Pence v. Frankfort*, 19 Ky. L. Rep. 721; *Frankfort v. Scott*, 19 Ky. L. Rep. 1068. Thus it will be observed that the supreme court of Kentucky is now in line with the almost uniform current of authority on the question of taxation. It will also be noticed upon examination that the principles announced in *Kaysville City v. Ellison* have no such support of authority as ought to prevent us from again considering the vexed questions, and, upon finding we have digressed, from returning to the true and well-beaten path. Especially is this so since that decision is of recent date, and no business rule or rule of property has grown up under it, and no property rights will be disturbed thereby. The correctness of the judgment in the *Kaysville Case*, it relating to municipal license, and the essential facts differing materially from those herein, is not necessary for us to discuss or decide. We are of the opinion that the tax in question herein is valid, and that the court erred in restraining its collection.

The judgment must therefore be reversed, with costs, and the cause remanded, with directions to the court below to set aside its decree, dissolve the restraining order, and enter a decree in favor of appellants.

It is so ordered.

Miner and Baskin, JJ., concur because of the provisions in the Constitution.

Motion for modification of decree overruled.

STATE of Utah, *Resp't.*,
v.

W. A. MANNION, *Appt.*

(.....Utah.....)

*1. Under the Constitution (art. 1, § 12) and the statutes of this state, a person accused of crime has the constitutional right to be present at his trial in person and by counsel; to appear and defend against the accusation preferred against him in person and by counsel; to examine and cross-examine witnesses in person or by counsel; to see the face and hear the testimony of the witnesses; the right to see and be seen, to hear and be heard, under such reasonable regulations as the law establishes; to be confronted by his accusers and witnesses against him face to face; and he cannot be denied this constitutional right because of the youth, incapacity, or unwillingness of his accusers to meet him face to face in the presence of the court and jury; and an order of the trial court to permit a witness to turn her back to the accused, and directing the removal of the defendant from his counsel, 24 feet away from the prosecuting witness testifying against him, so far that the defendant could neither see nor hear the witness nor see the jury on account of the distance and intervening obstacles, denied the defendant a constitutional right, and prevented him from having a fair trial.

2. In a prosecution for assault with intent to commit rape, the prosecutrix, on taking the stand, and without further question, stated that she was afraid to testify because she was afraid of the defendant, and the court, without comment or cross-examination, ordered the defendant away, out of sight and hearing of the witness and jury. *Held*, prejudicial error, because the jury might infer that the court not only believed the statement, but believed the witness had good reasons for making it.

3. While in cases of this character, where a witness is young, the court should protect the witness from imposition, regulate the procedure, and control the conduct of the accused, within the rules of law, it should also see to it that the constitutional rights of the accused are not denied him.

14. The record filed in this court must be held to import absolute verity; and although certain matters stated in the brief of counsel, but omitted in the bill of exceptions, would possibly, if they had been included, have caused a different decision, the judgment, under the circumstances, seems to be a logical sequence.

5. The trial court in a criminal case has the right, in the interests of justice, to exercise a reasonable discretion in removing the accused to some other place not without the presence of the witness and jury, without violating constitutional right of an accused person "to be confronted by the witnesses against him."

*Headnotes by *Minor, J.*

†Headnotes 4-6 by *Bartch, Ch. J.*

NOTE.—For constitutional rights of an accused person to be confronted with witnesses against him, see cases in *note* to *Gore v. State* (Ark.) 5 L. R. A. 832.

For right of prisoner to appear unmanacled at his trial, see *State v. Williams* (Wash.) 39 L. R. A. 821, and *note*.

45 L. R. A.

6. The words "to be confronted," as used in the state Constitution (art. 1, § 12), have reference to cross-examination of the witness in the presence of the accused, and not to sitting face to face in a literal sense.

(June 6, 1899.)

A PPEAL by defendant from a judgment of the District Court for Salt Lake County convicting him of an assault with intent to commit rape. *Reversed*.

The facts are stated in the opinion.

Mr. S. H. Lewis, for appellant:

If the prosecution is for a felony, the defendant must be personally present at the trial.

Bishop, New Crim. Proc. §§ 271, 273; *Lewis v. United States*, 146 U. S. 370, 38 L. ed. 1011; *Fight v. State*, 7 Ohio, pt. 1, p. 180, 23 Am. Dec. 628, *note*; *Roberts v. State*, 111 Ind. 340.

The defendant cannot waive his presence, or his rights guaranteed by the Constitution. He must be confronted with the witnesses against him.

Utah Const. art. 1, § 12; *Maurer v. People*, 43 N. Y. 1; *Lewis v. United States*, 146 U. S. 370, 38 L. ed. 1011; *State v. Thomas*, 64 N. C. 74; *Bishop*, New Crim. Proc. § 1194.

Counsel's presence does not satisfy the law. *Bishop*, New Crim. Proc. § 271; *State v. Jenkins*, 84 N. C. 812, 37 Am. Rep. 643; *State v. Myrick*, 38 Kan. 238.

In removing the prisoner, the judge assumed by that act—and so impressed the jury—that the witness spoke the truth when she said she was afraid.

The jurors are the sole judges of the facts. Utah Rev. Stat. § 3147, subd. 4; *People v. Bragle*, 88 N. Y. 585, 42 Am. Rep. 269.

Messrs. A. C. Bishop, Attorney General, *William A. Lee*, and *Ray Van Cott*, for respondent:

The order removing appellant to the place complained of did not deprive him of the right to be personally present at the trial.

3 Enc. Dict. 3736; *State v. Laxton*, 78 N. C. 570; 1 Thompson, Trials, § 964; *People v. Bragle*, 88 N. Y. 586, 42 Am. Rep. 269; 11 Crim. L. Mag. 173, 178.

The constitutional requirement that the accused shall be confronted upon his trial by the witnesses against him has sole reference to the personal presence of the witnesses for the prosecution.

Summons v. State, 5 Ohio St. 325; *Mattos v. United States*, 156 U. S. 237, 39 L. ed. 409; *Houser v. Com.* 51 Pa. 332; *Westfall v. Madison County*, 62 Iowa, 427; *Bell v. State*, 2 Tex. App. 216, 28 Am. Rep. 429.

The judge, in ordering the appellant to the position complained of, acted within the sound discretion of the court, and in no wise invaded the province of the jury.

State v. Laxton, 78 N. C. 564.

It is only in cases where the court has refused to exercise its powers, or where its discretion has been manifestly abused and where prejudice has thereby resulted to the accused, that appellate courts will interfere.

See 1 Thompson, Trials, § 964.

Mimer, J., delivered the opinion of the court:

The defendant was convicted of the crime of an assault with intent to commit a rape upon one Anna Bell Low. It appears from the record that the prosecutrix upon whom the alleged offense was attempted was about six years old, and when she was sworn, and before giving any testimony, stated in the presence of the court and jury as follows: "I am afraid to tell, because I am afraid of my papa," meaning the defendant. The defendant was at this time sitting with his counsel in front of the witness and jury; and the court thereupon, without further testimony or cross-examination of the witness, ordered the defendant to take a seat in the southwest corner of the courtroom, south of the entrance to the bar, and facing the judge, clerk's bench, and jury box. The prisoner's bench was 1 foot 5 inches in height, 27 feet from the jury box, and 24 feet west from the witness Low when testifying. The first row of jurors were seated in chairs 2½ feet high from the floor. The judge's and clerk's desks were 3 feet in height. These were the only objects intervening between the defendant and the witness, except the judge, clerk, and reporter. Witness Low, when she testified, sat in a chair 1½ feet high, and faced the jury, with her back to the defendant. From the place where the defendant was ordered to sit during the examination of the witness he could not see all of the jurors; neither could he see the witness, nor could he hear any of her testimony when given to the jury. The defendant was represented by counsel, who then and there objected to said order of the court, on the ground that the defendant was not permitted to confront the witnesses against him, which objection was overruled, and the defendant excepted to the ruling of the court. During all the time the witness was giving her testimony she sat upon a chair facing the jury, with her back to the defendant, as ordered by the court. After the testimony of this witness was finished, the defendant was permitted to return to his former seat within the bar, by his counsel. The witness Low was the only witness who testified to the *corpus delicti*. Prior to judgment upon the verdict, the defendant, by his counsel, moved the court to set aside the verdict and to grant a new trial on the ground that the trial was had in the absence of the accused; that the prosecutrix was permitted to testify with her back to the defendant, so that he could not hear her testimony, or see her face to face; that the defendant was not permitted to be confronted by the witnesses against him while testifying; that the testimony of the prosecutrix was permitted to go to the jury when the defendant was out of sight and hearing of the witness, to his prejudice; that the court during the trial ordered the defendant out of the presence and hearing of the prosecutrix when she was giving her testimony against him, and that he was prejudiced by such ruling and order of the court. From the affidavit of the defendant used on the motion for a

new trial it appears: "That on said trial one Anna Bell Low testified before the jury, on behalf of the state, and against this affiant; that before she so testified the presiding judge at said trial ordered the defendant from the presence of the witness, and ordered him to take a seat in a part of the courtroom away from the jury and witness; that by order of said court said defendant took said seat, and remained there until said witness had testified in the case against this defendant; that defendant, owing to his being ordered out of the presence of said witness, and away from the jury, by said court, could neither hear, nor did he hear, what said witness testified to, nor could he see the said witness while she testified as above stated, nor could he see the jury while she was so testifying; that the defendant then and there objected to the said first order of the said judge, and objected to being absent and out of the presence of said witness, which objection the court overruled, to which ruling of the court affiant excepted." The court denied the motion, and refused to grant a new trial, to all of which the defendant excepted. Thereupon the defendant was sentenced to imprisonment in the state prison for a period of seven years. From this judgment and conviction the defendant appeals to this court.

Under the statutes of Utah, when a defendant in a criminal case is accused of a felony, he must be personally present during the trial. This is a right he cannot waive. The public has an interest in the life and liberty of an accused person. That which the law requires and makes essential in the trial of persons accused of a felony cannot be dispensed with, either by the consent of the accused or by his failure to object to unauthorized methods pursued by those in authority. Utah Rev. Stat. 1898, § 4811; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262; 1 Bishop, New Crim. Proc. §§ 271, 273; 1 Bishop, Crim. Proc. § 273; Utah Const. art. 1, § 12; *Lewis v. United States*, 146 U. S. 370, 36 L. ed. 1011; *State v. Myrick*, 38 Kan. 238. Article 1, § 12, Const., provides that "in criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him." In this case the accused had a right to appear in the case, and defend in person and by counsel, and to be confronted by the witnesses against him. This constitutional right was denied the accused. Webster defines "confront" as follows: "(1) To stand facing or in front of; to face. (2) To stand in direct opposition; to oppose. (3) To set face to face for examination and discovery of the truth; to set together for comparison; to compare." Bouvier's Law Dictionary defines "confrontation in criminal law" to mean: "The act by which a witness is brought into the presence of the accused, so that the latter may object to him if he can, and the former may know and identify the

accused, and maintain the truth in his presence. . . . No man can be a witness unless confronted with the accused, except by consent." In Anderson's Law Dictionary (p. 226) the following definition is given: "Confront. To bring face to face. The constitutional provision that the accused shall be 'confronted with the witnesses against him' means that the witnesses on the part of the state shall be personally present when the accused is on trial, or that they shall be examined in his presence, and be subject to cross-examination by him." In *State v. Thomas*, 64 N. C. 74, it is said: "In all criminal prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other witnesses." We take it that the word 'confront' does not simply secure to the accused the privilege of examining witnesses in his behalf, but is in affirmation of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face." In speaking of the rights of the defendant upon a criminal trial, the court in the case of *Brown v. State*, 38 Tex. 483, said: "The accused should not only be within the walls of the courthouse, but he should be present where the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law has established." The doctrine now well established is that, except as to documentary evidence and dying declarations, one accused of a felony cannot be convicted except on the testimony of witnesses whom, now on the trial, or on some previous occasion, he has had the opportunity of meeting face to face, and openly examining and cross-examining, in the presence of the parties and the jury. 1 Bishop, New Crim. Proc. 1194. Under the Constitution and statutes of the state the accused had a right to be present at the trial, to be confronted by the witnesses against him, and to meet his accusers face to face. He also had the right to appear and defend against the accusation preferred against him in person and by counsel. He had the right, not only to examine the witnesses, but to see into the face of each witness while testifying against him, and to hear the testimony given upon the stand. He had the right to see and be seen, hear and be heard, under such reasonable regulations as the law established. By our Constitution it is clearly made manifest that no man shall be tried and condemned in secret and unheard. When the court ordered the defendant away from his counsel, 24 feet away from the witness who was testifying against him,—so far away that he could not hear her testimony nor see her face because of intervening obstacles,—and permitted her to turn her back to the defendant, so that he could not see her while testifying, he denied the defendant a constitutional right, and prevented him from having a fair trial. When the witness stated, in the presence of the jury, that she was afraid to tell, because she was afraid of the defendant, the court,

without further comment, or cross-examination of the witness, ordered the defendant away, out of sight and hearing of the witness. From this order the jury might draw the inference that the court not only believed her statement, but believed the witness had good reasons for making the statement. The order was consequently prejudicial to the defendant. In cases of this character, where the witness is young, the court should have considerable latitude in protecting the witness from the effects of improper conduct and language of parties and of counsel, but in doing so the constitutional right of the defendant must be protected. The defendant was entitled to a trial in accordance with law. He was entitled to be confronted by witnesses of the state face to face, and he cannot be denied a constitutional right because of the youth, incapacity, or unwillingness of the witnesses brought against him to meet him face to face. The presumption of innocence follows every man accused of crime until the verdict of guilty is pronounced. The presence of such a child, under such circumstances, doubtless made a strong appeal to the court for protection. This was natural. But it must not be forgotten that in this class of cases the "accusation was easy to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." Coming, as it did, from a child of six years, with no other witnesses to the act, it was proper that the defendant should have a full opportunity to see her, and cross-examine the witness. The constitutional right to be confronted by witnesses against him, and to defend in person, would be of little avail to the accused if he could be compelled to remain away during his trial, out of the sight and hearing of the witnesses against him. The right to defend in person would be a meaningless term if the accused is required to remain so far away from the witnesses that he cannot hear the testimony, and therefore cannot cross-examine them. The right of having counsel in his defense would amount to but little if the accused is required to remain so far away from him that he cannot confer with him concerning the testimony that is being given against him. The jury had a right to know whether the witness herself knew the facts stated by her from her own knowledge and recollection, whether she was induced to make the charge through the plotting or scheming of others, or whether she was controlled and induced to make the voluntary statement that she was afraid of the defendant by those having her under their control. While the testimony of such a witness, if she be shown to understand the obligation of an oath, is competent, proper, and entitled to credit, the same as any other, yet it must not be forgotten that a child of six years is quite as likely to be mistaken, or to repeat the statements of those controlling her, as other witnesses. While the court should protect a witness from imposition, regulate the procedure, and control the conduct of the accused, with-

in the rules of law, it should also see to it that the constitutional rights of the accused are not denied him. We are of the opinion that the court erred in making the order complained of, and in denying the defendant's motion for a new trial.

The judgment of the District Court is reversed, and the cause remanded, with directions to grant a new trial.

Baskin, J., concurs. **Bartch, Ch. J.**, concurs in the judgment.

Bartch, Ch. J., concurring:

I concur in the judgment of reversal, but not in all of the reasoning nor in all of the propositions of law laid down in the opinion. If the statements purporting to have been made by the court below, contained in the attorney general's brief, as to what took place immediately preceding the order complained of, and those indicating the circumstances connected with the making of the order, were in the bill of exceptions, I would dissent, but, as they are not in the record, and since the record, as filed in this court, must be held to import absolute verity, the judgment announced seems to be a logical sequence, even though there be a miscarriage of justice, which, if the prisoner is in fact guilty, is likely to result in case the opinion be literally complied with at the next trial. From the tenor of the opinion it would seem that, regardless of any circumstances, a court, in the trial of a criminal case, has no discretion whatever respecting the nearness of defendant to a witness; that he may, if he so wills, seat himself immediately in front of his victim, who is on the witness stand, and remain there, even though he so intimidate the witness by his close proximity and insistent look that the witness will be unable to testify. If it were shown in the record, as intimated in the brief referred to, that repeated efforts to elicit the testimony of the witness were unsuccessful because of the manner of the defendant before the witness, then, in my judgment, the order complained of could not be regarded as reversible error. The court, under circumstances like these referred to, would clearly have the right, in the interests of justice, to exercise a reasonable discretion in removing the prisoner to some other place not without the presence of the witness and jury. The constitutional right of one accused of crime "to be confronted by the witnesses against him" was never intended as an instrument with which to defeat justice. Where the witnesses for the prosecution are present at the trial, are examined in the presence and within the hearing of the accused and jury, and an opportunity afforded the prisoner for cross-examination, I am of the opinion the constitutional provision is complied with, even though the prisoner be not permitted to sit immediately in front of the witness, when such position would cause intimidation, and prevent the eliciting of testimony. Doubtless the purpose of that constitutional provision is to compel the prosecution to

produce its witnesses at the trial, and to prevent the admission of testimony by deposition, so as not to deprive the accused of cross-examination in his presence before the jury. The words "to be confronted" manifestly have reference to cross-examination of the witness in the presence of the accused, and not to sitting face to face, in a literal sense. This is manifest from the authorities. In *Summons v. State*, 5 Ohio St. 325, a constitutional provision that "the party accused shall be allowed to meet the witnesses face to face" was held to have reference to the personal presence of the witnesses called to testify, and, in delivering the opinion of the court, Mr. Chief Justice Bartley said: "The object of this provision manifestly is to exclude testimony by depositions, by requiring it to be given orally, in the presence of the accused, on the trial. The admission of testimony by depositions against the accused in a criminal cause would often afford the prosecutor great advantages over him, as well as furnish at times opportunities for abuses beyond the reach of detection by the defendant. Deprived of this right, the accused would often be without the opportunity of cross-examination, without the means of hearing or knowing the persons who testify against him, and without the advantage of an oral examination of the witnesses before the jury which is to decide upon his case. But, important as this right is, as established at common law, and secured by the Constitution, it has application to the matter of the personal presence of the witness on the trial, and not to the subject-matter or competency of the testimony to be given. The requirement that the accused shall be confronted, on his trial, by the witnesses against him, has sole reference to the personal presence of the witnesses, and in no wise affects the question of the competency of the testimony to which he may depose." So, in *Houser v. Com.* 51 Pa. 332, it was held, Mr. Chief Justice Woodward delivering the opinion of the court, that "confronting witnesses" means cross-examination in the presence of the accused. In *Mattow v. United States*, 156 U. S. 237, 39 L. ed. 409, where a constitutional provision that the accused shall "be confronted with the witnesses against him" was interpreted, Mr. Justice Brown, speaking for the court, said: "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony, whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death

of the witness, and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation, and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." And again, he said: "A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." So the supreme court of Iowa, in *Westfall v. Madison County*, 62 Iowa, 427, with reference to the constitutional provision that the accused shall "be confronted with the witnesses against him," said: "We understand this to mean that the witnesses on the part of the state shall be personally present when the accused is on trial." Anderson, Law Dict. 226; *Com. v. Richards*, 18 Pick. 434, 29 Am. Dec. 608; *United States v. Gibert*, 2 Sumn. 19; *People v. Oiler*, 66 Cal. 101; *Bell v. State*, 2 Tex. App. 216, 28 Am. Rep. 429; *State v. Laaton*, 76 N. C. 216.

I am of the opinion that a trial court has power, in the conduct of a criminal prosecution, to make such an order as is in question in this case, whenever the facts and circumstances warrant it; and that an accused has no right to insist on sitting in such a position as to intimidate a witness and defeat the ends of justice. In the conduct of a criminal, the same as in a civil, jury trial much ought necessarily be left to the good sense and judgment of the judge. It is his duty to exercise a sound discretion in all matters appertaining to the orderly progress of the trial, and his action should not be interfered with unless there is a clear abuse of discretion. Mr. Justice Miner, in his opinion, uses language as follows: "The jury had a right to know whether the witness herself knew the facts stated by her from her own knowledge and recollection, whether she was induced to make the charge through the plotting or scheming of others, or whether

she was controlled and induced to make the voluntary statement that she was afraid of the defendant by those having her under their control. While the testimony of such a witness, if she be known to understand the obligation of an oath, is competent, proper, and entitled to credit, the same as any other, yet it must not be forgotten that a child of six years is quite as likely to be mistaken, or to repeat the statements of those controlling her, as other witnesses." With all due respect for the majority opinion of the court, I am impelled to say that I find nothing whatever in the record which warrants the insinuation that others have been plotting against the defendant. He was charged, it is true, with one of the most heinous crimes known to the law,—a crime which, from time immemorial, has shocked every civilized community in which it has been perpetrated,—and he was convicted by a jury of his peers of an attempt to commit that offense; but there does not appear to be even a hint in the record that either the charge or conviction was the result of the "plotting or scheming" of others, or that the infant witness was induced by others to make the "voluntary statement" that she was afraid of the defendant, or any other statement. Nor is there anything in the record to indicate that anyone except the defendant himself exercised any undue or improper influence over the witness. Except the bare statement, "I am afraid to tell, because I am afraid of my papa," made by the little one on the stand, the record contains no evidence of witness. the appeal being based upon the affidavit of the defendant relating entirely to the order of the court. In my judgment, therefore, the language above quoted is not applicable to this case.

The result of this appeal emphasizes the importance of the prosecution exercising vigilance in the settlement of a bill of exceptions, so that the record will be made to reflect accurately the facts and circumstances which may have led up to any action of the court which is made the basis of an exception.

OREGON SUPREME COURT.

Henry H. SIEVERS, *Appt.*,
v.

Samuel B. BROWN, *Resp't.*

(.....Or.....)

1. Crops planted by one in possession under a bond for title after he has refused to comply with his contract to purchase, and the vendor having tendered a good title has begun an action to foreclose the bond, belong to the vendor.

2. A judgment in favor of the vendor,

in a suit against him for conversion of crops planted by the vendee in possession under a bond for title which has been foreclosed, raises the presumption that they were not planted until after the foreclosure suit was begun.

(February 27, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover the value of certain crops grown by

NOTE.—As to crops on mortgaged premises, see also *Richards v. Knight* (Iowa) 4 L. R. A. 453, and *note*; *Batterman v. Albright* (N. Y.) 11 L. R. A. 802, and *note*; *Goodwin v. Smith* 45 L. R. A.

(Kan.) 17 L. R. A. 284; *Caldwell v. Alsop* (Kan.) 17 L. R. A. 782; *Riddle v. Dow* (Iowa) 32 L. R. A. 811; and *Cox v. Martin* (Miss.) 36 L. R. A. 800.

plaintiff upon defendant's land and appropriated by the latter to his own use. *Affirmed.*

Statement by **Moore, Ch. J.:**

This is an action to recover the value of certain crops grown by plaintiff upon defendant's land, but appropriated by the latter to his own use. The transcript shows that plaintiff, having agreed to purchase from defendant a tract of land in Marion county for the sum of \$3,200, paid of the purchase price, on September 8, 1892, the sum of \$600, and executed his promissory note for the balance, payable in eight years, in annual instalments of \$325, which note provided that, if default should be made in the payment of any of said instalments when they severally matured, defendant might elect to consider and treat the whole sum as then due and payable; that, in consideration of said payment and promise, defendant executed to plaintiff a bond for a deed, whereby he covenanted, upon the payment of said note, to convey the premises, by a good and sufficient deed, free from all encumbrances, and plaintiff, by defendant's license, entered into possession thereof; that, on the maturity of the first instalment, defendant demanded payment of the same, but plaintiff, claiming that the land was not correctly described in the bond, and that defendant's title thereto was defective, refused to comply therewith; that defendant instituted a suit in the circuit court of Marion county against the heirs of his grantors, and obtained a decree correcting the description, and, having otherwise perfected his title to the premises, he executed and tendered to plaintiff a deed thereof and demanded payment of said note, but plaintiff refused to pay any part thereof, whereupon defendant commenced a suit in said court against him, and obtained a decree correcting the description contained in the bond, foreclosing plaintiff's equitable interest in the premises, which were ordered sold, and the purchaser put in the immediate possession thereof, in pursuance of which the sheriff of said county sold the land to defendant, and on July 31, 1894, evicted plaintiff therefrom, and restored the possession to defendant; that when said land was sold there was a quantity of wheat and oats growing thereon of the reasonable value of \$92.66, and vegetables of the value of \$75, and a lot of hay cut from said premises stored in the barn, all of which defendant appropriated to his own use. The cause being at issue, a trial was had, and the jury, in pursuance of the court's instructions, found that plaintiff was only entitled to the sum of \$37.50, the value of the hay, and, judgment having been rendered thereon, plaintiff appeals.

Mr. A. H. Tanner for appellant.

Mr. W. H. Holmes for respondent.

Moore, Ch. J., delivered the opinion of the court:

It is contended that if the crops be regarded as part of the realty, no title thereto vested in defendant, under the foreclosure 45 L. R. A.

proceedings, until the sheriff's deed was executed; that plaintiff, having planted them, was the owner thereof; and that defendant, having converted them to his own use, is liable for their value.

A bond for a deed transfers to the obligee an equitable interest in the premises agreed to be conveyed, which is measured by the amount paid on account of the purchase. The legal title remains in the obligor, in trust for the purchaser, who, upon payment of the entire consideration, acquires the whole equitable interest, and may maintain a suit to compel the specific performance of the contract, if the obligor refuse to keep his covenants. In *Lysaght v. Edwards*, L. R. 2 Ch. Div. 499, Jessel, M. R., in commenting upon the purport of an agreement to convey real property and the method of foreclosing the purchaser's equity, says: "It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that, the moment you have a valid contract for sale, the vendor becomes, in equity, a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession. In other words, the position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, *viz.*, possession of the estate and a charge upon the estate for his purchase money. Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose: that is to say, he has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate;' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity. He has a right to say to the purchaser, 'Either pay me the purchase money, or lose the estate. Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the court of equity or now by a judgment of the high court of justice: and, if the time expires without the money being paid, the contract is canceled by the decree or judgment of the court, and the vendor becomes again the owner of the estate.'" It will be observed, from the language quoted, that in England, if the vendee under a contract for the purchase of real property, make default in the payment of the purchase money, the vendor may maintain a suit to cancel the contract, which is equivalent to a strict foreclosure. In *Button v.*

Schroyer, 5 Wis. 598, it was held that a decree foreclosing a contract for the conveyance of real property, which ordered a sale of the premises, was erroneous, the court saying: "The proper decree in such cases is that the money due upon the contract be paid within such reasonable time as the court may direct, or that the vendee be foreclosed of his equity of redemption." To the same effect is the case of *Baker v. Beach*, 15 Wis. 99.

The justice of the rule, announced in England and followed in Wisconsin, may well be doubted, and particularly so when the vendor has received a large portion of the purchase money; in which case equity would seem to demand that the premises be sold to satisfy the balance due on the contract, upon the payment of which the vendee should be entitled to the remainder of the money derived from such sale. But whatever the proper rule may be, the consideration of the decree in the foreclosure proceedings does not seem to be necessary in the determination of this cause. An examination of the transcript shows that the sheriff, obeying the mandate of the court, sold the land to defendant, which sale was thereafter confirmed by the court, and, in the absence of an appeal from said decree, it must be assumed that defendant did not acquire plaintiff's equitable interest in the premises until he procured the sheriff's deed thereto. Such interest not having been barred when plaintiff was evicted, it becomes important to consider the relation that existed between the parties under the contract. A bond for a deed, unless so specified therein, does not entitle the obligee to take possession of the premises, and hence if he enter without the obligor's license, express or implied, he is a trespasser. *Williams v. Forbes*, 47 Ill. 148; *Chappell v. McKnight*, 108 Ill. 570; *Druse v. Wheeler*, 22 Mich. 439. When possession is given, however, either by the bond or the obligor's license, it is understood, in the absence of any stipulation to the contrary, that the payment of interest on the deferred instalments of the purchase price affords an ample consideration for the use and occupation of the premises. *Cleveland v. Burrill*, 25 Barb. 532; *Parke v. Leeuright*, 20 Mo. 85; *Hundley v. Lyons*, 5 Munf. 342, 7 Am. Dec. 685; *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. ed. 65.

It has been held that a purchaser in possession of real property under the vendor's license cannot be evicted, so long as he offers to perform the conditions of his agreement (*Whittier v. Stege*, 61 Cal. 238); but, if he refuses to comply therewith, the vendor may treat him as a tenant at will (*Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318); and he thereby becomes liable to the vendor for the reasonable value of the use of the premises for the time during which he continues in possession after he abandons the agreement (*Smith v. Wooding*, 20 Ala. 324; *Osgood v. Devey*, 13 Johns. 240; *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Hogsett v. Ellis*, 17 Mich. 351; *Gould v. Thompson*, 4 Met. 224). The application of this rule would 45 L. R. A.

render plaintiff liable to defendant for the reasonable rent of the land from the time the relation of vendor and purchaser was abrogated by the former's refusal to keep his agreement, and, as a corollary therefrom, he would undoubtedly be entitled to the crops grown thereon, as emblements, unless the relation of landlord and tenant was terminated, for it has been held that a tenant is not affected by a foreclosure till the sale is consummated and the deed delivered. *Whalin v. White*, 25 N. Y. 462; *Allen v. Elderkin*, 62 Wis. 627.

The relation of vendor and purchaser was undoubtedly severed, and that of landlord and tenant inaugurated, September 8, 1893, when plaintiff refused to pay the first instalment due under the contract; but plaintiff's repudiation of his agreement did not authorize defendant to declare a forfeiture until March, 1894, when he was ready and able to convey the premises according to the terms of his bond. *Mia v. Beach*, 46 Ill. 311; *Peck v. Brighton Co.* 69 Ill. 200. Defendant, in March, 1894, having tendered a deed, and demanded payment of the amount agreed upon, plaintiff's refusal to comply therewith was tantamount to a declaration of forfeiture, which terminated the tenancy existing between the parties, and, this being so, the decision must hinge upon the question whether the crops were planted before or after that date. In *Samson v. Rose*, 65 N. Y. 411, it is held that one whose estate is terminated by his own act or default is not entitled to emblements. In *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318, Mr. Justice Rapallo, in commenting upon the right of a vendee to take the crops grown upon the premises of which he was in possession under a contract of purchase, says: "If he makes default in his contract of purchase, or commits waste, or in any other manner terminates the tenancy by his own wrongful act, he becomes a trespasser, and may be sued as such, or in ejectment, and he cannot dispute the title of the party under whom he entered (*Cooper v. Stover*, 9 Johns. 331; *Dolittle v. Eddy*, 7 Barb. 74; *Whiteside v. Jackson*, 1 Wend. 418; *Leonard v. Pitney*, 5 Wend. 30; *Jackson v. Stewart*, 6 Johns. 34; *Quackenboss v. Lansing*, 6 Johns. 49); and he would, no doubt, forfeit his right to emblements under those circumstances." See also *Stewart v. Doughty*, 9 Johns. 108; *Whitmarsh v. Cutting*, 10 Johns. 360; *Powers v. Ingraham*, 3 Barb. 576. "It is true," says Mr. Justice Folger in *Reeder v. Sayre*, 70 N. Y. 180, 26 Am. Rep. 567, "that a tenant, holding by a tenure which is uncertain as to the time at which it will cease, is entitled to take off, after it has ceased, the crops which he has sowed in the due course of husbandry. But if it is certain at the time when he sows how long it will continue, and it is plain that he cannot, before it ceases, reap that which he may sow, then it is his own folly if he sows (per Lord Mansfield, *Wigglesworth v. Dallison*, 1 Dougl. 201), and he will not be permitted to reap. This rule does not give to the tenant any right by reason of his having

ploughed, manured, or otherwise prepared the ground for the seed, if he has not sowed." There is no evidence in the bill of exceptions tending to show when the seed was planted or sowed, and, this being so, it must be presumed, in view of the judgment, that the crops were not put in until after the tenancy was terminated by the commencement of the suit to foreclose the bond, which was equivalent to a notice to quit. Hill's Anno. Laws (Or.) § 3523.

No error having been committed by the introduction in evidence of the judgment roll or the instructions complained of, it follows that the judgment is affirmed.

J. F. FLYNN, *Appt.*,

v.

S. B. BAISLEY *et al.*, *Respts.*

(.....Or.....)

1. **Earnings of minor children** who have been emancipated by their father when he was in good financial circumstances, and when the earnings have been loaned to him, may constitute a good consideration for a conveyance to them from him as against his creditors.
2. **A writing is unnecessary** to evidence the emancipation of an infant, but that may be implied from circumstances.
3. **The earnings of a minor child** who has been emancipated in good faith by his father cannot be reached by the father's creditors.

(July 10, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Baker County in favor of defendants in an action brought to set aside a deed of certain real estate as a fraud on plaintiff's rights. *Affirmed.*

Statement by **Moore, J.**:

This is a suit to set aside a deed, and to subject a part of the real property described therein to the lien of a judgment against the grantor. It is alleged in the complaint: That on July 1, 1893, the defendant S. B. Baisley executed to the Baker City National Bank his promissory note for the sum of \$3,588, payable six months after date, with interest at the rate of 10 per cent per annum. That plaintiff thereafter became the owner thereof, and on March 6, 1898, recovered judgment thereon, upon which an execution was issued, and returned wholly unsatisfied. That at the time said note was executed Baisley was the owner in fee of the S $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 15, in township 7 S., of range 38 E. of the Willamette meridian; the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 25, the S. $\frac{1}{2}$ of section 26, the E. $\frac{1}{2}$ and the N. W. $\frac{1}{4}$ of section 35, in township 8 S., of range 39 E. of said

NOTE.—As to rights of creditors in personal services of debtor, see *Mayers v. Kaiser* (Wis.) 21 L. R. A. 623, and *note*; also *Bogges v. Richards* (W. Va.) 26 L. R. A. 537; and *Trefethen v. Lynam* (Me.) 38 L. R. A. 190. 45 L. R. A.

meridian, in Baker county,—containing 1,000 acres, more or less. That on December 1, 1894, Baisley and wife, for the expressed consideration of \$6,000, executed to their sons, Perry A. and J. H. Baisley, a general warranty deed of said property. That no consideration was paid for the conveyance. That it was executed with intent to hinder, delay, and defraud the creditors of S. B. Baisley. That the premises therein described were then of the reasonable value of \$10,000; and that Baisley had no other property out of which plaintiff's judgment, or any part thereof, can be satisfied. The answer denies the material allegations of the complaint, and avers that S. B. Baisley, on December 1, 1894, was indebted to Perry A. and J. H. Baisley in the sums of \$500 and \$125, respectively, in consideration of which, and of their payment of the sum of \$25, and agreement to discharge the principal of two mortgages to secure the sums of \$3,350 and \$2,000, executed to them a deed of the north half of lot 3 and the south 30 feet of lot 4 in block 4 in the United States town site of Baker City, the E. $\frac{1}{2}$ of section 35, in township 8 S., of range 39 E., and an undivided one tenth in fee and a dower interest in the other property described in the complaint for which he received an adequate consideration. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals.

Messrs. J. L. Rand and C. F. Hyde for appellant.

Messrs. Butcher & Eastham, for respondents:

To set aside a deed as fraudulent:

1. The debtor must have made the conveyance with intent to hinder and delay his creditors. And the burden is on the plaintiff to show this fact.

2. The conveyance must have been without consideration, or for an inadequate one, or the purchaser must have had notice of the fraudulent intent. And this burden is upon the defendant.

Weber v. Rothchild, 15 Or. 385; *Crawford v. Neal*, 144 U. S. 596, 36 L. ed. 557.

3. The plaintiff must have been hindered or delayed or defrauded by reason of making of the conveyance. And the burden of this issue is on the plaintiff.

Where a conveyance is made subject to a mortgage, and the deed is accepted upon that condition, that constituting part of the consideration, which is subsequently paid by the grantee, this will uphold a deed as against creditors.

Miles v. Miles, 6 Or. 266, 25 Am. Rep. 522.

There is nothing in the evidence to show that the plaintiff was hindered, delayed, or defrauded by the conveyance in the collection of his debt.

Weaver v. Owens, 16 Or. 301; Code, § 3059.

The return of execution *nulla bona* is conclusive proof of the insolvency of the defendant at that time as a circumstance giving equity jurisdiction in a creditor's suit; but it is no evidence of insolvency of the defend-

ant at the time of the conveyance claimed to be fraudulent.

Wyatt v. Wyatt, 31 Or. 531.

Moore, J., delivered the opinion of the court:

It is contended by plaintiff's counsel that the evidence shows that the conveyance was voluntary, and that, Baisley being indebted to plaintiff's assignor at the time it was executed, the court erred in dismissing the suit. The evidence shows that on December 1, 1894, said lots in Baker City, together with a building thereon, known as "Meier's Hotel," were encumbered with a mortgage executed by Baisley and wife to the Baker City National Bank, to secure the sum of \$3,350; that the E. $\frac{1}{2}$ of section 35 in township 8 S. of range 39 E., was subject to a mortgage executed by them to the Lombard Investment Company, to secure the sum of \$2,000, and that such encumbrance on the hotel property was also a second lien thereon, but that the undivided one tenth of the other tracts, equivalent to 68 acres, was unencumbered; that the grantees in said deed sold the lots in Baker City some time in 1896, for the sum of \$3,000, in consideration of which and the further sum of \$50, said bank entered satisfaction in full of its mortgage, thereby relinquishing the sum of \$767.58, and releasing the E. $\frac{1}{2}$ of said section 35 from the lien thereof; that they paid the interest and \$300 of the principal due upon said Lombard Investment Company's mortgage, and secured an extension of two years for the payment of the remainder; that when said deed was executed to them they were aged twenty-one and nineteen years respectively; that Perry, being permitted by his father to labor on his own account during the latter years of his minority, and to retain his earnings, operated a boarding house at the gold mines in said county, and was thereafter employed as a bookkeeper in the Baker City National Bank, whereby he accumulated the sum of \$500, which he loaned to his father prior to the execution of the deed; that J. H. Baisley labored under the same privileges and conditions as his brother, and earned \$125 during his minority, which he loaned to his father, and which the latter owed him at the time the deed was executed. It is argued by plaintiff's counsel that this money belonged to the father, and that his being indebted at that time constituted it a trust fund for the benefit of his creditors, and, this being so, the conveyance, as to that part of the consideration, was voluntary. This must depend upon whether Baisley had in good faith emancipated his sons before they earned the money. A conveyance of lands without a valuable consideration, by one who is indebted at the time, is presumptively a fraud upon his creditors, who have an equitable right to set it aside or to avoid it, at least to the extent of the debts due them. *Elfelt v. Hinch*, 5 Or. 255; *Davis v. Davis*, 20 Or. 78; *Sterry v. Arden*, 1 Johns. Ch. 261. It being the duty of an infant to labor for his parent in consideration of the latter's furnishing him maintenance and education, it has been held 45 L. R. A.

that a deed of land executed by an insolvent parent to his infant child in consideration of services rendered or to be rendered during his minority is voluntary, and void as to creditors of the grantor. *Swartz v. Hazlett*, 8 Cal. 118; *Stumbaugh v. Anderson*, 46 Kan. 541. A father, who was insolvent, having made a deed to his minor son in consideration of wages earned and a note executed by him, it was held that the conveyance was voluntary, and void as to the grantor's creditors. *Winchester v. Reid*, 53 N. C. (8 Jones, L.) 377. In *Bell v. Hallenback*, Wright (Ohio) 752, it is held that if a father, who at the time is indebted, invests the earnings of the minor children in real estate, and takes the title in their names, the premises will be charged with the debts he then owed. In *Jolly v. Kyle*, 27 Or. 95, it is said: "Conveyances from one relative to another, when attacked by the creditors of the grantor, will always be closely scrutinized, for from the very relation of the parties it is scarcely to be supposed that the circumstances and intention of the grantor were not known to the grantee." To the same effect, see also *Burt v. Timmons*, 29 W. Va. 441; *Shober v. Wheeler*, 113 N. C. 370. Where, however, the parent has in good faith emancipated his minor child, and relinquished all right to his earnings, his creditors cannot reach earnings thereafter acquired by such minor to apply them in payment of the parent's debts. 17 Am. & Eng. Enc. Law, p. 379. In *Jenney v. Alden*, 12 Mass. 375, a father, who was in good financial circumstances, having agreed that his minor son should have the benefit of his own wages, the latter sent his earnings from time to time to his father, who invested them in real property, taking the title in his son's name; and, the father thereafter becoming insolvent, it was held that the property was not liable for the payment of his debts. In *Atwood v. Holcomb*, 39 Conn. 270, 12 Am. Rep. 386, it is held that a father, acting in good faith, may make a valid gift to his minor son of his time and future earnings, although insolvent at the time. In *Clemens v. Brillhart*, 17 Neb. 335, Mr. Justice Maxwell says: "Creditors have no vested rights in the future earnings of the minor children of the debtor." "A son," says Mr. Justice Black in *McCloskey v. Cyphert*, 27 Pa. 220, "is bound to render obedience to his father until he is twenty-one years of age. The father may employ him about his own business without paying him wages, or hire him out and appropriate his earnings, if he sees fit. But he may also let him go free from his service whenever he chooses. If he happens to be in debt, he is not bound to work his son or daughter as he would work a horse or a slave for the benefit of his creditors." To the effect that the right of a parent to the labor of his child during its minority is personal, and that, though insolvent at the time, he may, for the best interest of the child, emancipate him, and, as a consequence, place his earnings beyond the reach of his creditors, see *Donegan v. Davis*, 66 Ala. 362; *Shortel v. Young*, 23 Neb. 408; *Beaver v. Bare*, 104 Pa. 58, 49 Am. Rep. 567; *Wambold v.*

Vick, 50 Wis. 456; *Lackman v. Wood*, 25 Cal. 147; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115. A writing is unnecessary to evidence the emancipation of an infant, it having been held that his liberation may be established by direct evidence or implied from circumstances. *Wood, Mast. & S. § 25; Dierker v. Hess*, 54 Mo. 246; *Monaghan v. School Dist. No. 1*, 38 Wis. 100; *Wilson v. McMillan*, 62 Ga. 16, 35 Am. Rep. 115. Nor is it necessary that the infant should abandon his home, or turn his parent out of doors, to afford proof of the latter's relinquishment of his earnings. "The emancipation of the son from the father's control," says Mr. Justice Black, in *McCloskey v. Cyphert*, 27 Pa. 220, "may be as perfect when they both live together under the same roof as if they were separated. The father's renunciation of all legal right to the son's labor is not less absolute because other family ties continue unbroken, and the son's security in his rights of property would not be at all increased by turning his father out of doors." To the same effect, see *Donegan v. Davis*, 66 Ala. 362; *Johnson v. Silsbee*, 49 N. H. 543; *Penn v. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478; *Beaver v. Bare*, 104 Pa. 58, 49 Am. Rep. 567.

Considering the facts of the case at bar in the light of these decisions, we think the evidence shows that Baisley in good faith emancipated his sons while he was in good financial circumstances, and that they thereafter earned the money which they loaned to him, and which formed a part of the consideration for the deed. The books of the Baker City National Bank, being offered in evidence, showed that Perry had deposited money in said bank from time to time, until his account exceeded \$500, against which he drew for that amount, and loaned it to his father, who had not repaid the same when the deed was executed. The evidence of the manner in which J. H. Baisley earned the money which he loaned to his father is not so clear, but, the sum being small, it was probably not considered so important. No testimony was introduced by the plaintiff, however, tending to show that he had not earned or

loaned it. S. B. Baisley, being indebted to his sons on a bona fide claim in the sums named, though also indebted to others at the time, had a right to prefer them if he did not reserve to himself some secret benefit (*Jolly v. Kyle*, 27 Or. 95), and we think there is no evidence tending to show that such was the case. True, he exchanged labor with them, and helped them to make hay on a part of the land conveyed, performing about one and a half months' work for them in four years, but the evidence fails to show that he derived any secret benefit therefrom, and it must be inferred that the sons' labor for him in return was an adequate compensation therefor. The lower court found that at the time of the conveyance the lots in Baker City were worth from \$2,000 to \$2,500, and that the other land was worth \$9 per acre. There being 388 acres of the latter, if the value of the lots be estimated at \$2,500, the aggregate value of the property conveyed would be \$5,992. While there is some conflict in the testimony as to the value of the land on December 1, 1894, we think the court found the full value thereof, considering the great financial depression prevailing at that time. It will be remembered that in 1896 the receiver of the Baker City National Bank released a second mortgage on the east half of section 35, relinquishing the sum of \$757.-58. This tract was then subject to the Lombard Investment Company's prior mortgage of \$2,000, and from the satisfaction of the second mortgage it must be inferred that the receiver considered it of no greater value than the amount of such prior encumbrance, or \$0.25 per acre. The evidence also shows that this tract is the most valuable portion of the whole premises conveyed. S. B. Baisley was the owner of a dower interest in the tracts of which he was seised of an undivided one-tenth interest, but, the person for whose life he held such estate having died soon after the conveyance to his sons, the value thereof is not computed; but, if it were, we nevertheless think that an adequate consideration was paid for the conveyance, and hence it follows that *the decree is affirmed.*

NEBRASKA SUPREME COURT.

ENTERPRISE DITCH COMPANY *et al.*,
Plffs. in Err.,

v.
Joseph MOFFIT *et al.*

(.....Neb.....)

*1. In the absence of statutory author-

*Headnotes by HARRISON, Ch. J.

NOTE.—Assessments on paid-up stock.

- I. General rule.
 - II. The question of assent.
 - III. Under state statutes.
 - IV. Under charter provisions.
 - V. Assessments under by-laws.
 - VI. Assessment by resolution.
 - VII. Voluntary assessments.
 - VIII. Nonassessable stock; estoppel.
 - IX. Injunction restraining.
- 45 L. R. A.

ity or power given by the articles of incorporation, there can be no assessment against or on paid-up stock of a corporation.

2. The fully paid-up stock of a corporation is the personal property of the owner, and the articles of incorporation and laws of the state are elemental of the contract existent between the corporation and the owner of stock, and may not be so

Upon the question of the liability of stockholders to assessments, see *note* to *Anvil Min. Co. v. Sherman* (Wis.) 4 L. R. A. 232.

As to the effect of assessments on stockholders, made under order of court in another state, see *note* to *Mutual F. Ins. Co. v. Phoenix Furniture Co.* (Mich.) 34 L. R. A. 694.

As to effect of nominal payment for shares of bonus stock, see *note* to *Dummer v. Smedley* (Mich.) 38 L. R. A. 490.

amended by legislative enactment as to make the paid-up stock subject to an assessment or general or specific assessments, and forfeitable or subject to summary sale by the corporation for the nonpayment of such assessment.

(June 8, 1899.)

ERROR to the District Court for Scotts Bluff County to review a judgment in favor of plaintiffs in actions brought to enjoin defendants from selling plaintiffs' stock for failure to pay assessments. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. H. Broady and F. H. Bentley, for plaintiffs in error:

The company had the right to assess the stock to pay the running expenses of the enterprise.

By-laws are a law which the stockholders make unto themselves. Third persons need not know what they are, nor be bound by them. The stockholders through their prop-

er corporate authorities may by by-laws make unto themselves any law that they please, subject only to the general state laws, and, in case the legislature has not spoken, subject only to the doctrine of public policy. The by-law in question is not inconsistent with any existing law.

Com., ex rel. Dickinson, v. Detwiler, 131 Pa. 614, *sub nom. Detwiler v. Com., ex rel. Dickinson*, 7 L. R. A. 357; *Pfister v. Gerwig*, 122 Ind. 567; 1 *Thomp. Corp. §§ 939-941*; 5 *Am. & Eng. Enc. Law*, N. S. pp. 88, 92, 103; *Kent v. Quicksilver Min. Co.* 78 N. Y. 179.

Without the authority of the statute and the by-laws the assessments of stock could have been made.

2 *Thomp. Corp. §§ 1701, 1705, 1708, 1710.*

The long custom of this corporation in making such assessments proves acquiescence of stockholders and waiver of objections.

Hale v. Sanborn, 16 Neb. 1; 2 *Thomp. Corp. §§ 1724, 1728.*

I. General rule.

The principles declared by the court in *ENTERPRISE DITCH Co. v. Moffit* are in accord with the general rule upon the question of the assessment of fully paid-up stock in a corporation, as, in the absence of statutory authority or special power conferred upon the directors of a corporation by the articles of incorporation, they have no power to make calls or assessments on fully paid-up stock or stock which is issued as fully paid up, or to subject it to sale or forfeiture for nonpayment of the same. *Wells v. Green Bay & M. Canal Co.* 90 Wis. 442, 452; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463, 470; *Omaha Law Library Asso. v. Connell*, 55 Neb. 396; *Sullivan County Club v. Butler*, 26 Misc. 306.

And this is so for the reason that the liability to calls is the result of contract such as an agreement of subscription or the like, and the power to make assessments is wholly statutory. *Wells v. Green Bay & M. Canal Co.* 90 Wis. 442, citing *Beach, Priv. Corp. § 590.*

There must be a contract or consent given or conferred upon the directors of the company, for this purpose, and without it they have no authority to make calls or assessments on fully paid-up stock, and calls or assessments so made are absolutely void. *Wells v. Green Bay & M. Canal Co.* 90 Wis. 442.

And a provision introduced into a receipt for fully paid-up stock to the effect that the party holds it pursuant to the by-laws of the corporation as to dues and transfers is not sufficient to make the stock subject to assessment under the by-law passed before the signing of the receipt but after the stockholder had contracted for the fully paid-up stock and paid for it,—especially where the receipt is dated back to the time of the payment for the stock. *Sullivan County Club v. Butler*, 26 Misc. 306.

In *Lancaster Starch Co. v. Moore*, 62 N. H. 671, the corporation sought to recover against one of its stockholders the amount of two assessments made for the general purpose of building and carrying on the business, as well as paying debts. The assessments were illegal in part, and such part was indeterminate, and unauthorized, and as *N. H. Laws 1866, chap. 4344, § 2*, only allowed assessments for payment of debts, and the defendant had fully paid up his stock, the action against him failed. 45 L. R. A.

II. The question of assent.

A stockholder may waive his constitutional right, and may become liable by his own act or consent, and for this purpose it is not even necessary that he should give his express or direct consent, but it may be implied or he may be estopped from denying it by his act or by his silence, although an apparent acquiescence to his assent cannot be presumed from the mere fact that the proceedings took place. *Ireland v. Palestine, B. N. P. & N. W. Turnp. Co.* 19 Ohio St. 369.

The burden of showing the assent of a stockholder or his acquiescence in proceedings of the corporation which increase his liability as a stockholder rests upon the company, or other party seeking to hold him liable, or to estop him from denying his liability, and will not be presumed from the fact that bonds were issued in pursuance of the act of the directors, and that the amount was assessed upon its members by a meeting of the stockholders, when it is not shown that the party was present at such meeting. *Ibid.*

But in *Sullivan County Club v. Butler*, 26 Misc. 306, it was held that a provision in a certificate of fully paid-up stock that it was "nonassessable beyond \$100 per annum" was not an assent on behalf of the stockholder to such assessment in any manner which was not authorized by law without his assent.

And from the case of *Atlantic De Laine Co. v. Mason*, 5 R. I. 463, it would appear that an illegal assessment upon corporate stock cannot be made good upon the ground of contract by an assent to be presumed from assent to former illegal assessments of lesser amount, neither can such assent be given with effect by an assignor of stock after he has assigned the same and has given notice of the assignment to the corporation.

See also *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52, 56, *infra*, VI.; *Re Maria Anna & S. Coal & Coke Co. L. R. 20 Eq. 585*, 44 L. J. Ch. N. S. 423, 32 L. T. N. S. 747, 23 Week. Rep. 646, *infra*, III.; *Gardner v. Hope Ins. Co.* 9 R. I. 194, 11 *Am. Rep.* 238, *infra*, IV.

III. Under state statutes.

In California fully paid-up stock of a private corporation is assessable under the laws of that state. *Green v. Abletline Medical Co.* 96 Cal. 322; *Santa Cruz R. Co. v. Spreckles*, 65 Cal.

Messrs. F. A. Wright and C. C. Wright, for defendants in error:

The by-laws in question are inconsistent with the laws of the state of Nebraska in that the effect is to violate the obligation of the contract, and to deprive the stockholder of his property without due process of law.

When stock is fully paid no further assessment can be imposed without special authority in the charter, or by statute warranting it.

Atlantic De Laine Co. v. Mason, 5 R. I. 463; *Beach, Priv. Corp.* § 590; *Cook, Stock & Stockholders & Corp. Law*, §§ 241, 242.

The general power to pass by-laws does not embrace that of creating liens and through the lien a forfeiture.

Rosenback v. Salt Springs Nat. Bank, 53 Barb. 495; *Re Long Island R. Co.* 19 Wend. 37, 32 Am. Dec. 429; *1 Thomp. Corp.* §§ 1037, 1038; *Kirk v. Nowill*, 1 T. R. 118; *Bergman v. St. Paul Mut. Bldg. Asso. No. 1*, 29 Minn. 275.

193; *Sayre v. Citizens' Gas Light & Heat Co.* 69 Cal. 207.

The California act of 1864, which gives the corporation power to make assessments, was considered in the case of *Sullivan v. Trunfo Gold & S. Min. Co.* 39 Cal. 459. It was there held that the act was applicable to all corporations "formed under the general laws of the state." In that case, however, the court did not pass upon the question whether the provisions of the act were applicable to assessments for subscriptions to the capital stock, but it treated the assessment then in question as having been levied on fully paid-up stock, and sustained the assessment.

In *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, the court expressly held that in that state corporations might levy and collect assessments for corporate purposes on fully paid-up shares of stock, as § 331 of the Civil Code provides that "the directors of any corporation formed or existing under the laws of the state, after one fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent, provided herein."

In *Ossipee Hosiery & Woolen Mfg. Co. v. Canney*, 54 N. H. 295, it was held that a stockholder who had fully paid-up stock for which he subscribed must be taken to have waived the right to object that the whole number of shares fixed and limited by the corporation had not been subscribed for in a suit brought against him to recover an assessment made under the provisions of chap. 136, § 4, N. H. Gen. Stat. under which the stockholders might assess themselves to pay debts contracted contrary to the provisions of the statute which forbids the corporation contracting debts or incurring liabilities form more than one half of its capital stock actually paid in and unimpaired, in cases where such stockholders are individually liable to pay the other debts of the corporation.

In *State, ex rel. Canfield, v. Morristown Fire Asso.* 23 N. J. L. 195, certiorari was brought to remove an assessment made by the defendants on property within the limits of their association which it was contended was illegal. Under the New Jersey acts of 1837 the proprietors of buildings liable to injury by fire within certain limits were constituted a body politic and

The corporation cannot by by-laws impose any liability on the stockholder not given by its charter or the laws of the state.

Free Schools v. Flint, 13 Met. 539; *Reid v. Eatonton Mfg. Co.* 40 Ga. 98; *Great Falls & C. R. Co. v. Copp*, 38 N. H. 124; *Levey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236.

A lien on stock cannot be created by a by-law.

Anglo-Californian Bank v. Granger's Bank, 63 Cal. 359; *Driscoll v. West Bradley & O. Mfg. Co.* 59 N. Y. 96.

A corporation cannot assess beyond the face value of the stock.

State, ex rel. Canfield, v. Morristown Fair Asso. 23 N. J. L. 195; *Cook, Stock & Stockholders & Corp. Law*, §§ 241 et seq.

No power exists in a corporation to enforce penalties except by an action at law.

People, ex rel. Pulford, v. Fire Department, 31 Mich. 458; *Williams v. Lowe*, 4 Neb. 382; *Lawson, Rights, Rem. & Pr.* § 447.

corporate, and the capital stock of the corporation was not to exceed \$2,000. In 1840 a supplemental act was passed under which the association was empowered at its next annual meeting, and at any subsequent annual meeting, to raise by taxation for the objects of the corporation any sum not exceeding \$500, provided that the capital stock of the corporation should at no time exceed \$4,000. The association prior to the last assessment, claiming to act under the authority of the above statutes, raised by taxation more than \$4,000, but at the time of the assessment the entire property of the company was worth less than \$3,000. The question was whether the assessment was authorized by law. The decision depended entirely upon the true meaning of the phrase "capital stock" as used in the proviso in the 1st section of the supplemental act. The court held that such term meant the amount contributed or advanced by the stockholders or members of the company, and did not relate to the value of the property to be held by the company; and further, that under the charter and supplement the power of the association was limited in assessments to the sum specified in the acts, and that when such sum was raised their power was exhausted.

Under the 12th section of the Pennsylvania act of April 20, 1874, Pamph. Laws, 73, every corporation may from time to time at a legal meeting called for the purpose assess upon each share of stock such sums of money as the corporation may think proper, not exceeding in the whole the amount to which each share was originally limited, and such sums assessed shall be paid to the treasurer at such times and in such instalments as the corporation directs.

In *Price's Appeal*, 106 Pa. 421, it was held that under this section of the act the corporation had authority to assess upon each paid-up share of stock such sums of money as the stockholders of the corporation might think proper, not exceeding in the whole the original par value of the same, but separate and distinct from the subscription price itself and in addition thereto, and that the assessments thus raised were in addition to and independent of the capital raised by the sale of the shares, and did not constitute any part of the capital when paid in.

In *Belmont Park Asso. v. Toller*, 6 Pa. Co. Ct. 206, fully paid-up shares were annually assessed under the by-laws of the corporation. The

Mutual companies are formed under very different statutes, with different powers and different liabilities of its members. Irrigation companies are not only corporations, but they are quasi-public corporations.

Paxton & H. Irrig. Canal & Land Co. v. Farmers & M. Irrig. & Land Co. 45 Neb. 884, 29 L. R. A. 853.

The legislature is powerless to take away the substantial rights of a stockholder by any amendment to the articles of incorporation.

Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140; *Cook, Stock & Stockholders & Corp. Law*, §§ 492 *et seq.*; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 299; 1 Beach, Priv. Corp. § 40.

The sections of the law in question would allow the company to make any amount of assessments which it saw fit upon the stockholders who have paid all they agreed to pay to the company; and upon a failure to pay these assessments, which had been made

without any notice to stockholders or opportunity on their part to be heard, to forfeit and sell their property. This can no more be done by the legislature of the state than by the acts of individuals.

State v. Doherty, 60 Me. 509; *Hoke v. Henderson*, 14 N. C. (3 Dev. L.) 15; *Holden v. James*, 11 Mass. 404, 6 Am. Dec. 174; *Lane v. Dorman*, 4 Ill. 240, 36 Am. Dec. 543; *Com. v. Byrne*, 20 Gratt. 165; *Bank of Columbia v. Okely*, 4 Wheat. 243, 4 L. ed. 561; *Turner v. Althaus*, 6 Neb. 71; *Clark v. Mitchell*, 64 Mo. 564; 3 Am. & Eng. Enc. Law, p. 714.

Harrison, Ch. J., delivered the opinion of the court:

Six actions were commenced in the district court of Scotts Bluff county, in each of which it was sought to enjoin the sale by the Enterprise Ditch Company, a corporation, of some shares of fully paid-up corporate stock owned by the plaintiff in the suit, because of

question, however, in this case turned upon the right of the corporation to sue the stockholder in assumpsit, and the court denied the action, as the by-laws described the mode of collecting the assessments if they could be legally made, no personal liability really attaching upon paid-up stock. The question, therefore, of the power to make such assessment did not really arise in this case.

The word "assessment" as used in the statutes of Utah relating to private corporations in giving them power to assess stock and sell it in case of default would seem to include both calls and statutory assessments without distinction. *Gary v. York Min. Co.* 9 Utah, 464.

In the above case the plaintiffs were the owners of paid-up stock in the defendant company. The articles provided that no assessments should be levied on any stock for any purpose until the stock set apart for working capital was exhausted. The directors, after reasonable efforts to sell the stock, made an assessment upon all the subscribed stock for the purpose of paying debts. The plaintiffs failed to pay the assessment, and the directors after notice sold the plaintiffs' stock to pay such assessment. The question raised was whether, under the statutes of Utah (§ 2374), the corporation had the power to so assess and sell the stock. The statute in question gave the directors the right to make and collect assessments on stock, to pay expenses, etc., after one fourth of the stock was subscribed, but limited the assessments when the stock was paid up to 10 per cent, and declared that the holder of paid-up stock should not be liable for assessments unless distinctly provided for in the articles of incorporation, which could not be changed with the written consent of the stockholders. The court therefore held that the company had the legal right to make the assessment and sale of the plaintiffs' stock.

From *Henderson v. Turngren*, 9 Utah, 432, it would seem that § 2393, Utah Comp. Laws 1888, which provides that any person who is a holder of paid-up capital stock shall not be liable for any assessments or for any indebtedness of the corporation other than by a sale of his or her stock, would require such stock to be paid for in full, no matter whether the articles of association made any such provision.

In *Re Maria Anna & S. Coal & Coke Co.* L. R. 20 Eq. 585, 44 L. J. Ch. N. S. 423, 32 L. T. N. S. 45 L. R. A.

747, 23 Week. Rep. 647, the memorandum of association under the English joint-stock companies act of 1856 limited the liability to a given amount per share, and the articles of association provided, as regarded certain debts for which certain shareholders had given promissory notes, that if the company should be called upon to pay them, and should not have funds in hand applicable to the payment, each shareholder should contribute and pay to the company as a debt due to it a proportionate amount according to the number of shares held by him. It was held that though the memorandum of association limited the extent of liability as regarded creditors outside of the company, yet there was nothing in the act of 1856 preventing the shareholders *inter se* from contracting to make themselves liable to a greater amount, and that the provisions of the articles of association constituted such a contract, and consequently that the holders of fully paid-up shares might be put on the list of contributories for the purpose of having a call made to meet the liabilities so incurred.

In *Dewey v. St. Albans Trust Co.* 57 Vt. 332, 336, the receiver of the company sought to compel the directors to assess the stockholders a sum sufficient to make up a certain dividend for the creditors, under the Vermont statutes of 1868, which provide that if at any time the capital stock paid into said corporation shall be impaired by losses or otherwise the directors shall forthwith repair the same by assessment, upon the ground that the statute applied and gave power to make such assessments after the company had become insolvent and passed into the hands of the receiver. The court refused to make the order as no such personal liability was imposed, and the assessment could not be made, as the provision was inserted in the statute merely with the object of preventing a continuance of the business with impaired capital.

In this case the court pointed out that if the assessment were made it would have to be made for more than enough to pay all the debts in full, which would take many times the amount of the stock.

In *Ireland v. Palestine, B. N. P. & N. W. Turnp. Co.* 19 Ohio St. 369, 371, it was held that the Ohio act of May 3, 1852, relating to turnpike companies, in so far as it authorized assessments against stockholders who had fully paid the amount of their subscriptions, and who,

the nonpayment by the holder of certain assessments against said stock. The six suits were, by stipulation, consolidated and tried as one, injunctions were allowed, and from the decrees appeals have been perfected for the ditch company, and the one decision here is to be applicable in all the cases. It was alleged in the petition, and admitted, "that the Enterprise Ditch Company was duly organized as a corporation, under the laws of the state of Nebraska, on or about the 7th day of March, 1889, and ever since has been a corporation under the laws of the state of Nebraska, and doing business in Scotts Bluff county, Neb." A copy of the articles of incorporation was attached to each petition. Article 3 reads: "The general nature of the business to be transacted is to acquire, construct, operate, and maintain a canal, taking water from the North Platte river, in said county and state, and diverting and appropriating water from said river, sufficient to fill their said ditch, at all times as may

be necessary for the use of persons taking water therefrom, and conducting through their said canal, and renting, leasing, selling, and otherwise disposing, of water, water rights, or stock in said ditch to persons owning lands under said ditch, or to any other person or persons, in the discretion of the board of directors or trustees, for the purpose of irrigation, milling, manufacturing, domestic, or other use, as may be necessary to fully carry out the business for which the same is organized." The provision in relation to by-laws is as follows: "The duties of all officers shall be prescribed by the by-laws of said corporation; and the board of trustees shall have authority to adopt such prudential by-laws as they shall deem proper and expedient for the management of the affairs of said corporation, and not inconsistent with the laws of the state of Nebraska, for the purpose of carrying on the business, within the objects and purposes of this corporation."

by the charter of the company or the laws under which it was organized, were not individually liable for its debts, was unconstitutional, as it impaired the validity of the contract between the company and the stockholder, the terms of which the stockholder had a right to stand by.

IV. Under charter provisions.

If the company has under its charter power to assess fully paid-up shares, it can only do so at a corporate meeting duly notified for such purpose; and the general rule is well settled that an act of such importance cannot be done at a special corporate meeting unless the stockholders are duly notified of the purpose of the meeting so that they can attend and vote upon the matter. A clause in the charter that "all or any business of the corporation may be transacted or acted on" at such a meeting, and a by-law passed in pursuance of such charter prescribing how notice of special meetings shall be served upon the stockholders, do not dispense with the necessity of specifying the purpose of the meeting in the notice. *Atlantic De Laine Co. v. Mason*, 5 R. I. 463. In this case the charter contained a clause that the shares in said capital stock shall not be liable to assessment after the capital stock so fixed in amount as aforesaid has been paid in, except in equal proportions and by the consent of the stockholders owning at least three fourths of the shares of the capital stock of the corporation. It was held that such clause authorized a further assessment of paid stock, but only upon the basis that the capital stock as fixed by the charter had been subscribed for and actually paid in.

Under a charter providing that assessments shall not be made upon any share at a greater amount than \$100 in the whole, an assessment beyond that amount is void. *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 454, 77 Am. Dec. 236.

Where under its charter the directors of the company had power to make "such equal assessments from time to time on all the shares in said corporation as they may deem expedient and necessary in the execution and progress of the work, and direct the same to be paid to the treasurer of the corporation; provided, however, that no assessments shall be laid upon any share in said corporation of a greater amount than \$100 in the whole on such share; and if a 45 L. R. A.

greater amount of money shall be necessary to complete said road, it shall be raised by creating new shares, giving the stockholders in said corporation the right to take said stock in proportion to the stock by them respectively owned in said corporation."—It was held that the amount of the assessments was limited to the \$100 a share mentioned in such charter, and that the directors had therefore no power to make assessments beyond the sum upon stock which was fully paid up for the purpose of paying corporate debts, and that the assessment made for that purpose was invalid. *Great Falls & C. R. Co. v. Copp*, 38 N. H. 124.

Where at the time the stockholder purchased his stock the charter provided "that the stockholders . . . shall not be liable to any responsibility farther than the amount of their respective shares and interests thereon for or on account of any damage or loss sustained by said company, or for or on account of any debts due thereon."—It was held that such stockholder could not object to an assessment made upon him in conformity with the provisions of R. I. Stat. 1866, chap. 635, even though his stock was purchased before the passing of the act, as the general assembly had by an express reservation reserved to themselves the power to amend, alter, or repeal the charter at its pleasure. *Gardner v. Hope Ins. Co.* 9 R. I. 194, 11 Am. Rep. 238.

In this case the plaintiff, the owner of fully paid-up stock, sought to recover the value of shares in the capital stock of the company which the company refused to transfer upon the order of the plaintiff because of his alleged indebtedness for unpaid assessments on stock made to fill up the capital of the company reduced from its original amount from losses in business. It appeared that the corporators had accepted its charter upon the conditions and subject to the power reserved to the legislature, and had agreed that its provisions might be changed, and every purchaser of stock in the company had assented to those terms, and had agreed to hold the shares subject to this liability to change, and the assessment was therefore lawfully made.

V. Assessments under by-laws.

The dues imposed upon members of a library association by by-laws made pursuant to the articles of incorporation and intended to meet

By statute it is provided: "Every corporation, as such, has power: . . . Seventh. To make by-laws, not inconsistent with any existing law, for the management of its affairs." Comp. Stat. 1897, chap. 16, § 124. In the by-laws adopted by the ditch company it is provided that "the board of directors shall exercise a general supervision over the affairs of the company. . . . The board shall hold regular quarterly meetings the first Tuesday in December, March, June, and September. . . . The board of directors shall at their first quarterly meeting make an estimate of the total cost of maintenance, and levy an assessment for such an amount, subject to the call of the board of directors from time to time, as the same shall be needed." It is further provided: "For Non-payment of Dues on Any Cash Assessment. When any stockholder shall be in default of payment of any instalment of assessment upon his stock, pursuant to any levy or assessment of the board of directors or trustees,

for the period of thirty days after personal notice thereof or request to pay the same by the secretary, or after written or printed notice thereof or request to pay the same by the secretary, or after written or printed notice and demand therefor has been deposited in the postoffice properly addressed to such delinquent stockholder, the board of directors may, at any meeting, order that the shares of stock held by such delinquent stockholder, and all the right or interest of such stockholder therein, be sold by the president of the company at public auction, or at some certain time and place, to be designated in such order, to the highest bidder for each: provided, however, that notice of the time and place of such sale shall be published in some general newspaper in Scotts Bluff county, Nebraska, for four consecutive weeks just prior to such sale, proof of which publication shall be the affidavit of the publisher or foreman of such paper. Further, that the proceeds of such sale, over and above the amount

the current expenses cannot be considered as assessments upon the stock of the corporation within the meaning of that term as used in corporation laws, and are therefore not illegal. *Omaha Law Library Asso. v. Connell*, 55 Neb. 396.

In the above case the association was incorporated for the use of members, and the board of directors had power to provide for the forfeiture of stock on failure for a period of not less than one year by the owner of any share or shares to pay the annual dues assessed thereon. Under the by-laws made pursuant to the articles of incorporation the dues were to be paid to the treasurer for the purpose of meeting current expenses. The defendant, who brought action to recover dues imposed upon him as a fully paid-up stockholder, contended that the dues sued for were assessments levied or attempted to be levied by the by-laws on the capital stock of the corporation, and that as he had fully paid up his stock, and as the statute under which the corporation was organized did not expressly authorize the assessment, the by-law imposing the dues was void. The court held that under the by-laws the dues or assessments so imposed could not be considered as an assessment of stock, and the defendant was therefore liable for the same, and that under the articles of incorporation the board had power to make the by-law.

VI. Assessment by resolution.

In *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52, 56, assignors of fully paid-up stock, although notified, were not present at any meeting of the shareholders authorizing the directors of the bank to make an assessment on each share of the original stock, and to declare that, unless payment thereof was made within a given time by the owner of the stock, it should be forfeited and new stock issued and sold in lieu thereof. The assignors in no way consented to or ratified the action of the other stockholders and board of directors, advanced no additional sum, and took none of the new shares, and subsequently transferred their stock certificate to the plaintiff in the present action, who made demand for the transfer and was refused, and then brought suit to compel the bank to execute such transfers and to reinstate him as a stockholder, and, in case of refusal, to recover damages for conversion of the stock. It 45 L. R. A.

was held that the action taken by the stockholders and directors did not have the effect of cancelling the stock so held by the plaintiff's transferees, as without their consent their shares could not be thus forfeited.

VII. Voluntary assessments.

In *Brodrick v. Brown*, 69 Fed. Rep. 497, 499. It is said the law is well settled that where stockholders voluntarily assess themselves to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the advances thus made are not debts against, but assets of, the corporation.

In this case a bank examiner required \$50,000 to be raised and placed in the bank before it resumed business, and the shareholders, including the defendant, raised the money in amounts equal to 50 per cent of their stocks, and the examiner made entrance in the books showing that the contribution was a voluntary assessment, and after one year was subject to the liabilities of the bank. The bank then resumed business. This management was subsequently protested against by the defendant, who subsequently signed reports in which the amount was included as "surplus." The defendant at the time was indebted to the bank on notes, and, upon the bank again suspending payment, in an action brought by the receiver to recover their value, sought to set off the amount he had advanced to the bank as against his liability on the notes. His right to do so was, however, denied, as the assessment was binding.

In *Bidwell v. Pittsburgh, O. & E. L. Pass. R. Co.* 114 Pa. 535, the entire stock of the company was originally held by the plaintiff along with two others who, to meet an emergency, voluntarily assessed their stock and paid *pro rata* assessments into the company to be used and applied in the improvement and repair of its property. Later one of the stockholders sold out to the other two, and subsequently one of the other stockholders, after a sale of his stock on account of his bankruptcy, brought action against the company to recover the amounts paid by him on the voluntary assessment upon the ground that they had been considered and treated as loans, and that owing to the embarrassed condition of the company he had not pressed the payment of the amount due and

due on such shares, and all expenses incidental to such sale, shall be paid to such delinquent stockholder, and the treasurer of this company may, for the company, purchase the said shares at said sale for an amount not exceeding what shall be due from such stockholder to the company; or, instead of the sale mentioned, the board of directors may, after like notice to the delinquent stockholder, make an order that, at a certain time and place, the stock of such delinquent shall be canceled at such time and place mentioned in the said order. If said delinquent fail to pay the same, then it shall be lawful for the said board of directors to declare the same canceled, and from that date the said stock shall be subject to subscription and sale, the same as though it had never been sold, and all money paid thereon shall be forfeited and absolutely belong to the company." The action taken at the meet-

ing on January 27, 1894, according to the record introduced, was as follows: "Motion by Wright that a cash levy of \$6.50 per share be made upon the stock of the company, including the additional stock due and to be issued for work done in enlarging the canal; that \$4 per share of said assessment be declared due in thirty days after notice to stockholders, the balance of said assessment to be subject to the call of the directors of the company." November 16, 1894: "Moved and seconded that a special levy of \$1.50 per share on the capital stock of the company be made to complete this enlargement. Carried." And on April 13, 1895, "on motion, it was decided to make a cash assessment of \$4.50 per share for maintenance for the present year, \$2 of the same to be paid before the delivery of water; balance to be paid when the board demanded same. Before water is delivered, approved security to be given for

owing. The referee found that the advances were made as voluntary contributions to the company, and the amount thereof was measured by a consentable *pro rata* assessment of the shares, and that they were not made as loans, and were not intended or treated as such. The court sustained the finding of the referee, and plaintiff therefore failed in his action.

VII. Nonassessable stock; estoppel.

In *San Antonio Street R. Co. v. Adams*, 87 Tex. 125, a majority of the stockholders of the company agreed to transfer a large amount of stock to the transferee, who agreed to build the road, and who assigned to them certain shares of "paid-up nonassessable stock" the assessments on which he was to pay. Under article 12 of the Constitution the issuance of unpaid stock was prohibited, and in an action to recover the assessments imposed upon such stock by the company it was held that the agreement did not make such stock nonassessable, and that the corporation was not estopped by reason of its acquiescence therein for fourteen years from denying that the stock was nonassessable, as the transferee acted for himself in making the contract, and not on behalf of the corporation, and that such fact was not affected by reason that the contract was subsequently entered on the minutes of the corporation, nor by the fact that a resolution was subsequently passed declaring such shares nonassessable. In the above case the court reversed the decision of the court below in (Tex. Civ. App.) 25 S. W. 639, to the effect that the company was estopped to deny that the stock issued was nonassessable, and that the contract did not contravene art. 12, § 6, of the Constitution.

The issuance of new certificates for fully paid-up stock under resolution duly passed by the stockholders for the distribution in this way of surplus earnings of the company is held, in *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. Rep. 737, to estop the corporation from making assessments on that stock, when there are no rights of creditors involved.

And in *Christchurch Gas Co. v. Kelly*, 51 J. P. 374, it was held that when a company issues shares to directors as fully paid-up shares, and afterwards endeavors to recover a call on such shares, the company is prevented by estoppel from recovering the amount of such calls.

The note to *Dummer v. Smedley* (Mich.) 38 L. R. A. 490, treats of the effect of nominal payment for shares of bonus stock.
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IX. Injunction restraining.

In *San Antonio Street R. Co. v. Adams* (Tex. Civ. App.) 25 S. W. 639, it was held that when a solvent corporation assesses nonassessable stock, and demands payment of the assessment on penalty of a forfeiture and sale of the stock, an injunction will lie at the suit of a stockholder to restrain the action of the corporation. But this case was reversed in 87 Tex. 125, on the ground that the stock was not nonassessable.

And in *Moore v. New Jersey Lighterage Co.* 25 Jones & S. 1, an injunction was granted restraining the company from forfeiting fully paid-up shares held by the plaintiffs in the company. In this case the directors had made a call on the corporate stock, and had threatened to forfeit the same under the charter if not paid. The plaintiff's contention was that the call was unauthorized and invalid, for the reason that the shares of the company had been fully paid for before the call, and were not assessable, and the corporation was not authorized by law to take anything but cash in payment for shares.

In *Sparks v. Lower Payette Ditch Co.* 2 Idaho, 1030, plaintiff sought to restrain the corporation from selling fully paid-up shares of its capital stock upon which an assessment was made for the preservation and improvement of the corporate property under the Idaho laws of 1875. The court refused the injunction as under such laws stockholders were individually and personally liable for their proportion of all indebtedness incurred in conducting the business of the corporation, and a joint or several action might be instituted for the collection of the same, and under the laws of 1887, which superseded those of 1875, a corporation organized under the act of 1875, and continued under the provision of the later act, might by its board of directors proceed to collect by assessment on the capital stock of the corporation legally incurred debts and liabilities as therein prescribed, the act of 1887, not increasing the liability of the shareholders or altering their position from that of the act of 1875.

In *Sullivan v. Triunfo Gold & S. Min. Co.* 39 Cal. 459, the court expressed no opinion upon the question as to whether a stockholder who alleges that his stock is about to be sold for the satisfaction of an assessment which he alleges is illegal and void would suffer such injury by the sale of his stock as would entitle him to an injunction restraining the same.

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the payment of the same; also, all back dues to be paid before water is delivered." At a meeting on October 19, 1895, it appears: "It was moved and seconded that we advertise the delinquent stock, or any stock not paid up on assessments, there being in default the following stock certificates: Nos. 125, 142, 178, 191, 116, 130, 143, 144, 135, 176, 142, 49, 88, were ordered advertised and sold." Notice was published and sale of the shares of stock would have ensued had it not been enjoined.

There was no statutory authority to assess stock of which the amount had been fully paid, neither did the articles of incorporation confer any express power so to do. In the absence of authorization by either, the directors could not enact a by-law by which provision was made for such assessments, and especially not to be enforced by a sale or practical forfeiture of stock. *Omaha Law Library Asso. v. Connell*, 55 Neb. 396; *Atlantic De Line Co. v. Mason*, 5 R. I. 463; 2 Beach, Priv. Corp. § 590; 1 Cook, Stock & Stockholders & Corp. Law. §§ 241, 242; 1 Thomp. Corp. §§ 1037, 1038; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495; *Re Long Island R. Co.* 19 Wend. 37. 32 Am. Dec. 429; *State, ex rel. Canfield, v. Morristown Fire Asso.* 23 N. J. L. 195; *Williams v. Lowe*, 4 Neb. 382.

A short time prior to the last assessment to which we have referred, a legislative enactment of 1895 had become of effect, §§ 66 and 67 of which were as follows:

"Sec. 66. Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation purposes, and deriving no revenue from the operation of such canal, reservoir, or works, shall be termed a mutual irrigation company, and any by-laws adopted by such company prior to or after the passage of this act, not in conflict herewith, shall be deemed lawful and so recognized by the courts of this state: provided, such by-laws do not impair the rights of one shareholder over another.

"Sec. 67. Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs, or other works for irrigation purposes may through its board of directors or trustees assess the shares, stock, or interest of the stockholders thereof for the purposes of obtaining funds to defray the necessary running expenses of such corporation or association. Any assessments levied under the provisions of this section shall become and be a lien upon the stock or interest so assessed, such assessments shall become delinquent at the expiration of sixty days if not paid, and the said stock or interest may be sold at public sale to satisfy said lien. Notice of such sale shall be given in some newspaper published and of general circulation in the county where the office of the company is located, the said notice to be published for four consecutive weeks prior to date of sale, upon the date mentioned in the advertisement, or at such time to which the sale has

been adjourned, the said stock, or interest, or so [much] thereof as may be necessary to satisfy said lien and costs of advertisements and sale, shall be sold to the highest bidder for cash." Comp. Stat. chap. 93a, art. 2, §§ 66, 67.

The paid share or shares of stock were the personal property of any individual owner, and a contract which embodied the articles of incorporation and the pertinent laws of the state existed, to which the shareholder was a party. Without a discussion or notice of some other branches of the argument and subject, it must be said that the legislature could not so change these accrued, contractual, and property rights as to allow an assessment against the paid-up stock, and its forfeiture or sale for the nonpayment. This would involve too violent an invasion of property and contract rights. 1 Cook, Stock & Stockholders & Corp. Law, § 492; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140; 1 Beach, Priv. Corp. §§ 40, 41; 1 Cook, Stock & Stockholders & Corp. Law, § 50.

It follows that the decree will be affirmed.

James GADSDEN

v.

George THRUSH *et al.*

(56 Neb. 505.)

*1. The exemption of national banks from the penalties of usury prescribed by a statute of the state owes its existence to laws enacted by Congress, and such exemption should not, by implication, be extended beyond the import of the Federal statute.

2. In an action to foreclose a mortgage securing a note made to be used as collateral to a note owing to a national bank, the mere fact that the proceeds of such collateral, when collected by the payee thereof, are to be used to discharge the said principal note to the bank, does not justify the extension of the Federal exemptions of national banks from penalties for usury to such foreclosure proceedings.

(March 22, 1899.)

CROSS-APPEALS from a decree of the District Court for Dodge County foreclosing a mortgage; plaintiff appealing from so much of the decree as established the priority of another lien, and defendants appealing from so much of the decree as allowed such lien and as refused to enforce the state law against usury upon another lien claimant. *Reversed.*

The facts and discussion of the case, so far as they relate to the claim of the Schuyler National Bank after the first hearing of the case appearing in the opinion of Irvine, C., are as follows:

This was an action by Gadsden to foreclose

*Headnotes by RYAN, C.

NOTE.—For a case as to effect of usury by national bank, see *Danforth v. National State Bank* (C. C. App. 8d C.) 17 L. R. A. 622.

a mortgage made to him by George Thrush and wife. No controversy exists between the parties named. Certain other parties claimed liens on the mortgaged premises. The decree established a first lien in favor of the First National Bank of Schuyler, a second in favor of the Schuyler National Bank, a third in favor of the Nebraska State Bank, and a fourth in favor of the plaintiff. The plaintiff and Thrush appeal; the plaintiff, because the court awarded the First National Bank priority over him, and Thrush complaining against the allowance of any lien to the First National Bank, and also because, on a plea of usury by him interposed against the claim of the Schuyler National Bank, the court declined to permit the remedy afforded by the state law, but allowed the principal of the debt with a forfeiture only of unpaid interest.

We now come to the lien of the Schuyler National Bank. Thrush was largely indebted to that bank. He obtained a further loan, and executed to the bank a note for \$5,000 to represent the consolidated indebtedness. At the same time there was made a note for a like amount to William H. Sumner and a mortgage to Sumner to secure the latter note. Sumner was an officer of the bank. He had no individual dealings with Thrush, and the sole purpose of the note and mortgage to him was to secure the debt to the bank. Certain payments were made on the bank's note, so that, when it came to foreclosure, the bank claimed as due only \$3,229. To the cross petition of Sumner, in which the bank was permitted to join, Thrush pleaded usury. It was clearly shown that the transactions between Thrush and the bank were tainted with usury, and the court so found. But the view was taken that, as the transaction was, in effect, with a national bank, the remedies afforded by the act of Congress in that behalf were exclusive, and that Thrush was not entitled to the benefit of the state laws, whereby he might set off against the principal all payments made of interest. Accordingly, there was allowed this bank its principal. It is now firmly established that, as against a national bank, the remedies allowed by act of Congress in case of usury are exclusive, and that payments of usurious interest may not be set off in an action for the debt. But the case before us is complicated by the fact that the mortgage and note here in question were not made to the bank, but to an individual amenable to the state laws, who joins the bank in enforcing the security. We have been cited to no authority on the precise question thus presented, nor, in the course of an independent investigation, necessarily somewhat cursory, have we discovered any. We think, however, that under the circumstances the bank is in no position to assert any privilege under the act of Congress.

The inference from the direct testimony and from the circumstances is that, if the object of procuring the note and mortgage to be executed to Sumner was not to evade the penalties of the act of Congress with respect to usury, it was to evade the inhibition

against the taking by a national bank of real-estate security for loans made at the time. Whether that inhibition applies to a case where a portion of the debt was pre-existent, we need not inquire, because it is now settled that a violation of that enactment does not afford the debtor any ground of relief; the government alone may complain. Still, whichever motive influenced the bank, the object was to evade the burdens attaching to its position as a national bank. It would be highly unconscionable to permit a person to give a contract a false form to evade the burdens which would follow from its true expression, and then permit him to show the truth as against the form to evade the burdens cast by a contract in the form which has been so chosen. It is said that Thrush might certainly have recovered the penalty denounced by Congress by an independent action within the period of limitations against the bank, and that, therefore, the transaction must be regarded as one within the act of Congress. This does not follow. One may render himself liable because of a false aspect he throws upon his transactions, and at the same time be thwarted in his effort to evade another liability, to evade which he has selected the false aspect. The terse headnote to *Hayes v. People*, 25 N. Y. 390, 82 Am. Dec. 364, illustrates the principle: "A married man, it seems, imagining himself to effect mere seduction, may blunder into bigamy." The decree of the district court is reversed, and the cause remanded, with directions to ascertain the amount of money advanced to Thrush by the Schuyler National Bank, deduct therefrom all payments, whether of principal or interest, and award foreclosure for the remainder, if any, to postpone the lien of the First National Bank to that of the plaintiff, and for such further proceedings as may be necessary, and not inconsistent with this opinion.

Messrs. Frick & Dolesal for appellants.
Mr. George H. Thomas for appellee.
First National Bank.

Messrs. J. A. Grimison and Miles Zentmeyer for Schuyler National Bank.

Ryan, C., filed the following opinion:

In this case a rehearing was granted the appellees William H. Sumner and the Schuyler National Bank. The opinion originally filed is reported in 76 N. W. 1060, and therein will be found a general description of the relation of the parties and the pleadings filed by each. The present inquiry is with relation to the issues under which Sumner and the Schuyler National Bank seek relief, and accordingly we shall confine ourselves to the pleadings wherewith these parties are concerned. In his cross petition, William H. Sumner alleged that on August 8, 1890, the defendants George Thrush and Charles Thrush were indebted to the Schuyler National Bank in the sum of \$5,000, evidenced by their promissory note to said bank; that said note was renewed from time to time, and on March 31, 1894, there remained due the sum of \$3,229, for which amount George Thrush gave his promissory note to the bank,

due 180 days after its date; and that no part of this note had been paid. It was further alleged by Sumner, that on August 8, 1890, George Thrush and Mattie Thrush executed to him their promissory note for the sum of \$5,000, due two years after date, with 10 per cent interest per annum, payable annually, and that, to secure the said note, the makers of said note made a mortgage on certain described real property, which said mortgage was duly filed for record. In his said cross petition, William H. Sumner made the following averments: "This defendant further alleges that the note and mortgage, so as aforesaid executed and delivered by the defendants George Thrush and Mattie Thrush, were executed and delivered to him as trustee for the use and benefit of the Schuyler National Bank, and to secure the indebtedness of said Thrush to said bank; that said debt so secured on the 8th day of August, 1890, by said mortgage deed, was a debt previously contracted; that said mortgage was made in good faith, and in the name of this defendant, for the benefit of said Schuyler National Bank. No proceedings at law have been had for the recovery of the debt secured by said mortgage, or any part thereof, and there is now due from the defendants George Thrush and Mattie N. Thrush to this defendant, for the use and benefit of the Schuyler National Bank, the sum of \$3,229, and interest at 10 per cent from September 27, 1894." The prayer of the petition of Sumner was that an account might be taken of the amount due on said note and mortgage; that the priority of liens might be determined and the lien of other defendants declared inferior to that of Sumner, and that said George Thrush and Mattie N. Thrush might be foreclosed of all equity of redemption or other interest in the premises mortgaged; that said premises might be sold according to law, and out of the proceeds thereof that the lienholders might be paid the amount adjudged to be due them, in the order of their priority; that the defendants George Thrush and Mattie Thrush might be adjudged to pay any deficiency which might remain after applying the proceeds of said sale to the payment of said debts; and for such other relief as might be just and equitable. Later, the Schuyler National Bank was allowed to become a party to the litigation, and filed a cross petition alleging substantially the same facts, and, on behalf of itself and Sumner, praying like relief with that above described as the prayer of Sumner. The defendants George Thrush and Mattie N. Thrush, in separate answers, admitted the making of the promissory note for \$5,000, and of the mortgage securing the same, on August 8, 1890, but denied every other allegation of the petition of Sumner. In addition, they averred that said note and mortgage were made to Sumner as part of a usurious transaction; that the same were held by Sumner as collateral security to usurious loans, from time to time renewed at usurious rates, as in the answer more particularly described. Each successive usurious loan, at 12 per cent per annum interest,

was described in a distinct paragraph, and these paragraphs were twenty-four in number. The first paragraph described a loan on August 9, 1889, and the twenty-fourth paragraph described the history of the note of \$3,229, of date March 31, 1894. There was therefore a continuous chain of usurious transactions, extending over the entire period between August 9, 1889, and March 31, 1894, and the relief sought was the application of the payments of interest on the sum in satisfaction of which the foreclosure was prayed. By reply, Sumner denied the averments of the eleventh paragraph of the answer of each of the defendants Thrush, and the other paragraphs of his reply, substituting the appropriate figures to express the proper number referred to in each instance, were as follows: "That the interest payment mentioned in paragraph 10 of said answer was made to the Schuyler National Bank more than two years before the commencement of this action; and the consideration thereof in this action is barred by law." The reply of Sumner closed with this language: "He further says this court has no jurisdiction in this action to consider the questions raised in said answer as to each and every item of interest mentioned in said answer as paid to said Schuyler National Bank; that said items are not proper items to set off or counterclaim, and cannot be adjudicated, except in a suit brought expressly for that purpose, under the provisions of § 5198 of the Revised Statutes of the United States." On the trial there was a decree of foreclosure, in which there was a finding of usury in the note of \$3,229, to the amount of \$229, and the defendants George Thrush and Mattie N. Thrush were denied their costs. In other words, the district court held that the statute of limitations and costs were governed by the Federal statute relating to national banks, and not by § 5, chap. 44, Neb. Comp. Stat. The correctness of this ruling is the question presented by this appeal.

In the former opinion it was pointed out that the taking of real-estate security for the loan of money constitutes no defense to a foreclosure; hence the citation of authorities on behalf of the bank to that proposition was not necessary. It was further pointed out in that opinion that the government might complain, and upon this proposition it is noticeable that the bank has cited no authorities and has made no argument. There was, in view of the last consideration named, an incentive to the bank to take the security upon real property as it did in this instance, so that it might appear upon the face of the note and mortgage that the bank originally had not been a party thereto, if the governmental authorities should insist upon a strict compliance with the provisions of the Federal statute forbidding the taking of a real-estate mortgage, except in certain cases, in which that under consideration is not included. In *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, Norval, Ch. J., quoted, as of binding force upon this court, the following language of Swayne, J., in *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196:

"The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. . . . In the complex system of polity which obtains in this country, the powers of government may be divided into four classes: Those which belong exclusively to the states; those which belong exclusively to the national government; those which may be exercised concurrently and independently by both; and those which may be exercised by the states, but only with the consent, express or implied, of Congress. Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires, and lies in abeyance, until a proper occasion for its exercise shall recur. . . . It must always be borne in mind that the Constitution of the United States, 'and the laws which shall be made in pursuance thereof,' are 'the supreme law of the land' (Const. art. 6), and that this law is as much a part of the law of each state, and as binding upon its authorities and people, as its own local Constitution and laws. In any view that can be taken of the 30th section [Rev. Stat. § 5198], the power to supplement it by state legislation is conferred neither expressly nor by implication, there being nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the state where the bank is situated, but there is none why usury should be visited with the forfeiture of the entire debt in one state, and with no penal consequence whatever in another. This, we think, would be unreasonable, and contrary to the manifest intent of Congress." Conformably with the doctrine above announced, it was held in *Norfolk Nat. Bank v. Schwenk*, 46 Neb. 381, that a national bank is not liable to the penalties imposed by the usury laws of the state. We are now asked to go a step further, and hold, in a suit to foreclose a mortgage securing a note made to, and held by, an individual, in trust for the payment of a note owing to the bank, that the provisions of § 5198, Rev. Stat., are applicable, to the exclusion of the statute of this state with reference to usury. The cross petition of Sumner, in effect, was for the foreclosure of a mortgage of which the proceeds were to be applied in payment of a note made to the bank. The principal note was not sued upon. It was referred to only as showing how much was required to be realized in the foreclosure suit. The answers of each of the defendants Thrush showed that, by reason of usury, but little, if anything, was required to be realized from the foreclosure proceedings to satisfy what was due from George Thrush to the bank. It was not a suit, in

any sense, upon the note which George Thrush had given the bank. That was his individual note. The note secured by mortgage was signed by Mattie N. Thrush, who owed nothing to the bank. She did not merely sign the mortgage to release her dower right, but she signed the note as one of its makers. In case of a deficiency by sale of the mortgaged property, she was individually liable, as it is now claimed, not to Sumner, but to the Schuyler National Bank, to which she was not indebted, and had never agreed to pay a single cent. To her answer, setting up payments of usurious interest, which would release her from individual liability, there was a reply which, in effect, conceded the usury charged to have been contracted for and exacted in twenty-three instances, but sought to avoid the credits to which, under the state law, she would have been entitled, by invoking the Federal statute enacted for the protection of national banks as governmental instrumentalities. It is provided in § 5, chap. 44, Neb. Comp. Stat. that, "if a greater rate of interest than is hereinbefore allowed shall be contracted for, or received, or reserved, the contract shall not therefore be void; but if, in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon judgment shall be for the principal, deducting interest paid." Sumner himself put in issue the amount which he was entitled to collect for the payment of the note made by George Thrush to the bank. By the answers and replies there was alleged, and practically admitted, the right to credits by reason of payments of usury by George Thrush on his indebtedness to the bank. It is now insisted, however, that the trustee should stand for the bank, and, in equity, that he is entitled to the same rights and exemptions from liabilities as are conferred by Federal statute upon the governmental instrument referred to by Judge Swayne in *Farmers' & M. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196. There is no just reason for resorting to strained constructions to avoid the penalties of the statute of this state. As between these litigants, we are not measuring equities. The withdrawal of this case from the operation of our statute, as indicated by Judge Swayne, must be sanctioned by some express provision of the Federal statute. Section 5198, U. S. Rev. Stat., contains the following language: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of the interest thus

paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred." Under the above section, the forfeiture of the entire interest is of that which the note, bill, or other evidence of debt sued upon carries with it or which has been agreed to be paid thereon. In the case at bar the recovery by foreclosure was sought upon the note given by George and Mattie N. Thrush to William H. Sumner. There was no issue of usury on that note. It was concededly held by Sumner for a certain purpose; that is, to be collected, and the proceeds paid over on a note greatly reduced, if not discharged. To the foreclosure proceedings by Sumner, in which the bank joined, the Federal statute was inapplicable—First, for the reason that the note secured by mortgage was not the note upon which usurious interest was agreed to be paid; and, second, the note and mortgage are held by Sumner, and a foreclosure is sought by him. The bank, when it became a party, simply urged that the same relief prayed by Sumner should be granted. The rule is that the state statutes govern proceedings in the courts of the state, unless the Federal statute with reference to a proper

subject-matter prescribes a modification. It may be conceded that the interests of the general government require that it should take special care of national banks, but the Federal government must, by clear provisions, assert its authority. There is no good reason why state courts should extend the operation of statutes, affecting merely the remedy, beyond the clear import of the language of Congress, and there is no precedent for this that we have been able to find. If the bank had been one organized in the state of Illinois, Sumner would not have been permitted to commence his action of foreclosure in a Federal court, upon showing the conditions disclosed by the record in this case. No citation of authorities is necessary to demonstrate this proposition, and the reason of the rule is that the Federal statute prescribes what parties have a standing to begin suits in the Federal courts, and none others can. There is no enlargement of rights possible, upon mere equitable grounds, in such cases, and there should not be in this. For the reasons given, we think the former opinion should be adhered to, and the order therein prescribed should govern the further proceedings in this case.

Reversed and remanded.

OHIO SUPREME COURT.

BRADFORD GLYCERINE COMPANY,
Plff. in Err.,
v.

ST. MARY'S WOOLEN MANUFACTURING COMPANY.

(60 Ohio St. 560.)

- *1. Nitroglycerine is a substance usually recognised as highly explosive and dangerous, the storage of which at any place is a constant menace to the property in that vicinity. And one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage nor is chargeable with negligence contributing to the explosion.
2. A right of action will exist in favor of all property within the circle of danger, and the fact that the property injured was not on premises adjacent to those on which the explosive substance was stored will not defeat a recovery.

(*Shauck, J., dissents.*)

(June 20, 1899.)

ERROR to the Circuit Court for Hancock County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to

*Headnotes by the COURT.

NOTE.—For note on negligence in the manufacture and storage of explosives, see *Judson v. Giant Powder Co. (Cal.)* 29 L. R. A. 718. See 45 L. R. A.

recover damages for injuries caused by an explosion of nitroglycerine. *Affirmed.*

Statement by **Bradbury, Ch. J.:**

This action was commenced before a justice of the peace by the defendant in error to recover of the plaintiff in error damages suffered on account of an explosion of a magazine of nitroglycerine owned by the latter. The plaintiff in error prevailed before the magistrate, and the cause was appealed to the court of common pleas, where the plaintiff in error again prevailed. The cause was then carried to the circuit court on error, where the judgment of the court of common pleas was reversed, and a judgment rendered for the defendant in error for the damages it had sustained; whereupon proceedings were instituted in this court to reverse the judgment of the circuit court. The facts will be stated in the opinion.

Mr. George H. Phelps, for plaintiff in error:

One very important distinction in fact between the case at bar and *Rylands v. Fletcher*, L. R. 3 H. L. 330, is found in the fact that in this case there was not the slightest element of trespass.

The same distinction pervades all the Ohio cases which in any degree involved the principle or in which reference to the English case is made.

also *Rudder v. Koopmann (Ala.)* 87 L. R. A. 489; and *Kinney v. Koopmann (Ala.)* 37 L. R. A. 497.

Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; *Ohio Gas Fuel Co. v. Andrews*, 50 Ohio St. 695, 29 L. R. A. 337; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L. R. A. 736.

There is a manifest distinction in principle, and upon authority, between the impounding and presence of a dangerous and menacing substance for the purely personal convenience of the owner, and the presence of an equally dangerous agency having an element of public utility in the community in which it is kept.

Webb's Pollock, Torts, 608, 609.

Negligence must be the basis of liability for injury resulting from an explosion.

7 Am. & Eng. Enc. Law, p. 517, notes; Webb's Pollock, Torts, 164, notes; Cooley, Torts, 589-594; *Loose v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623.

Messrs. Culliton & Smith and J. H. Goeke, for defendant in error:

One who takes and keeps upon his own premises material or substance which in itself is dangerous and liable to explode and do injury to person or property on adjoining premises, or on premises in the neighborhood or vicinity, and it does explode, is liable in damages for the injury directly caused thereon by such explosion, without proof of negligence in storing or caring for such material or substance.

Fletcher v. Rylands, L. R. 1 Exch. 265, 1 English Ruling Cases, 235; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *Trenain v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284; *McAndrews v. Colford*, 42 N. J. L. 189, 36 Am. Rep. 509; *Judson v. Giant Powder Co.* 107 Cal. 549, 29 L. R. A. 718; *Moak's Underhill*, Torts, 12, 13; *Addison*, Torts, 308; *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556; *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Wood*, Nuisances, 142; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184.

It is not material that the glycerine company was using its land in a lawful or ordinary or usual way.

Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654.

It matters not whether it is a trespass or a nuisance, the liability is the same, and one who handles this dangerous substance must see to it that it does no mischief.

Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 417.

Bradbury, Ch. J., delivered the opinion of the court:

The cause was submitted to the court of common pleas on the following agreed statement of facts: "It is hereby stipulated that this case will be submitted to the court upon the following statement of facts as the evidence in this case: Plaintiff is a corporation organized under the laws of Ohio, and the owner of real estate whereon buildings are erected in the village of St. Marys, Auglaize 45 L. R. A.

county, Ohio, and was such at all times stated in the petition filed in this action. The defendant is a partnership organized for the purpose of doing business in the state of Ohio, and owning property therein. On or about January 25, A. D. 1890, the defendant was the owner of a magazine and contents containing about 50 quarts of nitroglycerine used by the defendant in its business of manufacturing, storing, and vending nitroglycerine, which magazine was situated on a tract of land belonging to one W. G. Kishler, and situated something over a mile west of the buildings so owned by the plaintiff in St. Marys, Ohio, and situated about one fourth of a mile distant from the corporation line of the village of St. Marys, Auglaize county, Ohio. That on or about said 25th day of January, A. D. 1890, while one of the defendant's servants was upon the premises upon which said magazine was located, engaged in transferring about 750 quarts of nitroglycerine from a wagon loaded with same to said magazine, the said nitroglycerine stored therein, and also the same upon the wagon aforesaid, from some cause unknown to said defendant, exploded with great force and concussion, causing vibrations in the atmosphere sufficient in power and violence to break, shatter, and destroy three plate glass and three common glass in the buildings owned by the plaintiffs aforesaid, of the value of \$244.10, by reason of which explosion and the breakage of said glass the plaintiffs were injured and damaged to the extent aforesaid. That nitroglycerine is a dangerous substance, and likely to explode. That demand of payment of said sum has been made by the plaintiff to the defendant, and payment thereof has been refused."

This agreed statement of facts does not show that the plaintiff in error violated any statute of the state, or was in any degree negligent in handling or storing the explosive substance involved. It was nitroglycerine, a well-known and highly-explosive agency, which the agreed statement of facts shows "is a dangerous substance, and likely to explode." Is one who brings upon his own premises such agency liable for damages caused by its exploding, although such owner is not chargeable with either want of care or an unlawful act in connection with the casualty? This exact question has not heretofore been considered by this court, although a number of cases have been decided by the court that bear a general resemblance to it. *Ohio Gas Fuel Co. v. Andrews*, 50 Ohio St. 695, 29 L. R. A. 337; *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 32 L. R. A. 736; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408. The tendency of these cases is towards holding the parties charged with the management of dangerous substances to a strict liability. In *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, this court held: "Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining landowner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked." And the same view of the lia-

bility of one who, by blasting rocks, cast fragments thereof against the house of another, was taken by the court of appeals of New York in the cases of *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279, and *Tremain v. Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284. The court in the first case decided that "the defendants, a corporation, dug a canal upon their own land for the purposes authorized by their charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. Held, that the defendants were liable for the injury, although no negligence or want of skill in executing the work was alleged or proved." And in the second case that "the defendants dug a canal upon their own land, and in executing the work blasted the rocks so as to cast the fragments against the plaintiff's house on contiguous lands. Held, in an action on the case brought to recover damages for the injury, that evidence to show the work done in the most careful manner was inadmissible, there being no claim to recover exemplary damages, and the jury having been instructed on the trial to render their verdict for actual damages only." Counsel for plaintiff in error contend that in respect of the matter under consideration the analogy between the act of blasting rock on one's premises and storing a dangerous explosive thereon is not close. In the one case the damage is caused by fragments of rock being hurled upon or against the property injured, while in the other case the damage is caused by violent atmospheric vibrations from the explosion. If, however, the explosion caused fragments of the building wherein the explosive material was stored, or other solid substance, to be thrown against the property injured, thereby producing damage, the analogy might be more easily perceived. True, it might be said that in the one case the party to be charged was actively engaged in the work that caused the injury, while in the other case he was simply using the premises to store the dangerous substance, not intending that it should explode. These distinctions, however, do not seem to be material. The right of the owner of a stone quarry to blast rock therefrom where that is necessary to a profitable use of his property, or the right of one to make an excavation of any kind on his own property where blasting is a proper and usual mode to accomplish the owner's purpose, would seem to be of as high and perfect a character as is the right of an owner to use his premises as a storehouse for explosive substances. Upon what principle should an owner of property hold it subject to the right of another to store on his own premises adjacent to it nitroglycerine, but not subject to the right of that other to blast rock? If one may store nitroglycerine on his own premises, and not be liable to adjacent property for damages caused by its exploding unless he has been negligent, while in the case of the owner of the quarry the latter is liable for an injury to an adjacent property resulting from blasting, although free from

negligence, then it is plain that the adjacent proprietor holds his property in the one case subject to the right of his neighbor to store a dangerous explosive, but not to the right of his neighbor to blast rock. In the first supposed case the liability grows, not out of the storing of the dangerous explosive, but out of the negligence of the person storing it, while in the last supposed case, the liability springs from the manner in which the property is used; i. e., the blasting and negligence need not be shown. If, in the latter instance, the party blasting is liable for injuries that resulted from his act, however careful he may have been, the reasons for absolving the former from liability, unless he has been negligent, are not apparent. The blasting doubtless is a menace to adjacent property, but so is the storing of a highly explosive substance.

In this case the premises on which the explosive substance was stored and the premises on which the building that was injured stood do not appear to have been adjacent. They were a mile apart, and, for anything that appears in the record, many parcels of real estate owned by third persons may have intervened. That, however, does not seem to be material either. One who, in blasting rock, should cast fragments across a strip of adjacent land owned by a third person against the windows of a more remote proprietor would hardly be heard to say in defense of his act that the property injured was not adjacent. Whatever duty he owed to his neighbor extended equally to all who might fall within the lines of danger. So it would seem that in the case of explosives the right of all within the circle of danger should be equal, irrespective of whether the property injured was adjacent to the premises upon which the material was stored. The liability of one who, for his own purpose, brings upon his own premises substances dangerous to others if not kept under control, was exhaustively discussed by the judges of England in the case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, and afterwards, on a review of the case, in the House of Lords (L. R. 3 H. L. 330). In the exchequer chamber Justice Blackburn, in giving judgment, employed the following language: "We think that the true rule of law is that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy

by the fumes and noisome vapors of his neighbor's alkali works, is dammed without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law whether the things so brought be beasts, or water, or filth, or stench." This language was approved in the House of Lords when the cause came up for consideration there, Lord Cranworth saying: "My lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the exchequer chamber. If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." The doctrine in this case (*Fletcher v. Rylands*, L. R. 1 Exch. 265) has not been accepted by some of the courts of this country (*Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394; *Sweett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 445; *Loosee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623), but has been approved in *Shipley v. Fifth Associates*, 100 Mass. 194, 8 Am. Rep. 318; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Mears v. Dole*, 135 Mass. 510; *Cahill v. Eastman*, 18 Minn. 324 (Gil. 292), 10 Am. Rep. 184. In the case above cited from New York, —*Loosee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623,—and that from New Jersey,—*Marshall v. Welwood*, 38 N. J. L. 339, 20 Am. Rep. 394,—a casualty occurred from an explosion of steam boilers.

To my mind, the analogy between the act of storing so highly explosive and dangerous an agency as nitroglycerine on one's premises and that of conducting a business thereon, which requires for its successful operation the use of steam, is not complete, although each is an explosive. Doubtless both are dangerous agencies, when control over them is lost. The use of steam has, however, so generally been employed in every productive industry that every owner of real property may reasonably be held to contemplate the contingency of its being employed upon adjacent premises, and to enjoy his property subject to that risk. In a great city like New York or Chicago, where numerous and varied industries are conducted, there are doubtless many thousands of places where steam is employed. The entire popu-

lation of such a city is interested, and most of them directly or indirectly benefited, by these industries. Large numbers of them labor by day in factories where steam furnishes the motive power, and many of them sleep at night in buildings containing engines in active operation. The modern steam boiler and engine cannot be said to be such a menace to property and human life as to constitute a nuisance *per se*. They cannot, as such, be driven from the centers of population. Not so, however, with gunpowder and nitroglycerine. These latter agencies, on account of their dangerous character, may be, and usually, if not universally, are, driven into the suburbs of towns and cities, remote from human habitations and valuable structures. Under the circumstances that surround the productive arts and industries of to-day, a modification of the strict rule of liability in favor of those who employ steam in such arts or industries may not be inconsistent with its assertion against those who store gunpowder and nitroglycerine, or blast rocks, adjacent to the property of others. That public policy which seeks to secure the welfare of the many may demand such modification. Whether upon such grounds, or for any other reasons, such a modification of the rule should obtain in the case for the use of steam is not, of course, before the court, and the question is only considered in this brief way to show that there may be no irreconcilable conflict between the cases that have absolved the owners of boilers from liability for the consequences of an explosion occurring without their fault, and the conclusions reached by us in the case under consideration. Doubtless, gunpowder, nitroglycerine, and other dangerous explosives are useful agencies in many industries, as well as steam; but conceding that, in the case of steam boilers, the extensive and varied uses to which steam is devoted, and the comparatively slight danger arising from its use, require, on principles of public policy, which regards the interests of the great body of the people, that every owner of real property should be held to possess it subject to the right of his neighbor to erect a manufactory and employ steam on adjacent premises, yet it does not necessarily follow that such owner should possess his property also subject to the right of his neighbor to erect a powder or nitroglycerine magazine in his vicinity. The existence of a manufacturing establishment, although it employ steam as a motive power, may be, and doubtless is, in many instances, a positive benefit to real property in its vicinity, and instead of diminishing may enhance its value; while, on the contrary, the erection and use of a nitroglycerine magazine could have no other than a disastrous effect on the value of all real property in its vicinity. We think, therefore, the right to maintain the former may be placed upon grounds that cannot apply to the latter. The general doctrine upon the subject stated in *Fletcher v. Rylands*, *supra*, seems to be just and fair in its general operation. The syllabus of that case, as announced by the House

of Lords (L. R. 3 H. L. 330), seems to recognize a distinction in this respect between an ordinary and an extraordinary use of his premises by their owner; and, had that learned tribunal then had before it a case where damages were sought on account of injuries resulting from an explosion of a steam boiler in a manufacturing establishment, it might have denied the liability in the absence of proof of negligence, on the ground that the owner was using his premises in an ordinary manner. But, whatever might have been done by the House of Lords in the case supposed, we are of the opinion that the storing of nitroglycerine should be deemed to be an extraordinary and unusual use of property, and we can see no principle upon which an exception to the general doctrine laid down in *Fletcher v. Rylands*, L. R. 1 Exch. 265, can be held to exist in favor of one who stores upon his own premises that or any other dangerous explosive.

Judgment affirmed.

Shauck, J., dissents.

Village of St. BERNARD *et al.*, *Plffs. in Err.*,
v.

KEMPER *et al.*

(60 Ohio St. 244.)

- *1. In this state, taxes and assessments are levied upon the corpus of real property, and not upon the titles by which the same may be held, unless otherwise provided by statute.
2. The lessee in possession under a lease of real property for ninety-nine years, renewable forever, the property standing in his name for taxation, is so far the owner of such property as to authorize him to subscribe a petition for street improvements, under § 2272, Rev. Stat.; and in such case the signature of the lessor to such petition is not required in order to authorize an assessment against the corpus of such property.

(May 9, 1899.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiffs in a suit brought to enjoin the collection of certain assessments for street improvements. *Reversed.*

Statement by **Burket, J.**:

On the 23d day of September, 1893, the defendants in error leased a certain tract of land adjoining the village of St. Bernard, in Hamilton county, to one Henry Bostwick, by a written lease duly executed, for ninety-nine years, renewable forever, upon a consideration of a ground rent to be paid from time to time, and in default the lien for rent to be

*Headnotes by the Court.

NOTE.—For 999-year lease, as distinguished from sale, see *Morrison v. St. Paul & N. P. R. Co.* (Minn.) 30 L. R. A. 546.
45 L. R. A.

foreclosed, and leasehold interest be sold. The lease was duly recorded, and the lands transferred to said Henry Bostwick, and the same stood in his name for taxation, and possession was delivered to him, and by him retained thereafter. The lease contained a privilege of purchase at any time during the term thereof, and contained the further provision that the lessee should pay all taxes and assessments that might thereafter be levied, charged, or rated against said premises. Said Henry Bostwick caused said lands to be laid out into village lots, and dedicated certain streets to the public, and the village accepted the plat, and the streets were duly opened, and used as public streets. Afterwards, and while said lessee was still the holder of many lots bounding and abutting upon the said streets, he, with other owners of property bounding and abutting on said streets, signed petitions directed to the council of said village, as provided in § 2272, Rev. Stat., for the improvement of the streets and avenues in said petition mentioned and described, by grading the roadbed, setting the necessary curbs and gutters along the entire length thereof, and constructing the necessary culverts and drains, macadamizing and graveling the roadway, and building necessary retaining walls; and, further, that the whole cost of such improvement be assessed per front foot upon the lots bounding and abutting on said streets, and to be collected in ten annual instalments. In said petition said Henry Bostwick represented himself as the owner of said lots so bounding and abutting on said streets. Said petitions having been regularly presented to the council, it duly acted upon the same, and passed the proper resolutions and ordinances, and caused the said streets to be improved, as asked for in the said petitions, and assessed the cost and expenses thereof against the abutting property by the foot front, payable in ten annual instalments. After the said streets had been improved, and the assessments made, said lessee all the while being the holder of said lots under his said lease, the defendants in error instituted proceedings in the court of common pleas to sell said leasehold estate for the payment of arrearages of ground rent reserved in said lease, and said leasehold estate was duly sold at sheriff's sale, bid in by said defendants in error, sale confirmed, and deed made and delivered by the sheriff. Thereupon the defendants in error commenced their action in the court of common pleas against said village, the county auditor, and the county treasurer, seeking to enjoin the collection of so much of said assessment as exceeded one fourth of the value of said lots after the completion of said improvements, and averred in their petition that they did not sign the petition for said improvements, which fact was conceded. To the said petition the said village filed its answer, and in the second and third defenses averred the facts aforesaid, to which the defendants in error demurred, and the circuit court sustained the demurrer, to which the village excepted. There were also defenses numbered 4 and 5,

to which demurrers were sustained, but, in the view taken by the court upon the main question, they become immaterial. The action was tried on appeal in the circuit court upon the petition and first defense, which raised issues as to the petitions signed by some of the defendants in error as to certain lots, and as to certain other irregularities in the case, and a judgment was rendered in favor of the defendants in error, reducing the assessment, except as to a few lots, to 25 per cent of the value of the lots after the improvements were made. The circuit court found its conclusions of fact separate from its conclusions of law, and, a motion for a new trial having been overruled and exceptions taken, the plaintiffs in error filed their petition in this court, seeking to reverse the judgment of the circuit court.

Mr. Samuel B. Hammel for plaintiffs in error.

Messrs. Ed. M. Spangenberg, John L. Gasser, and A. C. Kaylor for defendants in error.

Burket, J., delivered the opinion of the court:

No question is made by any of the parties as to the constitutionality of that part of § 2272, Rev. Stat., which applies to corporations in counties containing a city of the first or second grade of the first class, and therefore that question has not been considered. Section 2272, as it was then, is as follows: "In cities of the first grade of the first class when a petition subscribed by any owner or owners of property abutting upon any street or highway of any description, between designated points, is presented to the board of administration for the purpose, and in other cities of the first class, or in corporations in counties containing a city of the first or second grade of the first class, when a petition subscribed by three fourths in interest of the owners of property abutting upon any street or highway of any description, between designated points, is regularly presented to the council for the purpose, the costs of any improvement of such street or highway may be assessed and collected in equal annual instalments, proportioned to the whole assessment, in a manner to be indicated in the petition, or, if not so indicated, then in the manner which may be fixed by council; and the interest on any bonds issued by the corporation for the improvements, together with the annual instalments herein provided for, shall be assessed upon the property so improved: but when lot or land of one who did not subscribe the petition is assessed such assessment shall not exceed 25 per centum of the value of his lot or land after the improvement is made; provided, that whenever in this title the petition of the owners of property is required, a married woman shall have the same authority to sign that she would have if unmarried; and the guardians of infants or insane persons may sign such petition on behalf of their wards only when expressly authorized by the probate court on good cause shown." 45 L. R. A.

The plaintiffs in error contend that Mr. Bostwick, the lessee for ninety-nine years, renewable forever, was the owner of the property abutting on the streets in question, within the meaning of this section of the statute; while the defendants in error claim that he was not such owner. If he was not such owner, the judgment of the circuit court is right; but, if he was such owner, the judgment is wrong. In this state, taxes and assessments are levied and assessed upon the *corpus* of real estate, and not upon the title by which the same may be held, unless otherwise provided by statute. Section 2897 provides that where lands held upon permanent leases are taxed in the name of the lessee, and are allowed to become delinquent, and are brought to sale for taxes, the sale shall be confined to the rights of the lessee, if the same shall be sufficient to meet the tax, interest, and penalty so assessed and due. This statute undertakes to protect the interests of the owner of the fee, but this protection is given only in case the interest of the lessee shall be sufficient to pay the taxes. If not sufficient, the interests of the owner of the fee must respond to make up the deficiency. This is the only statute on the subject, and it shows the policy of the state to be that the state must have its taxes; and, while it will first exhaust the interest of the lessee in the property, the state will require full payment, even though it takes the whole property, including the interest of the lessor. While this is the rule as to taxes, the same rule obtains as to assessments, because the statutes provide that, when assessments are certified to the auditor, they shall be collected the same as other taxes, which in this case would be by a sale of the leasehold estate, if sufficient to pay the assessment, and, if not sufficient, then by a sale of the whole property. It is urged that to hold the lessee, under such a lease, to be the owner, would put it in his power to cause an assessment to be put upon the property to an amount greater than the value of the whole property, and thereby, in effect, confiscate the estate of the lessor to the public. But this consideration is not of sufficient weight to override the public policy of the state as shown by its statutes. The rules of taxation are prescribed by the statutes, and persons must make their contracts with reference thereto; and if the power is given to a lessee to deal with property as owner, to have it stand in his name for taxation, the lessor becomes bound by the acts of his lessee, and has no cause for complaint. A mortgagor is regarded as the owner of the real estate, even though the mortgage is for more than the value of the land, and in such cases the mortgagor may sign a petition as owner for improvements of streets and avenues, even though the assessments should exceed the value of the land, and thereby cause a total loss to the mortgagor. As the lessee in this lease is bound personally for the payment of the taxes and assessments, it must be presumed that he would not sign petitions for improvements recklessly, for the mere purpose of injuring the holder of the fee: and

the same is true of a mortgagor. He is, by statute, made personally liable for the assessments in some cases to the amount of the value of the abutting property, and in others to the amount of 25 per cent of such value, and this personal liability is sufficient usually to deter the lessee, as well as the mortgagor, from signing petitions for improvements whose cost would equal or exceed such value of the property. This personal liability is usually a sufficient protection to the lessor and mortgagee, but cases may arise, as in the case at bar, where unforeseen depressions take place, and shrinkages in value occur, to such an extent as to wipe out all profits, and most, if not all, of the capital; and in such cases each party attempts to save himself as far as possible from the wreck, and to shift the responsibility upon others, or the public. In this case it was reasonably expected that Mr. Bostwick, by platting the lands and improving the streets, would not only be able to pay the ground rent, but pay the assessments, and make large profits by sales of lots. But by reason of unforeseen causes, all this failed, and there is a loss to be borne by someone. Shall it be by the public, or those who engaged in the speculative venture? The defendants in error accepted the promise of Mr. Bostwick to pay the taxes and assessments, knowing that, if he failed to pay the same, the real estate would be held therefor,—first the leasehold estate, and, if that should prove insufficient, then the whole property. The defendants in error so drew the lease as to enable the lessee to have the property stand in his name on the duplicate

for taxation and assessment, and now, when a loss occurs by reason thereof, they desire to shirk it themselves, and throw it upon the public. We think the loss should fall upon those who engaged in the speculation, and not upon the public; and, if the lots of the defendants in error are assessed for what Mr. Bostwick agreed to pay, defendants must look to him for reimbursement. We think that Mr. Bostwick was so far the owner of the property as to make him the proper person to sign the petition for the improvements and that the signatures of the lessors were not necessary. Holding the lessee under such a lease to be the owner of the property under said § 2272 harmonizes the statutes and decisions of this court upon the subject of permanent leases. By § 4181 such leases are subject to the same law of descent as estates in fee simple. By §§ 5374 and 5375 such leasehold estates are regarded as real estate, and subject to levy and sale upon execution as such, and are bound by the lien of a judgment the same as other lands. See also the cases of *Loring v. McLendy*, 11 Ohio, 355, and *Northern Bank v. Roosa*, 13 Ohio, 335. The case of *Baltimore v. Boyd*, 64 Md. 10, does not seem to throw much light upon the question, as in that case the lessee was by statute made the owner for the purposes of signing petitions for street improvements.

The judgment of the Circuit Court will be reversed, and the cause remanded to that court, with instructions to overrule the demurrer to the second and third defenses, and for further proceedings according to law.

NEW YORK COURT OF APPEALS.

Walter R. SMITH, *Respt.*,
v.
City of BROOKLYN, *Appt.*

(160 N. Y. 357.)

The draining of the underground sources of a surface stream by pumping water from wells to supply a city reservoir renders the city liable to the owner of the land through which the stream naturally flows, although the city is the owner of the land on which the wells are located.

(October 10, 1899.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, affirming a judgment of a Trial Term for Queens County in favor of plaintiff in an action brought to recover damages for alleged unlawful draining of a pond belonging to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Whalen and William J. Carr, for appellant:

The owner of land may dig ditches or sink wells, or in any other manner exercise his dominion over his own land, without being liable at law for the interception of any underground percolating waters consequent upon such use of his own property.

Ellis v. Duncan, 21 Barb. 230; *Goodale v. Tuttle*, 29 N. Y. 459; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Bloodgood v. Ayers*, 108 N. Y. 400; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Covert v. Brooklyn*, 6 App. Div. 73; *Acton v. Blundell*, 12 Mees. & W. 324; *Raistron v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 Eng. L. & Eq. 553; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Bradford v. Pickles* [1895] A. C. 587; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Greenleaf v. Francis*, 18 Pick. 117; *Davis v. Spaulding*, 157 Mass. 431, 19 L. R. A. 102; *Frazier v. Brown*, 12 Ohio St. 294; *Haldeman v. Bruckhart*, 45 Pa. 514.

NOTE.—For rights in subterranean waters generally, see *Southern P. R. Co. v. Dufour* (Cal.) 19 L. R. A. 92, and *note*; also *Willis v. 45 L. R. A.*

Perry (Iowa) 26 L. R. A. 124; *Tampa Water-works Co. v. Cline* (Fla.) 33 L. R. A. 376; and *Wheelock v. Jacobs* (Vt.) 43 L. R. A. 105

84 Am. Dec. 511; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Ocean Grove Camp Meeting Asso. v. Asbury Park Comrs.* 40 N. J. Eq. 447; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 445, 9 Am. Rep. 276; *Phelps v. Nowlen*, 72 N. Y. 40, 28 Am. Rep. 93; *Paine v. Chandler*, 134 N. Y. 385, 19 L. R. A. 99; *Chatfield v. Wilson*, 28 Vt. 49; *Walker v. Cronin*, 107 Mass. 556; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *United States v. Alexander*, 148 U. S. 186, 37 L. ed. 415.

A municipal corporation using its own land for the purpose of obtaining a water supply for its inhabitants possesses all the rights over its own property as to underground percolating waters which are incident to the rights of an individual owner over his own soil.

Chasemore v. Richards, 7 H. L. Cas. 349; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Bradford v. Pickles* [1895] A. C. 587; *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

Mr. George Wallace, for respondent:

No person or corporation can divert a surface stream without becoming liable for damages thereby; the method of the diversion is of no consequence; it is just as unlawful to divert a stream by suction of the waters from beneath it as it would be by turning the waters into another channel at the surface.

Van Wycklen v. Brooklyn, 118 N. Y. 424; *Bellinger v. New York C. R. Co.* 23 N. Y. 47; *Goodale v. Tuttle*, 29 N. Y. 466; *Pixley v. Clark*, 35 N. Y. 522, 91 Am. Dec. 72; *Delhi v. Youmans*, 45 N. Y. 382, 6 Am. Rep. 100; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Colrick v. Swinburne*, 105 N. Y. 503; *Bloodgood v. Ayers*, 108 N. Y. 405; *Covert v. Cranford*, 141 N. Y. 525; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Frazier v. Brown*, 12 Ohio St. 294; *Roath v. Driscoll*, 20 Conn. 542, 52 Am. Rep. 352; *Davidson v. Boston & M. R. Co.* 3 Cush. 91; *Ætna Mills v. Brookline*, 127 Mass. 69; *Dexter v. Providence Aqueduct Co.* 1 Story, 387; *Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 33 L. R. A. 376; *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233; *Acton v. Blundell*, 12 Mees. & W. 324; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282; *Raustron v. Taylor*, 11 Exch. 381; *Bradford v. Pickles* [1895] A. C. 587.

Gray, J., delivered the opinion of the court:

This action was brought to recover damages of the defendant for the draining of a stream and pond upon the plaintiff's premises. The stream had existed in the same channel for very many years, and the plaintiff, by means of a dam, had made a pond upon his premises. He had made use of both in connection with his farming operations, for the collection and sale of ice, and for boat-building purposes. The defendant, at a distance of some 2,400 feet to the south of the 45 L. R. A.

plaintiff's pond, had constructed an aqueduct for the purpose of conducting water for its municipal purposes, and supplied the water from a reservoir, which was filled by means of wells and pumps upon its own land. The allegations of the complaint, which charged the defendant with draining the plaintiff's watercourse and pond, and with thus depriving him of their use, were denied by the answer, and upon the issue made by the pleadings the parties went to trial. There, after the plaintiff had given in evidence the facts upon which he relied as proving or tending to prove that the direct cause of the stream running dry was in the draining of the territory by the defendant's construction of an extensive system of conduits, wells, and pumps and the use of suction power, the latter undertook to meet the plaintiff's case by the testimony of its engineers and of experts, and to prove that the draining of the pond and stream were due to causes and conditions with which either it was not connected, or for which it could not be held responsible. In submitting the case to the jury, the trial judge instructed them that, upon the evidence, it was for them to determine what was the cause of the loss of water in the plaintiff's pond, and that, if the defendant did drain it for its purposes by the operation of its pumps and conduits, it was responsible to the plaintiff for the damages sustained. The jury returned a verdict for the plaintiff, and upon appeal to the appellate division from the judgment entered thereon that court directed an affirmance of the judgment by an order which recited that the court had "unanimously decided that the verdict of the jury is supported by evidence." That decision has conclusively established that the defendant's acts caused the diversion and loss of waters in the stream and pond, and is not subject to our review.

The legal question of the defendant's liability to respond in damages in such an action is no longer one which should be regarded as open to discussion. It is settled by the decision of the courts of this state, and it is the rule in England that no one may divert or obstruct the natural flow of a stream for his own benefit, to the injury of another. *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Covert v. Cranford*, 141 N. Y. 521; *Chasemore v. Richards*, 7 H. L. Cas. 349; and *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483. The right to the use and enjoyment of a stream of water running in a defined and natural channel *jure naturæ* appertains to the riparian landowners. *Shury v. Pigott*, 3 Bulst. 339; *Tyler v. Wilkinson*, 4 Mason, 397. In the *Van Wycklen Case*, 118 N. Y. 424, this same defendant, by sinking wells and pumping water into its reservoir, had caused a subsidence of the waters of a creek by which the plaintiff operated a grist mill, and a recovery of damages was sustained. In *Grand Junction Canal Co.'s Case*, L. R. 6 Ch. 483, where the defense was made that the defendant had only intercepted

underground waters before they had reached the stream, the diversion of which was the subject of complaint, the defense was held to be insufficient. It was there observed by the lord chancellor that, "if you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all." All the cases hold that the water of a natural surface stream is for the benefit of all the riparian owners, and that to divert or to diminish its flow in any way is an interference with a natural right, which will give rise to an action for the injury sustained. That the diversion and diminution of the stream were caused by arresting and collecting the underground waters, which, percolating through the earth, fed the stream, does not affect the question. When the fact was established upon the proofs that the defendant's works and wells had caused, by this subsidence of water, a diversion of the stream's natural flow in its channel, the injury was proved, and the plaintiff's cause of action established. Whatever may be the rule with respect to the right of a landowner to use, for any of his purposes, the waters percolating through the earth, and thereby to affect the sources of wells or springs upon his neighbor's land, the question is not one which is suggested by the present case. It is one thing to divert and to diminish the natural flow of a surface stream by preventing its usual and natural supply, or by causing, through suction or other methods, a subsidence of its waters; it may be another thing to collect and to use the waters which percolate through the earth in underground ways and channels without having connection with the supply of a surface stream. The latter question does not demand an answer upon the case before us. The right of this plaintiff to the enjoyment of his running stream and to his pond was absolute. The diversion of the water therefrom by the defendant's operations was established as a fact by the verdict, and the right of the former to maintain the action for the recovery of damages was clear.

I think the judgment should be affirmed, with costs.

All concur.

Adelbert MOOT, as Trustee, etc., *Respt.*,
v.

BUSINESS MEN'S INVESTMENT ASSOCIATION, *Appt.*

(157 N. Y. 201.)

1. A contract to convey a good and satisfactory title to real estate is compelled with by tendering a deed conveying a good title under circumstances such that the purchaser should have ascertained that fact, although there are discrepancies in the abstract of title accompanying the deed.

NOTE.—As to liability of officers for defects of abstract of title, see note to *Mallory v. Ferguson* (Kan.) 22 L. R. A. 99.
45 L. R. A.

2. Acceptance by the purchaser of real estate without objection until after the time for performance has passed of a search which purports to be a mere abstract of the indexes of the records in the clerk's office will relieve the seller from any further compliance with his contract to furnish an abstract truly showing the condition of the title.
3. The intending purchaser of real estate must, upon receiving a satisfactory abstract showing that the title in part depends on a judgment, make an examination which will disclose the true condition of the title by ascertaining the contents of the judgment roll and determining the validity, character, and extent of the judgment,—especially where there is a conflict between the diagram and contents in the abstract; and such facts need not be disclosed by the seller.
4. An intending purchaser of real estate cannot, upon receiving an acceptable abstract from which he discovers an apparent defect in the title, refuse to complete his contract to purchase if proper examination would have disclosed that the defect had been remedied.
5. An intending purchaser of real estate must make a proper and thorough examination of the title in the light of the search furnished, before he is justified in declining to perform his contract because of insufficiency of title.
6. A proffered title to real estate cannot be rejected by the intending purchaser and the contract declared void, where the title is good, although the abstract shows a defect caused by the improper record of a judgment, if failure to discover that the defect has been removed is due to the purchaser's negligence.
7. A contract to furnish a good and satisfactory title to real estate is performed by furnishing a good title.

(*Parker, Ch. J., and Vann, J., dissent.*)

(November 22, 1898.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of a Special Term for Erie County in favor of plaintiff in an action brought to recover back the deposit money and expenses of examining the title upon defendant's inability to tender a perfect title under a contract for the sale of real estate. *Reversed.*

Statement by **Martin, J.:**

This action was to recover \$1,000 purchase money paid upon a land contract, and \$300 for the services of an attorney in examining the title to the premises which were the subject of purchase and sale. The defendant after denying many of the material facts alleged in the complaint and admitting others, set up as a counterclaim the agreement between the parties, and alleged that it had tendered performance upon its part by offering the plaintiff a good title as required by the contract, and a judgment for the amount due upon it was demanded. On the 5th day of May, 1893, the plaintiff, representing cer-

tain clients, and the defendant, who was the owner of real estate in the city of Buffalo, therein described, entered into a land contract by which the latter agreed to sell to the former certain premises on Main street that were 91 feet front, running through to Washington street, where they were 70 feet in width. The premises were about 240 feet and 8 inches south of the south line of Tupper street. The plaintiff agreed to purchase them, and pay therefor \$127,400, \$1,000 to be paid upon the execution and delivery of the contract and the remainder as provided therein, the particular terms of which need not be stated. The \$1,000 was paid. The defendant agreed, on or before the 20th day of May, 1893, to execute and deliver to the plaintiff a good and sufficient deed containing covenants of warranty, which should convey a good and satisfactory title, "a search truly showing the condition of the title being furnished at the expense of the" defendant. It was also agreed that time was of the essence of the contract, and that it should be performed on or before the 20th day of May. The time was, however, extended by the stipulation or agreement of the parties until the 6th day of the following June. On the 5th day of June the defendant made a tender of performance upon its part, and demanded that the plaintiff complete his contract. Before the day of performance the defendant delivered to the plaintiff a search furnished by the Buffalo Guaranty Company, which purported to show what appeared as to the property described in the contract upon an examination of the indexes to the records, papers, files, documents, and judgment dockets in the office of the clerk of the county of Erie from July 26, 1814, to and including December 28, 1893. Upon the first page of the abstract so furnished there was a diagram of the premises, upon which the distance of parcel A from Tupper street was given as 272 $\frac{1}{4}$ feet. The twenty-third paragraph of the search showed that an action for the partition of premises which included parcel A, and which were included in and were a portion of the premises described in the contract, had been commenced in the superior court of Buffalo, and that a *lis pendens* was filed July 27, 1866. In paragraph 24 it was stated that a judgment in that action was signed July 24, 1866, and recorded in Liber 253 of Deeds, at page 383, August 4, 1866, by which parcel A on the diagram was allotted to Everard Palmer, an intermediate grantor, and that part of the premises was described as commencing 269 feet south of Tupper street. The plaintiff accepted the search as sufficient under the contract, and delivered it to George L. Lewis, a lawyer in the city of Buffalo, whom he employed to examine the title to the premises, and for whose services he was awarded \$300 by the trial court. The distance of the premises from Tupper street was incorrectly stated in the complaint, report of the commissioners, and in the judgment in the action of partition, which was referred to in the twenty-fourth paragraph of the search. Subse-

quently, however, and on the 11th day of October, 1866, the error having been discovered, upon notice to all the parties to that action an application was made to the superior court for an order correcting the complaint, report of commissioners, and judgment, by giving the correct distance of the premises from Tupper street, which was 272 $\frac{1}{4}$ feet. That order was granted. In pursuance of it, the complaint, report of the commissioners, and judgment were amended by striking out the erroneous distance, and substituting the correct one. The order was annexed to and made a part of the original judgment roll in the action, and filed in the clerk's office of the superior court. The original judgment was entered in the judgment book in that office, but the judgment there entered was not changed or amended, nor was the amending order recorded or filed in the Erie county clerk's office, and the record of the judgment in that office was not changed or amended. So that, after the order amending the proceedings in the partition action was granted, the judgment roll contained the order, and the proceedings were amended in pursuance of it, except the entry in the judgment book and the transcript of judgment entered in the Erie county clerk's office.

Mr. Spencer Clinton, with Mr. Worthington C. Miner, for appellant:

The true construction of the contract out of which this action has grown is that the defendant obligated itself to convey and the plaintiff to accept a marketable title free from reasonable doubt.

Vought v. Williams, 120 N. Y. 253, 8 L. R. A. 591; *Folliard v. Wallace*, 2 Johns. 395; *Rigney v. Coles*, 6 Bosw. 479; *Thomas v. Fleury*, 26 N. Y. 26; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 7 Am. Rep. 469; *Bowery Nat. Bank v. New York*, 63 N. Y. 336; *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387, 54 Am. Rep. 709; *Doll v. Noble*, 116 N. Y. 230, 5 L. R. A. 554; *Flanagan v. Foz*, 6 Misc. 132.

The title to the premises in question on the 5th day of June, 1893, when the defendant made its tender of performance, was, in fact and in law, a marketable title, free from all reasonable doubt such as the contract called for; and the search of the title which was furnished by the defendant truly showed the condition and marketability of the title.

Ferry v. Sampson, 112 N. Y. 415; *Cambrelleng v. Purton*, 125 N. Y. 610; *Todd v. Union Dime Sav. Inst.* 128 N. Y. 636; *Holly v. Hirsch*, 135 N. Y. 590.

The plaintiff was bound, as an intending purchaser, to investigate the title, examine every deed or instrument forming a part of it, especially if recorded, and was deemed to know every fact so disclosed, and every other fact which an inquiry suggested by the search would have led up to.

McPherson v. Rollins, 107 N. Y. 316; *Kirsch v. Tozier*, 143 N. Y. 390; *Bernstein v. Nealis*, 144 N. Y. 347.

Mr. Adelbert Moot, with Mr. Henry W. Sprague, for respondent:

As the defendant never tendered plaintiff a good title or a search showing that defendant had a good title while the contract was in force, the plaintiff had a right to reject the title tendered, and to recover back the money paid on the contract, and his expense in examining the title.

The plaintiff was only bound to examine the search delivered to plaintiff by defendant as truly showing the condition of defendant's title, and such instruments as were therein referred to, and as the examination of such search, and the instruments therein referred to, beyond dispute showed a defective title at the time defendant tendered title, while the contract was in force, the defendant could not months afterwards get deeds curing the title, or discover evidence curing defects in the title, and bring such deeds or evidence to plaintiff's attention months after the contract had expired, and after this litigation had commenced, and then insist that plaintiff should accept this title after the panic of 1893 had greatly depreciated the property in value; and for like reasons in December of 1894 the defendant could not insist that the court should compel the plaintiff to accept title.

Vought v. Williams, 120 N. Y. 253, 8 L. R. A. 591.

A purchaser will not generally be compelled to take a title where there is a defect in the record title which can be cured only by a resort to parol evidence.

Moore v. Williams, 115 N. Y. 586, 5 L. R. A. 654; *Irving v. Campbell*, 121 N. Y. 358, 8 L. R. A. 620; *Cambrelleng v. Purton*, 125 N. Y. 610; *Holly v. Hirsch*, 135 N. Y. 598; *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299.

Where property is of a character that fluctuates in value, even as to real property time is of the essence of the contract, whether the contract expressly so provides or not.

Waterman v. Banks, 144 U. S. 394, 36 L. ed. 479; *Bank of Columbia v. Haguer*, 1 Pet. 455, 7 L. ed. 219; *Slater v. Emerson*, 19 How. 224, 15 L. ed. 626; *Jones v. United States*, 96 U. S. 24, 24 L. ed. 644; *Houldsworth v. Evans*, L. R. 3 H. L. 263, 37 L. J. Ch. N. S. 800, 19 L. T. N. S. 211, 6 English Ruling Cases, 516, note, p. 539.

Martin, J., delivered the opinion of the court:

The right of recovery in this action is based upon the theory that the defendant was guilty of a breach of the contract between the parties, and hence the plaintiff is entitled to recover the amount paid thereon, together with the expenses he incurred in examining the defendant's title. The alleged breach of the contract was based on the claim that the defendant's title to the premises was defective, and not satisfactory to the plaintiff, and that the defendant could not convey a good and satisfactory title. The plaintiff's first objection was that the defendant had no record title to the south 3 feet and 8 inches of

the premises marked upon the diagram in the search as parcel "A." The diagram indicated that parcel A was 65 feet front by 200 feet deep, situated on the easterly side of Main street, 272 feet and 8 inches south of Tupper street, while paragraph 24 of the search gave the distance south of Tupper street as 269 feet. Thus, upon the face of the search furnished, it was apparent that the distance given upon the diagram and that given in paragraph 24 were unlike. Hence the attention of a reasonably prudent or careful lawyer must have been called to the fact that the diagram and description did not agree.

The principal, if not the only important question in this case is whether there was such a defect in the defendant's title as justified the plaintiff in refusing to fulfil the contract upon his part, and entitled him to recover the money paid thereon, and the expense of examining the defendant's title. That the deed offered was valid, and would have conveyed a good title to the premises, there is no doubt. That the record in the clerk's office of Erie county did not clearly show the defendant's title to have been valid as to all the land is also true. If, under the contract, the defendant was bound to furnish the plaintiff with a search or abstract which disclosed correctly the actual condition of its title, it has not been complied with. If, upon the other hand, the defendant was only required to furnish the plaintiff with a search, by reference to which an ordinarily prudent person would have ascertained the true state of the title, we apprehend there was no breach of the contract in this respect. By its contract the defendant agreed to convey a good and satisfactory title. If the title was good, and the plaintiff should have ascertained that fact, the deed tendered should be regarded as a compliance with that provision.

But it is said that the defendant agreed to furnish a search truly showing the condition of the title. It furnished a search which, upon its face, purported to be a mere abstract of the indexes of the records in the office of the clerk of Erie county. When this was furnished the plaintiff made no objection to it on the ground of its form or insufficiency. By his acceptance he treated it as a compliance with the provisions of the contract. It is also alleged in the complaint that the search was delivered in pursuance of the contract, and no claim is made that it was in any respect insufficient. It is now too late for him to object that the search furnished was not in fact an abstract of title, or because it differed in some way from the search required by the contract. The plaintiff, having accepted it without objection, could not wait until the law day had passed, and then insist upon its insufficiency as a breach of the contract. If he was not satisfied with it, it was his duty to speak. Having been silent when he should have spoken, he should not, after the defendant's time to furnish a search had expired, be heard to deny its sufficiency under the contract.

This brings us to the consideration of the question whether it was the duty of the plaintiff's attorney to make such an examination as would have disclosed the true condition of the defendant's title. It is obvious that the plaintiff did not intend to and did not rely upon the search which was furnished. The evident purpose of the provision in the contract relating to that subject was to require the defendant to furnish a search which would indicate to a person accustomed to examining titles sufficient facts to enable him, by a proper examination, to ascertain the true state of the title. The defendant furnished a search which disclosed that a *lis pendens* had been filed in a partition action in the superior court of Buffalo; that a judgment had been entered therein allotting a portion of the premises to one of the defendant's intermediate grantors; and that upon that judgment its title depended. The plaintiff's attorney, in examining the title, was bound to exercise the reasonable care and diligence of a good and faithful expert in that business, to ascertain the defendant's true title, before the plaintiff was justified in refusing to perform the contract upon the ground of an apparent defect in the title, when no real defect existed. As an intending purchaser, he must be presumed to investigate the title, to examine every deed or instrument forming a part of it, especially if recorded, and to have known every fact disclosed, or to which an inquiry, suggested by the record, would have led. *McPherson v. Rollins*, 107 N. Y. 316, 322; *Kirsch v. Towner*, 143 N. Y. 390, 397; *Bernstein v. Nealis*, 144 N. Y. 347. By the search furnished the plaintiff was apprised of the fact that the title to a portion of the premises depended upon a judgment in an action of partition entered in the superior court of Buffalo. The validity of such a judgment would depend upon a great variety of circumstances, and the regularity of the proceedings in that action was important, and could be ascertained only by an examination of the judgment roll. How the plaintiff's attorney could determine that the court had jurisdiction of the action without examining the judgment roll is not apparent. When the plaintiff was notified by the search that the defendant's title to a portion of the premises was dependent upon a judgment in partition rendered by the superior court, it was his plain duty to ascertain the contents of the judgment roll, to determine the validity, character, and extent of the judgment. This was clearly so when, upon the face of the search furnished, it appeared that there was a conflict between the diagram and statement.

When the defendant contracted to furnish a search, and furnished one, which was accepted by the plaintiff as a sufficient performance of the contract, the duty of examining and ascertaining the defendant's title rested upon him. Instead of fully discharging that duty, through lack of diligence he failed to ascertain the defendant's actual title, but merely discovered what was once a defect in it, without making sufficient exam-

ination to find that it has been remedied. Under these circumstances, he could not rely upon that apparent defect as a ground for refusing to comply with the contract, or as a basis for recovery against the defendant for the expenses of examining the title, when the failure to discover the true title was caused by his own neglect. Moreover, the justice of allowing the plaintiff \$300 for his expenses in examining the title, when, through lack of diligence, he succeeded only in discovering a defect which had been remedied, so that the title was good and should have been satisfactory, is not quite apparent.

If correctly understood, the decision of the special term was based upon the idea that by the provisions of the contract the plaintiff was entitled to a search which disclosed a good and satisfactory title in the defendant, and the actual condition of its title to the premises. If that finding was justified and that question was at issue between the parties, the decision was perhaps correct. But it is to be observed in the first place that no such issue existed, as no allegation of that kind was contained in the complaint. The right of action alleged is based solely upon the grounds that the title to the premises was found by the plaintiff to be unsatisfactory, and that the defendant could not convey a good and satisfactory title. In the second place, while it is true that the language of the contract is that a search should be furnished truly showing the condition of the title, it is manifest that the parties did not intend that the defendant should furnish an abstract of title which actually disclosed all the facts that were necessary to show that the defendant's title was good. When the defendant furnished a search which upon its face revealed that it did not and was not intended to disclose all the facts necessary to show the defendant's title, and it was accepted by the plaintiff as a compliance with the contract, it cannot be justly held that the defendant was guilty of a breach of the contract upon that ground. Plainly, it was the intention of the parties, as their acts prove beyond doubt, that the defendant should furnish precisely what it did, and that the title should then be properly examined by the plaintiff in the light of the information contained in the search, for the purpose of discovering the sufficiency of the defendant's title. The duty rested upon the plaintiff to make a proper and thorough examination in the light of the search furnished, before he was justified in declining to perform the contract upon the ground of the insufficiency of the defendant's title.

The provision in the contract was that the defendant should furnish a search as to its actual title, and not as to its record title. We are of the opinion that, when the defendant tendered to the plaintiff a deed which would have vested in him a perfect title, he could not, under the contract and the circumstances established upon the trial, refuse to accept it, and declare the contract void, as it was by reason of his own negligence that he

failed to discover that the title offered was in fact valid.

But it is said that the language of the contract was that the deed should convey a good and satisfactory title. Much stress is placed upon the word "satisfactory." We think that word in no way changes the contract. A good title must be regarded as a satisfactory one. As was said by Chief Justice Kent: "Nor will it do for the defendant to say he was not satisfied with his title, without showing some lawful encumbrance or claim existing against it. . . . The law in this case will determine for the defendant when he ought to be satisfied." *Folliard v. Wallace*, 2 Johns. 305, 402. This doctrine was reasserted in *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475, 479, 7 Am. Rep. 469; and again in *Miesell v. Globe Mut. L. Ins. Co.* 76 N. Y. 115, 119. See also *Rigney v. Coles*, 6 Bosw. 479; *Vought v. Williams*, 120 N. Y. 253, 8 L. R. A. 591. The plaintiff was entitled under his contract to a marketable title, free from encumbrances and defects, and as to which there was no reasonable doubt. He was entitled to one which would enable him to hold his land free from probable claim by another, and which, if he wished to sell, would be reasonably free from any doubt which would interfere with its market value. *Vought v. Williams*, 120 N. Y. 253, 257, 8 L. R. A. 591; *Shriver v. Shriver*, 86 N. Y. 575, 584; *Fleming v. Burnham*, 100 N. Y. 1. If there had been a defect in the record title which could be supplied only by resort to parol evidence, and the title might depend upon questions of fact, the plaintiff might not have been required to accept it. *Irving v. Campbell*, 121 N. Y. 353, 8 L. R. A. 620; *Holly v. Hirsch*, 135 N. Y. 590, 598.

In this case, however, when the plaintiff's title is properly examined and understood, it is manifest that, so far as this question is concerned, his title was valid and reasonably free from any doubt which would interfere with its market value, and the defect in the record could have been supplied without resort to parol evidence. Nor would any question of fact have been involved. Therefore, none of the authorities to which we have referred justified the plaintiff in claiming a breach of the contract upon the part of the defendant, as the title tendered was valid beyond reasonable doubt. If the error in the original judgment roll had not been corrected, the plaintiff would not have been required to take action to cure it. *Toole v. Toole*, 112 N. Y. 333, 2 L. R. A. 465; *Heller v. Co-*

hen, 154 N. Y. 209. It may also be said that if the plaintiff had called the attention of the defendant to the defect in the record, and asked that it procure the judgment entered in the clerk's office of Erie county to be corrected, so as to show it as it actually existed, and the defendant had declined, he would not have been required to accept the title. But the title being actually good, we do not think he was justified in rejecting it upon the slight ground that it was not correctly recorded in that office. We are therefore of the opinion that the court below erred in holding that the defendant's title was defective in that respect.

The respondent also claimed that the defendant had no record title to the north sixteen one-hundredths of a foot of parcel C, as delineated upon the search furnished by it. It is obvious, from an examination of the record, that this objection was of little consequence, and it was also clearly established that the property had been in the actual possession of the owner having the record title much longer than twenty years. This objection was not of sufficient moment to induce its consideration either by the general or special term. It was at most but technical, and one that the defendant was able to correct, if it existed, and did so.

The only remaining objection that need be considered is the claim that the defendant acquired no title to any of the premises for the reason that under the will of Chandler J. Wells and the codicil thereto the executors had no sufficient power of sale to convey a good title, even in conjunction with the owner of the life estate. The trial court found adversely to the plaintiff upon that question, and that under the provisions of such will and codicil the executors had full power to sell the land in question. Upon a careful examination of those instruments, we are clearly of the opinion that the special term was right, and that this objection has no force, and did not justify the plaintiff in declining to receive the title offered. These considerations lead to the conclusion that the judgments of the special and general terms were incorrect, and that they should be reversed, and a new trial granted.

The judgments should be reversed, and a new trial granted; with costs to abide the event.

All concur, except **Parker, Ch. J., and Vann, J.**, dissenting, and **Haight, J.**, not sitting.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ATLANTIC CITY RAILROAD COMPANY,
Plff. in Err.,
v.

Elizabeth GOODIN, Admr., etc., of John H.
Goodin, Deceased.

(62 N. J. L. 394.)

- *1. A duty to look and listen for trains, before stepping upon a railroad track lying between the station and a train discharging and receiving passengers at a regular stopping place, is not necessarily chargeable, as a matter of law, upon a passenger alighting from such train and proceeding at once towards the station.
2. Under the particular circumstances of this case, the question of negligence in such a passenger was properly submitted to the jury.
3. In this state a valid marriage can be contracted *per verba de presenti*, without a ceremony and without a witness.
4. *Quere*, as to nonresidents, since the act of 1897 (P. L. p. 378).

(McGill, Ch., and Lippincott and Van Syckel, JJ., dissent.)

(November 14, 1898.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed*.

The facts are stated in the opinion.

Messrs. J. Willard Morgan and Charles V. D. Joline, for plaintiff in error:

It is not negligence *per se* for a railroad company to run a train into a station where another train is discharging passengers, but circumstances may make it negligence.

A railroad company is not an insurer; it is not liable for the safety of passengers to the same extent that a common carrier is for the safety of property.

Shearm. & Redf. Neg. ed. 1898, § 494; Elliott, Railroads, § 1583; *Falk v. New York, S. & W. R. Co.* 56 N. J. L. 382.

No more can be demanded of it than the performance of its duty, which, in the case of travelers, is due and reasonable care.

New York, L. E. & W. R. Co. v. Ball, 53 N. J. L. 286.

The passenger certainly owes some duty, especially in the face of probable danger. It was his duty to guard against the danger, and even an invitation to pass that way would not absolve him from a reasonable performance of his duty.

Watson v. Camden & A. R. Co. 55 N. J. L. 128, 19 L. R. A. 487.

*Headnotes by COLLINS, J.

NOTE.—As to negligence of person crossing street-car track, see also *Newark Pass. R. Co. v. Bloch* (N. J.) 22 L. R. A. 374; *Cincinnati Street R. Co. v. Snell* (Ohio) 32 L. R. A. 276; *Consolidated Traction Co. v. Scott* (N. J.) 33 45 L. R. A.

The company is liable only when its negligence is the proximate cause.

Elliott, Railroads, § 1628; *Hoboken Ferry Co. v. Feiszt*, 58 N. J. L. 201; *Dwyer v. New York, L. E. & W. R. Co.* 47 N. J. L. 9, 48 N. J. L. 373; *Harper v. Erie R. Co.* 32 N. J. L. 88.

The rule is the same with respect to persons in a dangerous place, even though some other one may owe them a duty.

Mullen v. Rainear, 45 N. J. L. 522; *Smith v. Van Sciver*, 58 N. J. L. 192; *Menger v. Laur*, 55 N. J. L. 206, 20 L. R. A. 61; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L. R. A. 374; *Gleason v. Boehm*, 58 N. J. L. 475, 32 L. R. A. 645.

It was the duty of the decedent to have availed himself of the means provided by the defendant; if he failed to, he ceased to be strictly a passenger, and in its charge, and was liable for the consequences of his own act.

Michigan C. R. Co. v. Coleman, 28 Mich. 440; *Sturgis v. Detroit, G. H. & M. R. Co.* 72 Mich. 619; *DeKay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178; *Drake v. Pennsylvania R. Co.* 137 Pa. 352.

The mere fact of the platform being shorter than the train does not justify a passenger in jumping off beyond the platform.

Siner v. Great Western R. Co. L. R. 3 Exch. 150, L. R. 4 Exch. 117; *Owen v. Great Western R. Co.* 46 L. J. Q. B. N. S. 486; *Lewis v. London, C. & D. R. Co.* L. R. 9 Q. B. 66; *MacLeod v. Graven*, 43 U. S. App. 129, 73 Fed. Rep. 627, 19 C. C. A. 616.

Care is not to be pressed to such an extent as to render the conduct of business impracticable.

Shearm. & Redf. Neg. ed. 1898, § 496; *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138; *Gilbert v. West End Street R. Co.* 160 Mass. 403; *Delaware, L. & W. R. Co. v. Ashley*, 28 U. S. App. 375, 67 Fed. Rep. 209, 14 C. C. A. 368; *Wall's Digest*, 488, § 133.

Where a person receiving an injury has, by his own negligent conduct, partly aided in causing the injury, he cannot recover.

Pennsylvania R. Co. v. Richter, 42 N. J. L. 182; *Moore v. Central R. Co.* 24 N. J. L. 268; *Harper v. Erie R. Co.* 32 N. J. L. 88.

From the step of the car the decedent could have seen the approaching train for a distance of 500 yards, and the evidence is that before he got upon the track the whistle and the noise of the coming train were heard.

If Olive Green and Mr. Hickman, without any motive to listen, heard the whistle and the train before Goodin got upon the track, he surely heard and saw it before he got there.

Central R. Co. v. Smalley, 61 N. J. L. 277;

L. R. A. 122; *Baltimore Traction Co. v. Helms* (Md.) 36 L. R. A. 215; *Johnson v. St. Paul City R. Co.* (Minn.) 36 L. R. A. 586; and *Hoelzel v. Crescent City R. Co.* (La.) 38 L. R. A. 708.

Pennsylvania R. Co. v. Pfuelfb, 60 N. J. L. 278; *Pennsylvania R. Co. v. Leary*, 56 N. J. L. 705; *Connolly v. New York & N. E. R. Co.* 158 Mass. 8; *Winslow v. Boston & M. R. Co.* 165 Mass. 264; *Ellis v. Boston & M. R. Co.* 169 Mass. 600; *Bancroft v. Boston & W. R. Corp.* 97 Mass. 278; *Flanagan v. Philadelphia, W. & B. R. Co.* 181 Pa. 237; *Drake v. Pennsylvania R. Co.* 137 Pa. 352; *Blight v. Camden & A. R. Co.* 143 Pa. 10; *Morgan v. Camden & A. R. Co.* (Pa.) 23 W. N. C. 189; *Pennsylvania R. Co. v. Zebe*, 37 Pa. 420; *Hoboken Ferry Co. v. Feiszt*, 58 N. J. L. 198; *Delaware, L. & W. R. Co. v. Hefferan*, 57 N. J. L. 149; *West Jersey R. Co. v. Ewan*, 55 N. J. L. 574; *Baltimore Traction Co. v. Helms*, 84 Md. 515, 36 L. R. A. 215; *Goldberg v. New York C. & H. R. R. Co.* 133 N. Y. 561; *Smith v. Van Sciver*, 58 N. J. L. 192; *Foreman v. Pennsylvania R. Co.* 159 Pa. 541; *Chicago, R. I. & P. R. Co. v. Dingman*, 1 Ill. App. 162; *Indiana C. R. Co. v. Hudelson*, 13 Ind. 325, 74 Am. Dec. 254.

That the decedent put himself in front of the train is incontestible evidence that he did not look.

Pennsylvania R. Co. v. Pfuelfb, 60 N. J. L. 278.

It is idle for the plaintiff below to say that the decedent didn't hear the train.

Blight v. Camden & A. R. Co. 143 Pa. 13; *Moore v. Philadelphia, W. & B. R. Co.* 108 Pa. 353; *Pennsylvania R. Co. v. Bell*, 122 Pa. 58; *Marland v. Pittsburgh & L. E. R. Co.* 123 Pa. 490.

The inference is clear that he didn't look and listen, or else that he took the desperate chance of getting across before the train reached him.

Either exhibits negligence and imprudence.

Harper v. Erie R. Co. 32 N. J. L. 88.

Failure to delay is the want of reasonable prudence, which constitutes contributory negligence.

West Jersey R. Co. v. Ewan, 55 N. J. L. 575; *Pennsylvania R. Co. v. Zebe*, 37 Pa. 420.

Mr. George J. Bergen, for defendant in error:

If the man declares in words of the present that the woman is his wife and she accepts, the contract is made.

Bishop, Marr. Div. & Sep. §§ 340-352; *Bissell v. Bissell*, 55 Barb. 325; *Stevens v. Stevens*, 56 N. J. Eq. 488.

The matter of the contributory negligence of deceased was properly submitted to the jury, and the verdict of the plaintiff should not be set aside.

Klein v. Jewett, 26 N. J. Eq. 474; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 532; *Keller v. New York C. R. Co.* 2 Abb. App. Dec. 480; *Dickens v. New York C. R. Co.* 1 Abb. App. Dec. 504; *Gonzales v. New York & H. R. Co.* 39 How. Pr. 407; *Armstrong v. New York C. & H. R. R. Co.* 66 Barb. 439; *Green v. Erie R. Co.* 11 Hun, 333; *Terry v. Jewett*, 78 N. Y. 338; *Brassell v. New York C. & H. R. R. Co.* 84 N. Y. 241; *Van Ostran v. New York C. & H. R. R. Co.* 35 Hun, 590; 45 L. R. A.

Hirsch v. New York & G. Lake R. Co. 25 N. Y. S. R. 156; *St. Louis & S. W. R. Co. v. Johnson*, 59 Ark. 122; *Baltimore & O. R. Co. v. State, Hauer*, 60 Md. 449; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L. R. A. 673; *Weeks v. New Orleans, S. F. & Lake R. Co.* 40 La. Ann. 800; *Denver & R. G. R. Co. v. Hodgson*, 18 Colo. 117; *Burbridge v. Kansas City Cable R. Co.* 36 Mo. App. 669; *Union P. R. Co. v. Sue*, 25 Neb. 712; *Pennsylvania R. Co. v. White*, 88 Pa. 327; *Boss v. Providence & W. R. Co.* 15 R. I. 149; *Chicago, M. & St. P. R. Co. v. Lovell*, 151 U. S. 209, 38 L. ed. 131; *Robostelli v. New York, N. H. & H. R. Co.* 33 Fed. Rep. 796.

Collins, J., delivered the opinion of the court:

The writ of error in this cause removes a judgment for damages, recovered on verdict, under the death act. The chief complaint is that the trial judge refused to decide, as matter of law, that the decedent was guilty of negligence contributing to his death, but submitted the question of such negligence to the jury, as one of fact. The defendant operates a double-track railroad between Camden and Atlantic City. At Lawnside, one of its regular stopping places for accommodation trains, the station adjoins the west-bound track. Outside the east-bound track there is an uncovered platform, level with the track, where the conductor and trainmen stand to assist passengers; but, up to the time of the occurrence in controversy, passengers on east-bound trains had been permitted, without objection, to alight, if they wished, on the side of the train towards the station, and it was customary for those living on that side of the town, or those who wished to go to the station, to alight upon that side. Each rail of each track was planked, on both sides, the whole length of the platform, and the intervening spaces were filled in with cinders to the level of the tops of the rails. There was no special place of crossing provided. The company had published to its employees the following rule: "Any train approaching a station when a passenger train is receiving or discharging passengers must be stopped before reaching the station, and must not proceed until the passenger train moves away, or a signal is given to go on, except when safeguards are provided." There were no safeguards at Lawnside, and no gates on the car platforms. On July 21, 1896, John H. Goodin was a passenger on an east-bound accommodation train, scheduled to stop at Lawnside, where he lived. It did stop there. The car in which Goodin rode was carried beyond the platform, and, on that side, stood opposite a ditch and embankment beyond. Goodin alighted on the side towards the station, and was struck and instantly killed by a west-bound express train. There was nothing to prevent his seeing the train, had he looked before stepping on the track. It is contended that he was indisputably negligent.

There are adjudged cases that hold that

when a railroad company provides a convenient place at which to alight from a train, and invites egress only there, a passenger takes the risk of alighting elsewhere. Those cases are pressed upon our consideration. Whether sound or not, they do not touch the point of the present inquiry, viz.: What is the duty of passengers where, after they have alighted, there is necessity to cross a track in order to reach the company's station? We are asked to apply the same rule of duty to look and listen that is rigidly enforced upon the traveler on a highway. There is a plain difference between the case of such a traveler, about to cross a railroad, and the case of a passenger entitled to safe conduct to or from the company's station. In this state, and in most other jurisdictions, this difference is recognized by the courts. Vice Chancellor Van Fleet, in *Klein v. Jewett*, 26 N. J. Eq. 474, 479, points out that the rule of duty at a public crossing has no application to a case where, by the arrangement of the company, it is made necessary for passengers to cross the track in order to reach the station or the cars. He says: "They [the railroad company] are bound to provide a way by which passengers may pass in safety. If the way provided crosses a track, no train should be permitted to pass over it at the point where passengers are required to cross it, while a train on the opposite track is receiving and discharging passengers." On affirmation by this court (*Jewett v. Klein*, 27 N. J. Eq. 550), Mr. Justice Dalrimple said that a passenger, crossing a track which intervened between a station and a train standing at the station to receive passengers, was not bound to look to see whether another train was approaching. That decision would seem to be controlling in this case. A distinction is urged, because it related to a crossing from station to train, and not from train to station. This is a distinction without a difference. It is the passenger's right to go to the company's station, and a safe way for the purpose must be provided. In the later case in this court of *DeLaure, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 175, 7 L. R. A. 435, Mr. Justice Depue well states the true rule thus: "The duty of a railroad company as a carrier of passengers does not end when the passenger is safely carried to the place of his destination. The company must also provide safe means for access to and from its station for the use of passengers, and passengers have a right to assume that the means of access provided are reasonably safe." The great current of authority elsewhere is to the effect that failure to look for trains when crossing a track, in passing from train to station, is not necessarily negligent. The question is always one for the jury. The New York cases are most numerous, many of them being in the court of last resort. A full citation will be found in *Van Ostran v. New York C. & H. R. Co.* 35 Hun, 590. The following decisions in other jurisdictions are clear and explicit on the subject: *St. Louis & S. W. R. Co. v. Johnson*, 59 Ark. 122; *Den-*

ver & R. G. R. Co. v. Hodgson, 18 Colo. 117; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 8 L. R. A. 673; *Boss v. Providence & W. R. Co.* 15 R. I. 149; *Chicago, M. & St. P. R. Co. v. Lowell*, 151 U. S. 209, 38 L. ed. 131; *Robostelli v. New York, N. H. & H. R. Co.* 33 Fed. Rep. 796. In the case last cited the doctrine was even applied where the crossing was not to a station building, but to a mere gate of exit, customarily used to reach the town; the stopping place being at a junction and a single platform being on the opposite side. Some of the earlier Pennsylvania decisions were not very discriminating, and may seem to uphold the defendant's contention; but the later cases are in substantial accord with the general trend of judicial opinion. *Pennsylvania R. Co. v. White*, 88 Pa. 327; *Flanagan v. Philadelphia, W. & B. R. Co.* 181 Pa. 237. The only decision to which we have been referred, directly supporting the proposition that it is necessarily negligent for a passenger to cross from train to station without looking for a possible train on an intervening track, is *Connolly v. New York & N. E. R. Co.* 158 Mass. 8. That decision treats the question inadequately, without noticing the right of passengers to assume that their safety will not be imperiled by the carrier. The precedents cited are all highway cases. Massachusetts seems to stand alone on this subject.

That, in the case in hand, the passengers were only invited to alight upon a platform on the side away from the tracks, is not a controlling circumstance, but simply a fact for the jury. Such was the fact in all the cases cited. The passengers were not forbidden to alight on the other side, but, on the contrary, had always been permitted to do so. Wherever they should alight, they would have to cross the tracks to reach the station, where they had a right to go, and there could be no appreciable difference whether they should alight on the platform, and then walk around the train, and cross, or wait until the train should move on before crossing, or, as Goodin did, alight on the side towards the station, and cross at once. In *Chicago, M. & St. P. R. Co. v. Lowell*, 151 U. S. 209, 38 L. ed. 131, there was a notice posted in the cars that passengers leaving a car by the front should pass to the right, and by the rear to the left (to a platform), in order to avoid trains on the other track. A passenger failed to observe this rule in alighting from a car, and, in attempting to cross an intervening track, to the opposite side of a double station, was struck and injured by a passing train. In delivering the opinion of the Supreme Court of the United States, Mr. Justice Brown remarked: "Had the plaintiff complied with the notice, and alighted upon the platform, he would still have been obliged to cross the track, with the same possibility of being struck by a passing train that confronted him in this instance." And in *Robostelli v. New York, N. H. & H. R. Co.* 33 Fed. Rep. 796, Judge Wheeler thus elaborates the same argument:

"Passengers for West New Rochelle, stopping at this station, could not reach therefrom the train on the track which this train was on, without crossing the other track. They could get off onto the platform, and go past the end of the train, and cross, or get directly down on the other side, and cross. If they should get off on the platform, and wait for the train to leave, they would still have to cross; and there was no shelter there or other convenience for waiting. The train could not pass on the other track without the liability of encountering these passengers, and, if it passed while the train was standing, and the passengers alighting and leaving, it would be quite likely to encounter them when attempting to cross by the rear of the other train." It is noteworthy that in the case in hand the company's rule forbade the passing of trains only until the train at the station should move on. Strictly construed, that rule made it more dangerous to wait for the train to move on than to cross at once. In the *Massachusetts* case it was conceded that the passenger had the right to alight on the side of the train towards the station, although there was provided on the other side a platform for that purpose. The ruling was that, wherever he alighted, he was bound to look before crossing the track. It is suggested that Goodin was not intending to go to the station, but to his home, on the same side of the tracks. That circumstance is immaterial. It existed in several of the cases above cited. Goodin had a right to rely on the assumption that no train would be allowed to come while passengers might properly be crossing the track.

One other matter deserves notice. Goodin was a daily traveler by that particular train, and presumably knew that the express was scheduled to pass Lawnside only three minutes before the accommodation was due there; and it is argued that he should have had in mind the fact that it was behind time, as the trains had not passed one another at their usual point of passing. That argument was useful for the jury, but not conclusive for the court. I know of no rule of duty for a traveler on a railroad train to keep alert to such conditions. Within a few weeks there had been a change in the timetable. Before the change, the arrival at Lawnside of the accommodation preceded the passing of the express by nine minutes. It is too much to say that, as a matter of law, Goodin should have remembered the change, and should have noticed that the express had not passed. Besides, he had the protection of the company's own rule not to permit a train to come while his train was receiving or discharging passengers. It was not proved that he knew of this rule; but several of the decisions above cited hold, and I think rightly, that knowledge of such a rule by passengers may be presumed. For this reason, also, the *Massachusetts* case *ubi supra* is unsatisfactory, for it declares a contrary presumption. A careful reading of the whole testimony convinces me that, under the 45 L. R. A.

circumstances of this case, the question of contributory negligence was for the jury.

The only other errors assigned relate to the beneficial right of the plaintiff individually, in her suit as administratrix. Goodin left no child, or descendant of a child, and no parent. The plaintiff claimed, as widow, the entire benefit of the suit. Pamph. Laws 1897, p. 134. If she were not such, there could have been no recovery under the declaration as framed; and, while proof showed that the deceased left a sister, the case was not tried on any theory that recovery could be had in her interest. The measure of damages, of course, would have differed; and, as the judge, in his charge to the jury, put the matter of damages on the basis of a recovery by a widow, it is but fair to consider proof of that status as vital. The judge, on the motion to nonsuit or direct a verdict, rightly refused to decide that there was no such proof. There had been a ceremonious marriage between Goodin and the plaintiff many years before; but it was conceded that, soon afterwards, the plaintiff had learned that at the time of the marriage Goodin had a wife, from whom he was separated. Cohabitation was nevertheless continued, and the parties were reputed to be husband and wife. About 1892 the real wife died. Reliance is placed by the defendant upon the doctrine, declared in chancery and approved in this court, that where one of two persons, knowing of an existing bar to his or her marriage, perpetrates a fraud upon the other, by going through a marriage ceremony, such marriage is void, and that, although such bar be subsequently removed, cohabitation and reputation thereafter as husband and wife will not justify a presumption of marriage. *Voorhees v. Voorhees*, 46 N. J. Eq. 411; *Collins v. Voorhees*, 47 N. J. Eq. 315, 555. If the plaintiff's case had rested on presumption, it would have failed; but such was not the fact. It rested upon the proof of an actual marriage after the first wife's death. Some proof of reputation of marriage was, indeed, admitted under objection, and its admission is now assigned for error. Under the *Voorhees Case* it was not evidential; but, as it was of no avail whatever to the plaintiff, it was immaterial, and harmless to the defendant. In the *Voorhees Case*, Vice Chancellor Van Fleet concedes that a contract of marriage made *per verba de presenti* amounts to an actual marriage, and is valid; and in the case of *Stevens v. Stevens*, 56 N. J. Eq. 488, Vice Chancellor Pitney declares the law on the subject to the same effect, citing abundant authority. Dr. Bishop makes it quite plain that in this country, in the absence of prohibitive legislation, no more is required to constitute a legal marriage than that the man shall declare, in words of the present tense, that the woman is his wife, and that the woman shall assent. No witness need be present, and no particular ceremony is necessary. Bishop, Marr., Div. & Sep. chaps. 14, 15, especially §§ 299, 313. The effect of a recent statute of this state is applicable only to nonresidents (Pamph. Laws

1897, p. 378), and need not now be considered.

The plaintiff, by her own testimony, made a prima facie case of such a marriage contract, made directly after the first wife's death. True, no witness was present; but there was not the slightest reason to doubt the plaintiff's story, and every reason to believe it. It had corroboration in the testimony of a niece of the plaintiff, to whom Goodin had said, in 1892 or 1893, after his first wife's death: "Your aunt now is my lawful wife." One of the exceptions assigned for error was the refusal to strike out this admission of marriage, but it was clearly competent evidence. Bishop, Marr., Div. & Sep. §§ 1057, 1058. The defendant called no witness, and in no way weakened the prima facie proof of such marriage. Of

course, the jury might have disbelieved the testimony, and doubtless the judge, on request, would have submitted the fact of marriage to the jury, instead of assuming it as proved by undisputed testimony; but he was not asked to do so, and no exception was taken to the charge. The exception was to his refusal to charge that the "same proceeding" was necessary, "to make a common-law marriage, as was entered into before disability was removed." This seems to mean that a ceremonious marriage was requisite, and, of course, the judge properly refused the request.

I find no error in this judgment.

McGill, Ch., and Lippincott and Van Syckel, JJ., dissent.

MISSOURI SUPREME COURT (Division 2).

WATSON SEMINARY, *Appt.*,
v.

COUNTY COURT OF PIKE COUNTY,
Resp't.

(.....Mo.....)

1. The provision of a charter of a public corporation created for public purposes, such as that of education, whereby fines, forfeitures, and penalties accruing to a certain county are granted to the corporation, is not a contract within the constitutional protection, but may be changed at the will of the legislature.
2. A general statute permitting the alteration or repeal of any charter becomes a part of a charter granted while it is in force, so that the right to repeal the latter will not be affected by the repeal of the general law.
3. A legislative grant of fines, forfeitures, and penalties, accruing to a county when it is a mere gratuity or privilege without any consideration, can be revoked at any time.

(March 28, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Pike County in favor of defendant in a mandamus proceeding to compel defendant to place the fines, forfeitures, and penalties accruing to the county to the credit of a fund for the benefit of the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. Tapley & Fitzgerald, A. R. Coburn, and Elijah Robinson, for appellant:

The act of March 12, 1859, Laws 1859, p. 46, undertaking to repeal that part of the plaintiff's charter which appropriated to its

use the fines, penalties, and forfeitures accruing to Pike county, is in violation of those provisions of both the state and Federal Constitution which forbid the enactment of any law impairing the obligations of a contract.

U. S. Const. art. 10, § 1; Mo. Const. 1820, art. 13, § 17; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Planters' Bank v. Sharp*, 6 How. 301, 12 L. ed. 447; *Vincennes University v. Indiana*, 14 How. 268, 14 L. ed. 416; *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 19 L. ed. 977; *The Binghamton Bridge*, 3 Wall. 51, sub nom. *Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137; *Wilmington & R. R. Co. v. Reid*, 13 Wall. 266, 20 L. ed. 569; *Seibert v. Lewis*, 122 U. S. 284, sub nom. *Seibert v. United States*, Lewis, 30 L. ed. 1161; *State, Haessler, v. Greer*, 78 Mo. 188; *Scotland County v. Missouri*, 1. & N. R. Co. 65 Mo. 135; *Sloan v. Pacific R. Co.* 61 Mo. 30, 21 Am. Rep. 397; *New Jersey v. Yard*, 95 U. S. 111, 24 L. ed. 353.

The provisions of chap. 34, Rev. Stat. 1845, were not intended to apply to corporations created solely for the advancement of charitable or educational purposes. The entire chapter is in direct conflict with the spirit of the law and the general policy of the state relating to such institutions.

State, Clover, v. Ladies of the Sacred Heart, 99 Mo. 540, 6 L. R. A. 84; Gray, Perpetuities, § 590.

Notwithstanding the existence of these general statutory provisions, any subsequent legislature might lawfully ignore them and create corporations in no wise subject to them. In other words, the intention of the legislation of 1847, which enacted the statute under which the "Watson Seminary" was

NOTE.—As to the nature of incorporated institutions belonging to the state, see *State, Little, v. Board of Regents* (Kan.) 29 L. R. A. 378, and note; also *Lane v. Minnesota State Agri. Soc.* (Minn.) 29 L. R. A. 708; *Lund v. Chippewa County* (Wis.) 34 L. R. A. 131; *Ster-* 45 L. R. A.

ling v. Regents of University (Mich.) 34 L. R. A. 150; *Oklahoma Agricultural & M. College v. Willis* (Okla.) 40 L. R. A. 677; *Gross v. Kentucky Bd. of Managers of World's Columbian Exposition* (Ky.) 43 L. R. A. 708; and *Re Royer* (Cal.) 44 L. R. A. 364.

established, and not the intention of the legislature which enacted the Revised Statutes of 1845, must govern; and it is not necessary that the intention of the legislature of 1847, that said seminary should not be subject to the provisions of said Revised Statutes, should be manifested by any particular form of expression.

At common law every corporation is invested with the power of unlimited duration.

Kyd, Corp. § 70; Morawetz, Priv. Corp. § 411; Angell & A. Corp. § 110.

The act of 1847, when accepted and acted upon by the people who contributed to the establishment of this school, became, as between them and the state, or rather as between the state and the school, which stood in their shoes, a binding contract, the obligation of which no legislation could impair.

Morawetz, Priv. Corp. § 1101a; *Miller v. New York*, 15 Wall. 495, 21 L. ed. 103; *Hyatt v. McMahon*, 25 Barb. 457; *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336; *Orr v. Bracken County*, 81 Ky. 593; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140.

Messrs. W. H. Morrow and Ras. Pearson, for respondent:

The act of January 25, 1847,—or the so-called charter of Watson Seminary,—ceased to be operative after twenty years from the date of appointment of a board of directors December 20, 1853, or after December 20, 1873.

Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. ed. 385; *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710; *Mead v. Ballard*, 7 Wall. 290, 19 L. ed. 190.

When an act of the legislature confers a power or privilege it may be repealed at any time before the power has been exercised so as to confer a vested right.

Covington & L. R. Co. v. Kenton County Ct. 12 B. Mon. 144; *Bailey v. Mason*, 4 Minn. 546; *Union Parish Soc. v. Upton*, 74 Me. 545.

Inchoate rights, derived under a statute, are lost by a repeal of the statutes unless saved by express words in the repealing law.

Moor v. Seaton, 31 Ind. 11; *Dillon v. Linder*, 36 Wis. 344.

The promise of a gratuity, spontaneously made, may be changed or recalled at pleasure.

Tucker v. Ferguson, 22 Wall. 527, 22 L. ed. 805.

If in any event, by virtue of the act of January 25, 1847, Watson Seminary became entitled to have these fines, penalties, and forfeitures passed over to the Watson fund for its benefit, such right was impliedly repealed by subsequent legislative acts of a general nature and subsequently adopted constitutional provisions.

Waller v. Everett, 52 Mo. 57; *Deal v. Mississippi County*, 107 Mo. 464, 14 L. R. A. 622; Morawetz, Priv. Corp. §§ 463-468.

Even assuming what appellant claims in regard to the act of January 25, 1847, constituting a contract, it is nevertheless true that said act was subject to alteration or repeal by subsequent legislation.

45 L. R. A.

Rev. Stat. 1845, chap. 34, art. 1, § 7, p. 232; *Chincleclamouche Lumber & Boom Co. v. Com., Atty. Gen.* 100 Pa. 438; *Crease v. Babcock*, 23 Pick. 334, 34 Am. Dec. 61; *Re Gibson*, 21 N. Y. 9; *Griffin v. Kentucky Ins. Co.* 3 Bush, 592, 96 Am. Dec. 259; *Pennsylvania R. Co. v. Duncan*, 111 Pa. 352; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *McLaren v. Pennington*, 1 Paige, 102; *Lothrop v. Stedman*, 13 Blatchf. 134; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Pennsylvania College Cases*, 13 Wall. 190, 20 L. ed. 550; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98; Morawetz, Priv. Corp. §§ 463, 464.

Under the educational policy of the state the act of January 25, 1847, is detrimental to the general welfare and against public policy.

West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; *Searl v. School Dist. No. 2*, 133 U. S. 553, 33 L. ed. 740; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

Every surrender of the ordinary sources of the school revenue of a county not only tends to paralyze the public school system, but involves a loss to the balance of the community, since the deficiency thus created must be made by a larger contribution—or greater taxation—to meet the common-school expenses.

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

Fines, penalties, and forfeitures in their very nature are not grantable by legislative act so as to invest the grantee with such rights or privileges or property as to entitle the grantee, under any circumstances, to claim a vested right therein.

Morawetz, Priv. Corp. § 442.

No legislature could bargain away to appellant the future revenues of the state; such a bargain would be inequitable and unjust, and could not vest in the grantee a right to enforce it.

United States Mortg. Co. v. Gross, 93 Ill. 483.

Gantt, Ch. J., delivered the opinion of the court:

Plaintiff sought by mandamus to require the county court of Pike county to place all "fines, forfeitures, and penalties" accruing to said county to the credit of what is known in said county as the "Watson fund," for the benefit of Watson Seminary. The circuit court denied the peremptory writ, and plaintiff appeals.

The history of the Watson fund "runneth thus:" Samuel Watson died in Pike county prior to the year 1836, leaving a last will, which was duly probated February 2, 1836. Samuel Watson made the following bequest in said will: "And it is further my will and desire that, after the death of said Esther, two hundred dollars of the said sum be set apart, and the same is hereby bequeathed to the said county of Pike for the purpose of supporting a free school for the poor of said county. I give and bequeath to said county

of Pike the said sum of one hundred dollars for the purpose of supporting a free school for the poor of said county, and direct my executor to pay the same into the treasury of said county, under the direction of the county court; this, with the above-mentioned sum of two hundred dollars, making an entire sum of three hundred dollars for the support of the free schools for the poor. It is my will and desire that the said sum shall be loaned under the direction of the county court of said county, and the interest be added to the principal from year to year until there shall be some legal provision for free schools in this state; and, whenever free schools shall be established in said county by law, then it is my will and desire that the interest which may hereafter accrue on the sum total of principal and interest up to the time of establishing such school shall be annually appropriated towards defraying the expenses of such public school, reserving the said three hundred dollars, and the interest which may have accrued thereon before the establishment of such public school, as a permanent fund."

The present contention is grounded on an act of the general assembly of Missouri approved January 25, 1847. The following sections of said act sufficiently indicate its purpose and provisions:

"Section 1. A school is hereby established in the county of Pike by the name of 'Watson Seminary,' named in honor of Samuel Watson, deceased, of said county, the directors of which, when selected as hereinafter required, are hereby constituted a body politic or corporate with all the powers of corporation; and as such may sue and be sued, have a common seal, and hold such property, real and personal, as may be necessary and proper to effect the purpose of its creation, under the name and style of the 'Watson Seminary.'

"Sec. 2. The principal and interest of the fund, donated by the said Samuel Watson, now under the control of said county of Pike, shall be and the same is hereby declared to be a permanent fund for the support of said seminary, and, in addition thereto, the amount of fines now in the treasury of the said county, and all the monies which may hereafter accrue to said county by way of fine, penalty, or forfeiture, which shall be paid into the treasury of said county as the same is paid in, shall be added to and the same shall become a part of said fund, and the whole shall be loaned out as the 'Watson fund,' of said county, is now loaned," etc.

"Sec. 5. No part of the Watson fund above constituted, by the provisions of the 2d section of this act, shall be appropriated for any purpose whatever until, from the accumulation of interest thereon, and the payment of fines, penalties, and forfeitures, the whole shall amount to the sum of \$2,000.

"Sec. 6. When the said fund shall reach the sum of \$2,000, it shall be the duty of the county court of Pike county to give public notice by advertisement that said seminary shall be established at such place in said

county as will contribute or procure the largest donation in money or real estate for the erection of buildings for said seminary, and for establishing and purchasing a library, and suitable apparatus for the same, and which may in other respects be most advantageous for the location of said seminary, said subscription shall designate the place where said seminary is to be located, and the amounts subscribed shall be secured to the satisfaction of the county court and made payable to the county of Pike, and filed in the office of the clerk of the county court.

"Sec. 7. At the term of the county court of said county of Pike, held next after the publication of the advertisement above mentioned, the said court shall appoint not less than three nor more than five commissioners, residents of one or more of the adjoining counties, who shall meet on a day fixed by said court at the courthouse in Pike county, and examine said subscriptions, and shall fix upon a location for said Watson Seminary, at the place having the largest subscription in value, in the opinion of said commissioners, and possessing the greatest advantages for the permanent location of said school. The said commissioners shall file a report in writing of their proceedings with the clerk of the said county court, and the place designated by a majority of the commissioners in their report shall be the permanent location of said Watson Seminary.

"Sec. 8. So soon as the said seminary shall be permanently located it shall be the duty of the county court to appoint nine directors," etc.

"Sec. 9. At the first term of the county court, after the necessary buildings are completed and the school is in operation, the county court shall draw their warrant on the county treasurer for the amount of interest due for the year preceding, in favor of such officers as may be appointed for that purpose by said board of directors, and the same shall be done annually thereafter."

"Sec. 11. The directors shall appoint such officers as may be necessary, and shall fill all vacancies which may occur in their body by removal, resignation, or otherwise.

"Sec. 12. The directors shall biennially make a report to the superintendent of the common schools of the condition of said seminary, stating the number and ages of the pupils, the branches studied, the price of tuition, the amount received from interest on the fund, as well as from pupils, and any other information calculated to show the condition of said school; also the property held by said seminary, and the amount of its indebtedness.

"Sec. 13. All the interest accruing upon the fund regulated by said Samuel Watson, at the time of the appointment of said directors, shall be appropriated towards the education of any indigent youths in said county of Pike, who may apply for the benefit of the same, and it shall be the duty of said board to have them educated at said seminary without charge of tuition, use of rooms or of

any apparatus that may belong to said seminary."

"Sec. 17. The fines, penalties, and forfeitures, accruing to said county of Pike, after the organization of said seminary, shall still be paid into the county treasury, and be applied to the increase of said permanent fund.

"Sec. 18. An act entitled 'An Act to Establish the Watson Free School,' approved February 23d, 1843, is hereby repealed, as are all other acts and parts of acts inconsistent with the provisions of this act.

"This act shall take effect and be in force from and after its passage. Approved January 25, 1847."

On August 11, 1853, the county court of said county made an order reciting that the Watson fund then amounted to more than \$2,000, and declared that said seminary would be located in such place in said county as would contribute the largest donation in money and real estate, and directed that notice be given in certain newspapers. On the 10th of November, 1853, the county court appointed three commissioners to examine the subscriptions, and fix the location of the seminary. The people of Ashley donated \$3,302, and 4 acres of land adjoining said town. On December 20, 1853, the county court approved the location, and appointed a board of trustees. The county court subsequently, at different times, drew warrants on the Watson Seminary fund. In 1893 the county court refused to longer carry the fines, penalties, and forfeitures accruing to said county to the credit of the said Watson fund, but applied them to the common-school fund of said county. In 1859 (Laws 1859, p. 46) the legislature passed an act, approved March 12, 1859, whereby all or so much of the act of 1847 as appropriated the fines, forfeitures, and penalties of said county to the Watson fund was repealed, and repealing "all provisions giving said fund any portion of the school fund of said county."

Counsel for plaintiff seeks a reversal of the judgment below on the ground that the act of 1859 was unconstitutional, in that it impaired the obligation of a contract made by the state with Watson Seminary. This contention is controverted on various grounds, which will be noted in the discussion of the case.

Counsel for plaintiff invokes the authority of *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629,—a case so famous and historical that it is often assumed that both the profession and the laity are acquainted with the principles decided and the facts upon which the opinion was based; but it is opined that no harm can result from a short restatement of the facts and the actual ruling thereon. In 1769 George III. granted a charter which recited that Dr. Eleazer Wheelock had established at his own expense a charity school for the instruction of Indians in the Christian religion; that he had appointed agents to solicit contributions in England for extending the said charitable work, and had constituted the earl of Dart-

mouth and others trustees of the moneys so raised and to be acquired, and authorized them to fix the site of the proposed college; that they determined to establish the college in the western part of New Hampshire, and that Dr. Wheelock had applied for a charter, and in consideration of the foregoing premises a charter was granted, constituting the trustees of said college a body politic, to be known by the name of "The Trustees of Dartmouth College," with power to acquire real and personal property, and to pay the salaries of officers and teachers; that Dr. Wheelock should be president, and appoint his successor, until such appointment should be disapproved by the trustees; that the trustees should have power to appoint and displace officers, and make ordinances, orders, and laws for the college, etc. The charter was accepted, and the property contributed was conveyed to the corporation. The college continued to be governed by this charter until 1816. In the year last mentioned the legislature of New Hampshire passed an act to amend the charter, and enlarge and improve the corporation of Dartmouth College. The proposed change was to increase the trustees from twelve to twenty-one, and various other changes. The majority of the old corporation refused to accept the new charter, and brought an action for trover against the new treasurer for the record books of the college; and, the supreme court of New Hampshire having decided that the new charter was constitutional, the case was removed by writ of error to the Supreme Court of the United States. At the February term, 1819, the Supreme Court reversed the judgment of the supreme court of New Hampshire, holding that the legislature had no power to amend the charter without the consent of the trustees, and that the amending act impaired the obligation of contracts, within the meaning of the Constitution of the United States. Chief Justice Marshall, among other reasons for so holding, used this language: "Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn, and these salaries lessen the expense of education to the students. It is then an eleemosynary . . . and, so far as respects its funds, a private, corporation. . . . That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution, founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution?" The conclusion was reached that it was a private eleemosynary institution, and incapable of change without its consent by the legislature; but it was conceded that if it had been a public corporation, created for governmental purposes, the power to alter, amend, or change the charter

was unquestionable. Mr. Justice Story, in a concurring opinion, conceded that if the power to control, alter, or amend the charter was reserved in the charter itself, no doubt could exist as to that power. Accordingly the various legislatures have, since that decision, availed themselves of this suggestion, and either inserted this right in general laws made applicable to all charters, or incorporated it in subsequently granted special charters, in the charters themselves. *Pennsylvania College Cases*, 13 Wall. 213, 20 L. ed. 553; *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98; *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Sinking-Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 348, 28 L. ed. 174. "Private charters, or such as are granted for the private benefit of the corporators, are held to be contracts, because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified." *Pennsylvania College Cases*, 13 Wall. 213, 20 L. ed. 553.

Strained as the construction was in the *Dartmouth College Case*, no such state of facts exists in this case. Watson Seminary was not endowed by private individuals. Not a dollar of the funds which the seminary now demands is the gift of any private individual to this seminary. So much of said fund as originated in the will of Samuel Watson was bequeathed to raise a fund in aid of the free public schools of Pike county, when such schools should afterwards be established; and it would be an obvious misappropriation of said fund to apply it to an institution like Watson Seminary, which is not, in the meaning of said will, a free or public school. Outside of this donation, the record shows that the remainder of said fund has resulted from the addition to it of "the penalties, fines, and forfeitures"—public funds,—which have accrued to said county under the operation of the public laws of the state. Looking further into the charter of this corporation, we find there were no private incorporators, share or stock holders, and no shares of stock which an individual could hold. Whatever may be said of those charters granted to private persons for private benefit, the reasoning can have no application here. Here the state, *ex mero motu*, has created a corporation for a public purpose,—that of education,—and has provided for it out of public funds, to wit, "the penalties, fines, and forfeitures" accruing to a subdivision of the state, to wit, Pike county; and the state, through its own public servants, the county court, appoints its own agents or mandataries to administer that trust. Under the scheme the control of the state is perpetuated as long as the charter is effectual. To hold such a charter with such limitations a contract would be to disregard all fundamental distinctions of the 45 L. R. A.

law. At least two parties are essential to a contract. "A contract is an agreement between two or more competent parties touching a legal subject-matter, for a valuable consideration." Minor, Inst. In this case, if a contract, it is equivalent to saying the state has contracted with itself, or its own agencies and creatures,—a solecism in the law. Our conclusion is that the *Dartmouth College Case* cannot control, because this is not a private, but a public, corporation, created and founded by the state, and placed entirely under the control of a board created by the state, to dispense a purely public fund, and responsible and amenable exclusively to the state and its subdivision, the county of Pike. It necessarily follows that, as no contract was ever entered into by the state with any second party, it cannot, in the nature of things, be impaired by any subsequent amendment or alteration of said charter.

2. But, if we are wrong in our interpretation of the character of this corporate body, another insuperable difficulty lies in the way of granting plaintiff a peremptory writ of mandamus against the county court. The general law of Missouri applicable to corporations at the time this charter was granted, in 1847, provided, among other things, that "the charter of any corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature." Mo. Rev. Stat. 1845, chap. 34, art. 1, § 7, p. 232. We have already adverted to the fact that the states and the courts alike seized upon the qualification of the doctrine of the *Dartmouth College Case*, to wit, that when a provision was inserted, either in the charter itself, or a general statute governing all such charters, reserving the right to amend, alter, or repeal the charter, such reservation is a condition of the grant, and its subsequent exercise is in no sense an impairment of the obligation of the contract. *Union Branch R. Co. v. East Tennessee & G. R. Co.* 14 Ga. 327. When the charter under consideration herein was granted, the provision of the general statutes of 1845 became, to all intents and purposes, as much an integral part thereof as if it had been written therein in so many words. To parry the force of this well-high universal construction, counsel for the seminary argue that, while this is true, it is also indisputable that, as the general law of 1845 was only a legislative enactment, it could not bind subsequent legislatures, and prevent their granting charters which were not subject to this amendatory reservation and power. This is true. But where in this charter is there an intimation that the state had voluntarily denied itself this power of amendment and alteration? The negation of this reserved power is certainly not to be found in any express provision of the charter, taking it out of the general right reserved to the state; nor are there such words as necessarily imply such an intention. Nor are we called upon to give a strained construction of exemption from the

general law in favor of this gratuity granted to this corporation. It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication; regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public. *Fanning v. Gregoire*, 16 How. 534, 14 L. ed. 1047; *Min-turn v. Larue*, 23 How. 435, 16 L. ed. 574; *Carroll v. Campbell*, 108 Mo. 550. Mr. Justice Swayne declared in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036, and in *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710, "Nothing is to be taken as conceded. . . . The affirmative must be shown. Silence is negation, and doubt is fatal to the claim." To construe this act as sought by plaintiff would be to deprive Pike county forever of the funds granted to it by the Constitution of the state for the support of its public schools (Mo. Const. art. 11, § 8); to deprive that county of a privilege granted to every county in the state. The act of March 12, 1859, expressly repealed so much of the charter of Watson Seminary as granted the "fines, forfeitures, and penalties" accruing to Pike county to said seminary, and, in view of the reserved right to so amend said charter in the Revised Statutes of 1845, we have no doubt of the constitutionality of this act of 1859. To the contention of counsel that because the revision of 1855 did not, in words, continue the general law of 1845, though the same provision is found therein (Rev. Stat. 1855, p. 371, chap. 34, art. 1, § 7), it is only necessary to say that the subsequent repeal, if conceded, did not affect the right to amend, which, to all intents and purposes, was incorporated in the charter at the time of enactment. *Freehold Mt. L. Asso. v. Brown*, 29 N. J. Eq. 122; *United Hebrew Benev. Asso. v. Benshimol*, 130 Mass. 325; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989. But regardless of the reserved right of the legislature to amend the charter as it did by the act of 1859, in view of the fact that there are no incorporators of Watson Seminary outside of the state itself, its sole benefactor, we think it is perfectly clear that this corporate body has no standing to complain of the action of the state in the amending or repealing act. The persons who gave the land, and contributed money to build the schoolhouse, are not before this court, and are not represented. They had no voice in creating the board of directors. They were no parties to any contract, if one ever existed, between the state and its own appointees, not one of whom has the slightest pecuniary interest in the school. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569. We are not called upon to decide or determine the rights of persons who contributed to the school property. It is not our duty to decide 45 L. R. A.

any constitutional question affecting their rights, until they are in court, and the issue is directly or necessarily involved. *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. *loc. cit.* 92.

Finally we come to consider whether the grant of the fines, penalties, and forfeitures accruing to Pike county was such that it became, upon its passage, irrevocable. Said Chief Justice Marshall in the *Dartmouth College Case*: ". . . If the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States." The same principle was repeated in *East Hartford v. Hartford Bridge Co.* 10 How. 511, 13 L. ed. 518; *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472. In *Newton v. Mahoning County Comrs.* 100 U. S. *loc. cit.* 559, 25 L. ed. 711, the Supreme Court of the United States discussed the act of Ohio providing for the removal of the courthouse of Mahoning county from Canfield to Youngstown. By the act of 1846, upon certain conditions, complied with by the people of Canfield, the courthouse was "permanently established" at said place. In 1874 the legislature passed the act of removal, and it was resisted as impairing the obligation of a contract; but the court held the first act was not a contract, and was not irrevocable, because the provisions for holding courts were public things, and laws concerning them must be of the same character. Said the court: "They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less." Now, "fines, forfeitures, and penalties" accrue to the state from the violation of some obligation to the state, or as the result of criminal prosecutions for offenses against the state. Each legislature may repeal the laws creating these, and enact new laws, imposing other and different ones. The whole subject is a matter absolutely in the power of each succeeding legislature, acting in its relation to public objects. No person or institution can have a vested right therein. Hence, when the legislature granted the fines, forfeitures, and penalties then in the county treasury, in 1847, it did so subject to the right of the next legislature to repeal the act of 1847. In the very nature of the subject-matters granted, and the public purpose to which they were devoted, there was not, and could not be, an absolute and unchangeable contract, which future legislatures might not modify or repeal; but it was a gratuity or privilege, without any consideration moving to the state, which could be revoked at any time, as was expressly done in 1859. *State v. Gilmore*, 141 Mo. 506; *New-*

ton v. Mahoning County Comrs. 100 U. S. 561, 25 L. ed. 712; *Christ Church v. Philadelphia County*, 24 How. 300, 16 L. ed. 602; *State v. Julow*, 129 Mo. 177, 29 L. R. A. 257.

Upon a full consideration of all the facts, we are satisfied that there was no contract, because there were no parties to the act creating and endowing the school, but the state itself, and no consideration moved to the state for the grant of the funds, and that the state had the reserved power, under the general law of 1845, to amend, alter, or repeal

the act, without infringing any constitutional right; and, without reference to this right,—the matter being one of public concern, in which the state alone was interested,—the legislature had a perfect right to act in regard to it according to its own judgment, and was in no way restrained by the Constitution of the United States.

The judgment is affirmed.

Sherwood and Burgess, JJ., concur.

IOWA SUPREME COURT.

Mary BRADT, *Appt.*,

v.

NEW NONPAREIL COMPANY.

(.....Iowa.....)

A mother cannot recover damages for a libelous publication about her deceased adult son.

(May 17, 1899.)

A PPEAL by plaintiff from a judgment of the District Court for Pottawattamie County in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

Defendant published in its newspaper an article entitled "Hunting a Dead Man," in which the charge was made that the United States authorities attempted to make the arrest of George Bradt for counterfeiting. In that article it was stated that Bradt was mixed up in many criminal transactions, implicated in several burglaries, was known to be the leader of a gang of counterfeiters, and was recognized as a desperate character. The article then describes the efforts of the officers to arrest Bradt, and stated that their efforts were rewarded only by their being handed a telegram stating that he was dead. For the publication of this libel, plaintiff instituted this action.

Further facts appear in the opinion.

Mr. J. B. Sweet, for appellant:

The definition in § 5086 of the Code, while found in the criminal chapter, nevertheless defines a libel as the basis of a civil action for damages.

Stewart v. Pierce, 93 Iowa, 136.

The publication of the article brought scandal to the plaintiff, and on account of its publication and the defamation of the memory of her son she suffered great humiliation, shame, and mental anguish, and this suffering constituted her damages.

Halley v. Gregg, 74 Iowa, 563; *Call v. Larabee*, 60 Iowa, 212.

Messrs. Frank H. Gaines and Mayne & Hazelton for appellee.

Deemer, J., delivered the opinion of the court:

The only question presented by this appeal is this: May a mother recover dam-

NOTE.—For attempt by injunction to protect the memory of a deceased relative, see *Schuyler v. Curtis* (N. Y.) 31 L. R. A. 286. 45 L. R. A.

ages for a libel published of and concerning an adult son, published after his decease? The damages sought to be recovered in this action are for humiliation, shame, and mental anguish of the mother caused by an alleged libelous publication concerning her deceased son, George Bradt. The publication, which is set forth in the petition, is undoubtedly libelous *per se*. But the pivotal question is, May plaintiff recover damages therefor? Section 5086 of the Code makes it a crime to maliciously blacken or vilify the memory of one who is dead by a libelous publication tending to scandalize or provoke his surviving relatives or friends; and there is no doubt that for the publication set out in plaintiff's petition defendant was subject to a criminal prosecution, provided the article was published without sufficient justification. But is it liable civilly to the mother of the deceased? She does not sue in a representative capacity, and, if she had, she could not recover, for it is manifest no injury was done to the estate of her deceased son. It seems that contemptuous demeanor towards a corpse was, by the Roman law, an insult to the heir of the deceased, and that action could lie therefor. Dig. 47, 10, 11. The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action. There was nothing in the article which tended in any manner to reflect on the plaintiff, and her sufferings were of the same kind as that produced by publication upon any of the other relatives or close friends of deceased. To permit a recovery in this case would allow the mother of any person libeled to bring suit in her own name for the consequential damages done to her feelings, and the death of the person libeled would be a wholly irrelevant matter; for the suffering is in kind the same whether the person libeled be living or dead. We have not been cited to an authority, and, after a diligent search, we have been unable to find one, which authorizes a recovery in such a case. On the other hand, the following cases hold such action will not lie: *Sorensen v. Balaban*, 11 App. Div. 104; *Wellman v. Sun Printing & Pub. Assn.* 66 Hun, 331.

The trial court correctly sustained the demurrer, and its judgment is affirmed.

ILLINOIS SUPREME COURT.

Re Probate of Will of Thomas J. THOMPSON, Deceased.

Mary Ann THOMPSON, Appt.,

v.

Letitia J. OWEN, et al.

(174 Ill. 229.)

1. That the attesting witnesses to a will are unable to remember the facts stated in the attestation clause will not prevent the admission of the will to probate if the signatures of testator and the witnesses are proved, and no evidence appears tending to disprove the recitals in the attestation clause of compliance with the statutory requirements, where the statute permits the party seeking to probate a will to support the same by any evidence competent to establish a will in chancery.
2. Affidavits of attesting witnesses to a will prepared for use upon the first application for probate are, although the proceeding is dismissed without result, admissible, together with the testimony of the subscribers, as to facts and circumstances which attended the signing in a subsequent proceeding to probate the will.
3. The rule that the party who produces a witness cannot impeach or discredit him does not apply with full effect in case of a witness produced as required by law to prove a will.

(June 18, 1898.)

A PPEAL by proponent from a decree of the A Circuit Court for Hancock County affirming an order of the County Court refusing to admit to probate the will of Thomas J. Thompson, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. John B. Risse & Son, for appellant:

A will may be established by one, only, of the attesting witnesses if that witness can testify to a compliance with the statute relating to its execution.

Re Page, 118 Ill. 576, 59 Am. Rep. 395; *Canatsey v. Canatsey*, 130 Ill. 397.

It is not necessary that all of the witnesses should be able to testify to all the statutory requirements being complied with. The presumption in favor of due execution of the will when it appears on its face to possess all the legal requisites is such that it will prevail over the testimony of all the witnesses to the contrary, where so far corroborated by circumstances, or other testimony, that the court is satisfied such was the fact.

Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 424.

Where witnesses fail to recollect what took place at the time of the execution of the will

these facts may be presumed from the attestation clause if it shows a compliance with the statute.

Cheney v. Arnold, 18 Barb. 434; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 89, 40 Am. Dec. 225; *Barnes v. Barnes*, 66 Me. 286; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424.

A perfect attestation clause, showing that all of the statutory formalities have been complied with, is presumptive evidence of the valid execution of a will, and, in absence of proof to the contrary, is conclusive.

Barnes v. Barnes, 66 Me. 286; 1 Redf. Wills, 3d ed. * 237, 238; *Lawrence v. Norton*, 45 Barb. 448; *Nelson v. McGiffert*, 3 Barb. Ch. 153, 49 Am. Dec. 170; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Theological Seminary v. Calhoun*, 25 N. Y. 422; *Peck v. Cary*, 27 N. Y. 10, 84 Am. Dec. 220; *Ela v. Edwards*, 16 Gray, 91; *Eliot v. Eliot*, 10 Allen, 357; *Re Johnson*, 7 Misc. 220; *Re Nelson*, 43 N. Y. S. R. 30; *Re Peppoon*, 91 N. Y. 256; *Re Kellum*, 52 N. Y. 517; *Cheney v. Arnold*, 18 Barb. 434; *Allaire v. Allaire*, 37 N. J. L. 312; 3 Washb. Real Prop. 3d ed. *682; *Tilden v. Tilden*, 13 Gray, 103; *Nickerson v. Buck*, 12 Cush. 332; *Orser v. Orser*, 24 N. Y. 51.

The probate of a will does not depend upon the recollection or veracity of a subscribing witness.

Cheney v. Arnold, 18 Barb. 434; 1 Redf. Wills, *218; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424; *Rogers v. Diamond*, 13 Ark. 474; *Hall v. Hall*, 18 Ga. 40.

Messrs. O'Harra, Scofield, & Hartzell, for appellees:

To entitle a will to be admitted to probate, four things must concur: (1) The will must be in writing, and signed by the testator, or in his presence by someone under his direction; (2) it must be attested by two or more credible witnesses; (3) two witnesses must prove that they saw the testator sign the will in their presence, or that he acknowledged the same to be his act and deed; (4) they must swear that they believe the testator to be of sound mind and memory at the time of signing or acknowledging the same.

Dickie v. Carter, 42 Ill. 376; *Crowley v. Crowley*, 80 Ill. 469; *Canatsey v. Canatsey*, 130 Ill. 397.

The statute has prescribed the rule, and its requirements must be obeyed.

Doran v. Mullen, 78 Ill. 344.

Boggs, J., delivered the opinion of the court:

The appellant filed in the county court of Hancock county an instrument in writing purporting to be the last will and testament of Thomas J. Thompson, deceased, and also filed her petition praying that the said instrument might be admitted to probate. A hearing was had, and the county court refused to

NOTE.—For proof of signature by mark when attesting witnesses thereto are dead or cannot remember the transaction, see *note to Wienecke v. Arlin* (Md.) 44 L. R. A. 142. 45 L. R. A.

admit the instrument to probate as the will of the said deceased. The appellant appealed from this order of the county court to the circuit court of said county, and in the said circuit court the cause was, by agreement of the parties, submitted to the court without the intervention of a jury. The circuit court entered an order refusing and disallowing the petition of the appellant that said instrument be admitted to probate, and the appellant has brought the cause to this court by a further appeal from the said order and judgment of the circuit court.

The alleged will purported to bequeath and devise all the real and personal property of the said deceased, and upon its face appeared to have been duly executed, with all the formalities provided for by statute, and appended thereto was an attestation clause containing full recitals to that effect. The attestation clause was as follows:

The within instrument, consisting of two (2) sheets, or four (4) pages was now here subscribed by Thomas J. Thompson, the testator, in the presence of each of us, and at the same time declared by him to be his last will and testament; and we, at his request and in his presence, and in the presence of each other, sign our names hereto as attesting witnesses, this 6th day of January, 1893.

Arch E. McNeill.

S. M. Irwin.

The attesting witnesses were produced, and each for himself testified that the signature appended to the attestation clause, purporting to be his signature, was his true and genuine signature; each of them, however, testifying he had no recollection of signing the said attestation clause, or of seeing the deceased sign the will, or that the deceased ever acknowledged the same to be his act or deed.

It was proved by the testimony of two witnesses, and not denied or questioned, that the signature to the will was the true and genuine signature of the deceased, Thomas J. Thompson. The body of the will and the attestation clause were both in the handwriting of David E. Mack, judge of the county court of said Hancock county. It appeared from the testimony of Judge Mack that the deceased, who resided at Bowen, in said county of Hancock, about two years before his death came to the office of the witness in Carthage, in said county, and requested and directed him to prepare the will in accordance with his wishes which he then fully made known to the witness. The witness testified he advised the deceased as to the requirements of the statute with relation to the execution of wills, and gave him full and explicit directions as to the mode and manner in which the instrument should be signed, executed, and witnessed; that he afterwards, on the same day, wrote the instrument (including the attestation clause) offered as the will, and sent it by mail to the said deceased, at Bowen. This witness identified the instrument offered as being the one so pre-

pared and written by him. It was also proved that the deceased delivered the instrument purporting to be his last will and testament to one George Nash, a banker residing and doing business in Bowen, and requested him to preserve and safely keep the same, and that said Nash produced the instrument after the death of said Thompson.

The court rejected from consideration the recitals of the attestation clause as being incompetent. The will bore the genuine signature of the alleged testator; the attesting clause recited full compliance with all the requirements of the statute with relation to the execution of the will, and bore the genuine signatures of the attesting witnesses; no evidence appeared tending to disprove the observance of any requirement of the statute; circumstances were proved corroborative of due execution; the attesting witnesses were produced, identified their signatures to the attesting clause, and gave no testimony tending to contradict anything recited in said clause,—and in such state of circumstances we think the attesting clause was competent to be received in evidence, and to be considered in connection with the testimony of the two attesting witnesses on the question of the execution of the will by the said deceased. Such, of course, is not the rule when a will is presented to the county court for probate, and the attesting witnesses are present in that court, and under no disability; for the reason that it is expressly provided, in order to authorize a county court to admit a will to probate, the execution of the will shall be proved by two or more credible witnesses, declaring, on oath or affirmation, they were present, and saw the testator sign the said will in their presence, or that the testator acknowledged to them that the instrument purporting to be his last will was his act and deed. Rev. Stat. chap. 148, § 2, entitled "Wills." But it is also expressly provided by § 13 of the same chapter that if the probate of any will shall have been refused by any county court, and an appeal shall have been taken from such order of the county court to the circuit court, it shall be lawful for the party seeking probate of such will to support the same, on the hearing in the circuit court, by any evidence competent to establish a will in chancery.

There is abundant authority for the view we have expressed that an attestation clause which the attesting witnesses to a will swear bears their signatures is competent evidence tending to establish the due execution of the will in chancery, when the only defect in the proof of the execution is that the subscribing witnesses are unable to recollect that all the formalities prescribed by the statute and recited in the attesting clause were actually complied with. In 1 Jarman, Wills, 6th ed. 123, 124, note, it is said that "failure of memory on the part of the witnesses will not upset the will, where the attestation clause is sufficient," citing many cases. Also, in 1 Redf. Wills, 4th ed. p. 238, it is said: "It seems to be well settled, that, in the absence

of all proof, the witnesses being deceased, or not in a condition to give testimony, the presumption *omnia rite acta* will arise, as in ordinary cases. . . . And where the attestation clause contains all the particulars of a good execution, it will always be *prima facie* evidence of due execution, and will often prevail over the testimony of the witnesses, who give evidence tending to show that some of the requisites were omitted." The text is supported by many authorities cited, and it is further said in note 26, on page 238, that "the mere forgetfulness of the witnesses of the facts certified in the attestation clause is not regarded as any obstruction to granting probate of the will." To the same effect, see Schouler, Wills, §§ 347, 348.

In *Abbott v. Abbott*, 41 Mich. 540, where one of the attesting witnesses failed to remember, and could not therefore testify, that all the formal requisites required by the statute to be observed had been complied with, the late Chief Justice Campbell said: "But we know of no rule of law which makes the probate of a will depend upon the recollection, or even the veracity, of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. But, if the forgetfulness or falsehood of a subscribing witness can invalidate a will, it would be easy, in many cases, to use such artifices or corruption as would render the best will nugatory. Their evidence is not conclusive either way, nor does the law presume that they are more or less truthful than others. It presumes they had, when they signed, full knowledge of what they were doing, and, in case they are dead, their attestation, when proved, is *prima facie* evidence that all was done as it should be."

In New Jersey (*McCurdy v. Neall*, 42 N. J. Eq. 333,) it was said: "The attestation clause is perfect, and the execution to which the witnesses thus certify and attest is an exact compliance with the statute. Under such circumstances, the court must have clear proof to warrant the conclusion that the will was not duly executed. *Wright v. Rogers*, L. R. 1 Prob. & Div. 678. In *Allaire v. Allaire*, 37 N. J. L. 312, it is laid down that, 'if the attestation clause is perfect, and shows on its face that all the forms required by the statute have been complied with, and the subscribing witnesses, when called, admit their signatures, but through defect of memory, or for any other reason, fail to testify to the due execution of the will, it may be established on the presumption arising from the form of the attesting clause, unless there be affirmative evidence given to disprove its statements.' In *Tappen v. Davidson*, 27 N. J. Eq. 459, it was held that if, in such case, it be merely doubtful, from the evidence, whether the statutory requisites have been complied with, the presumption arising from the attestation clause is not overcome. In this case the evidence is by 45 L. R. A.

no means such as to disprove the statements in the attestation clause."

In New York (*Re Kellum*, 52 N. Y. 317) it was said: "If the attestation clause is full and the signatures genuine, and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution or what took place at the time. In proportion to the absence of memory should care and vigilance be exercised in examining the facts to prevent fraud and imposition; but, if the circumstances of good faith and intelligence of the witnesses satisfy the judgment that the statute has been complied with, there is no rule of law to prevent admitting the will to probate; and this accords with the authorities in this state. *Lewis v. Lewis*, 11 N. Y. 220; *Orser v. Orser*, 24 N. Y. 51; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Theological Seminary v. Calhoun*, 25 N. Y. 422; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85, 40 Am. Dec. 225."

In *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424, Chancellor Walworth said: "It is a very different question, however, whether, to sustain and establish the validity of a will, the courts should hold it to be necessary for the subscribing witnesses to recollect and testify to the fact that all the formalities prescribed in the statute were actually complied with. For, if this were required, very few devises of property would be supported unless the testimony of the witnesses was taken and perpetuated very soon after the wills attested by them were made. This, in many cases, would be wholly impracticable, as the testator frequently lives many years after he has executed his will. And where there is good reason to suppose that the will has been duly executed, and that no fraud or want of testamentary capacity existed at the time it was made, justice to the dead as well as to the living, requires that the declared wishes of the testator should not be defeated by the imperfect recollections of the attesting witnesses; or by reason of their deaths or removal beyond the jurisdiction of the state. It is for this reason that the most liberal presumptions in favor of the due execution of wills are sanctioned by courts of justice, when, from lapse of time or otherwise, it may be impossible to give positive evidence on the subject." See also *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220, and *Re Cottrell*, 95 N. Y. 330. In the *Peck Case* Chief Justice Denio said: "A different rule, and one which would require the witnesses always to remember and be able to state affirmatively the several matters required to be done, would render wills the most uncertain of all legal instruments."

In Wisconsin, see *Meurer's Will*, 44 Wis. 392, 28 Am. Rep. 591; *Re Lewis*, 51 Wis. 101, and *O'Hagan's Will*, 73 Wis. 78. In the latter case, as in the case at bar, both of the attesting witnesses testified that they had no recollection whatever of signing the instrument, and could testify only to the genuine-

ness of their signatures; and the supreme court said that "the presumption arising from the attestation and the attesting clause, to the effect that it was subscribed by the witnesses in the presence of the testator, is not overcome by proof. Hence the instrument was properly probated as the last will and testament of Peter O'Hagan." See also, to the same effect, note to *Welch v. Welch* (Ky.) 15 Am. Dec. 126; *Ela v. Edwards*, 16 Gray, 91; *Pate v. Joe*, 3 J. J. Marsh. 116; *Clarke v. Dunnavant*, 10 Leigh, 13; *Griffith v. Griffith*, 5 B. Mon. 511; *Lamberts v. Cooper*, 29 Gratt. 61; 29 Am. & Eng. Enc. Law, pp. 199 *et seq.* The rule seems to have been the same in England both before and after the passage of the act 1 Vict. chap. 26, in 1838. 1 Jarman, Wills, chap. 6.

It is, however, insisted this view cannot be harmonized with the declaration of this court in *Dickie v. Carter*, 42 Ill. 376; *Crowley v. Crowley*, 80 Ill. 469, and *Canatsey v. Canatsey*, 130 Ill. 397. The first of these cases enumerated four things which it was declared must concur to entitle a will to probate, one of such things being stated as follows: "Two witnesses must prove that they saw the testator or testatrix sign the will in their presence, or that he or she acknowledged the same to be his or her act and deed." The later cases cited adopt the language of the former case as expressive of the true rule. It is contended the true interpretation of this language so employed by the court in *Dickie v. Carter*, 42 Ill. 376, and quoted with approval in the later cases, is that it must be "proved" by at least two subscribing witnesses to the will that they saw the testator or testatrix sign said will or that it must be "proved" by said two subscribing witnesses that the said testator or testatrix acknowledged the will to be his or her act and deed. It is manifest such was not the interpretation which this court intended should be given to the language in question in *Dickie v. Carter*, 42 Ill. 376 (the case in which the language was first employed), for the reason that in that case the will was held to have been legally and duly proved though one of the two subscribing witnesses thereto did not see the testatrix sign the will, and could not swear the testatrix acknowledged to him that the will was her act and deed. In that case the attestation clause bore the names of two subscribing witnesses, *viz.*, George S. Pidgeon and one Fitzgerald. The witness Pidgeon testified that he drew the will and that the testatrix signed it in his presence. Fitzgerald, the other subscribing witness, testified that he did not know the testatrix and did not see her sign the will; that he was in an office in Cairo, and the other attesting witness asked him to witness a paper; that he saw a lady in the office, and asked her, "Is this your signature?" and she answered, "Yes," whereupon he signed as a witness; that there were two women in the office, both unknown to him; that he did not know the woman he addressed, never saw her before or since, and did not know he was witnessing a will. This witness did not and could not "prove" that Mrs. Elizabeth Burnett, the

testatrix, signed the will, or acknowledged it to be her act and deed; but other witnesses were produced, and their testimony "proved" that the woman who acknowledged to Fitzgerald that the signature to the will was her act and deed was the testatrix, and such proof was deemed competent and sufficient, in connection with the testimony of the subscribing witness, to sustain the will. It is manifest this court did not then understand that it could only be proved by the testimony of the subscribing witnesses that the testatrix acknowledged to the subscribing witnesses that the instrument purporting to be her will was her act and deed.

Nor do we think the interpretation claimed must be given to the language in question in order to harmonize the view adopted in this case with the principle which was accepted in *Crowley v. Crowley*, 80 Ill. 469. In that case we said (p. 470): "It cannot be claimed that the testimony of the subscribing witnesses to the will was sufficient to admit the instrument to probate. Neither of the witnesses had written his signature to the document, but each had signed by a cross, and they could not identify the instrument of writing as the one they had attested, nor could the witnesses testify that Daniel Crowley was, at the time the instrument of writing was executed, of sound mind and memory. . . . The evidence of the attesting witnesses failed entirely to establish two very important facts: First, the execution of the will, as they could not identify it as the one they signed as witnesses; second, they could not swear they believed the testator to be of sound mind and memory when the instrument was executed. So far, then, as appellant relied upon the evidence of the attesting witnesses to establish a state of facts under which the circuit court could admit the instrument of writing to probate, he failed entirely. It is, however, urged that as probate of the will was refused in the county court, on the trial of the appeal in the circuit court appellant was entitled, under § 13, chap. 148, of 'Wills,' to prove the will by any evidence competent to establish a will in chancery. The statute authorizes such proof on the trial of an appeal in the circuit court in a case where probate of the will was denied in the county court, and it was expressly held in *Andrews v. Black*, 43 Ill. 256, in such a case, for the purpose of establishing the sanity of the testator, resort might be had to the same character of evidence as upon a hearing of a bill in chancery, filed under the statute, to set aside the will. Appellant was not, therefore, bound to rely upon the testimony of the two attesting witnesses to establish the execution of the will or the sanity of the testator, but could resort to any legitimate evidence to establish the fact." The opinion then proceeded to show that, aside from the testimony of the subscribing witnesses, the only legitimate evidence produced which could be relied upon to establish the execution of the will was the testimony of the scrivener who drew the will, who testified that the alleged maker of the will executed it in the presence of the two attesting

witnesses. It was insisted that the evidence of the scrivener was sufficient to establish the execution of the will, but we held that the requirement of the statute that the evidence of two witnesses should be required to establish that a testator executed a will could not be satisfied by the uncorroborated testimony of the scrivener. In that case proof of a valid and sufficient clause of attestation was wholly lacking. The attesting witnesses were unable to identify the will or the attesting clause, and the extent of the ruling was that the testimony of the scrivener alone was not sufficient to supply the proof demanded by the statute to establish the execution of the will. In the case at bar the attesting witnesses established that the attesting clause bore their genuine signatures. The signature of the deceased was also fully established. The defect in the proof was that the attesting witnesses were unable to recollect the facts connected with the action of the deceased and their action at the time they signed the attesting clause. In such state of case, we think the attesting clause competent to be received in evidence, and to be given such weight as it may be found properly to have in connection with the testimony of the attesting witnesses.

In *Canatsey v. Canatsey*, 130 Ill. 397, the expression of the court in *Dickie v. Carter*, 42 Ill. 378, is quoted, but neither the conclusion reached, nor any observation of the court in the course of the opinion, is antagonistic to the position assumed in the case at bar.

It appears a prior application had been made to the county court of Hancock county by the appellant to have the will under consideration admitted to probate, and that the attesting witnesses then signed and made oath to certain affidavits relative to the execution of the will. The county court then admitted the will to probate, but an appeal was prosecuted to the circuit court, and the appellant dismissed the proceeding before it was reached for hearing in the latter court. Whether the certificates of the oaths of said witnesses were competent to be received in evidence in the present proceeding is a question discussed in the briefs, and which we ought to determine, in view of the fact that the cause must be again tried. The circuit court deemed the certificates or affidavits of such witnesses competent to be received in evidence.

The 7th section of chapter 148 of the Revised

Statutes, entitled "Wills," provides that "the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence" on the hearing of a bill in chancery to contest a will. There was, however, no first probate. The appeal and the dismissal of the application by the appellant blotted out the order of the county court admitting the instrument to probate. Therefore the statute cited cannot operate to render the certificates admissible. The certificates tended, however, to contradict, in some degree, the testimony given by the subscribers thereto on the hearing. We think the certificates were, for this reason, competent to be received in evidence, together with the testimony of the subscribers thereto as to the facts and circumstances which attended the signing of the same. It is true the appellant introduced the witnesses before the court for the purpose of having them testify in her behalf; but the well-known general rule that a party who produces witnesses vouches for their integrity and credibility, and cannot be allowed to impeach and discredit them, has not all application where the law requires the party shall produce such witnesses in the cause. Under § 2 of our statute of wills a party who desires a will to be admitted to probate must of necessity produce the subscribing witnesses, if living and within the jurisdiction of the court and sane, as witnesses in the probate court; and such party, on appeal from an order refusing to so admit the alleged will, is not relieved, by the provisions of the 13th section of the same statute, from the duty of laying before the circuit court the testimony of the subscribing witnesses, though such last-mentioned section authorizes such party to produce other testimony in addition to that of the subscribing witnesses. As to a witness whom a party is required by law to introduce, the rule is that the truthfulness and integrity of the witness is not vouched for, and that the party so producing the witness may bring forward proof of previous declarations at variance on material points with his testimony, for the purpose of impeaching him or contradicting his testimony on such points. 29 Am. & Eng. Enc. Law, p. 816, and cases cited in note 1.

Because of the error of the chancellor hereinbefore indicated, *the order and decree of the Circuit Court must be reversed*, and the cause remanded for further proceedings consistent with the views herein expressed.

TENNESSEE SUPREME COURT.

Lon FOUTCH, Appt.,
v.
STATE of Tennessee.

(95 Tenn. 711.)

1. To deny one who provokes a difficulty in which his adversary is killed the right to plead self-defense he must have provoked it with intent to kill his adversary or to do him great bodily harm or to afford a pretext for wreaking malice upon him.
2. The right to plead self-defense by the one provoking difficulty in which his adversary is killed is not taken away by the fact that he had a dangerous weapon and used it, if without that fact the right would have existed.

(February 27, 1896.)

NOTE.—Self-defense set up by accused who began the conflict.

- I. General doctrine.
- II. What amounts to provoking or bringing on the difficulty, or producing the occasion.
 - a. In general.
 - b. In seeking or returning to the deceased.
 - c. Abuse or other act provoking attack by other party.
- III. Threats.
- IV. Where relative or other party is the aggressor.
 - V. In case of mutual combat.
 - VI. Former quarrel induced by deceased.
 - VII. Burden of proof of freedom from fault.
- VIII. Question for the jury.
- IX. The question of withdrawal.
 - a. In general.
 - b. Retreat sufficient.
 - c. Retreat insufficient.
 - d. As a question for the jury.

As to self-defense in defense of person and property, see notes to *Com. v. Donahue* (Mass.) 2 L. R. A. 628, and *Drysdale v. State* (Ga.) 6 L. R. A. 424, which also treat of the question of the degree of force employed.

I. General doctrine.

The doctrine of self-defense as declared in *FOUTCH V. STATE* is in keeping with the trend of the decisions upon the question of the right of the aggressor, or the one who provokes or brings on the difficulty, to free himself from liability or punishment for his acts upon the ground that what he did was in self-defense.

The courts in general hold that the accused must be free from blame in bringing on or provoking the difficulty; in other words, he must not be the aggressor.

In considering the question, Who is the aggressor? it is important to discover how far a person can go without his acts being construed so as to fix upon him the liability or penalty. As stated in the principal case, it is not every word spoken by the accused that provokes another that will constitute him the aggressor. If, however, the words spoken were intended to, and did, induce the difficulty, the plea of self-defense will not avail the accused. Upon this phase of the question, see II. c, *infra*.
45 L. R. A.

A PPEAL by defendant from a judgment of the Circuit Court for DeKalb County convicting him of the crime of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Robert Cantrell and J. J. Ford for appellant.

Messrs. G. W. Pickle, Attorney General, and Dan Williams, for the State.

Wilkes, J., delivered the opinion of the court:

The defendant was convicted in the circuit court of DeKalb county for murder in the second degree, and sentenced to the penitentiary for eleven years. He appealed, and has assigned many errors. In the view we take of the case, it is only necessary to notice one of them, as it is fatal to the conviction.

A brief statement of the facts is that de-

So, it is not every act of the accused in seeking the deceased that will deprive him of his right to plead self-defense. This question will be found in II. b, of this note, and from the cases and principles there collated may be adduced the following general doctrine: The mere fact that the accused seeks the deceased is not alone sufficient to deprive him of his right, for, as stated by the court in the recent case of *Airhart v. State* (Tex. Crim. App.) 51 S. W. 214, 216, the accused is to be tried, not merely for his act in seeking the deceased, but for his acts after he finds him. His intention in seeking the deceased or other party may be perfectly lawful. It may be for the mere purpose of having a friendly talk in order to settle previous difficulties and troubles, or it may be to prevent a trespass upon his property, and in such cases the mere fact that he did seek the deceased for the purpose of settling the previous trouble is not evidence that he provoked the difficulty. His intention in such cases, in the first instance, is perfectly honest and just, and may be necessary in order to accomplish that to which he has a perfect legal right. On the other hand, if he enters into the difficulty or provokes the occasion with the purpose and intention of wreaking his malice, if he has premeditated the act and enters upon it with the preconceived intention of doing the other party an injury, his right of self-defense is gone. See II. a, b, *infra*.

The doctrine of self-defense is thus stated in *King v. State*, 13 Tex. App. 277, 282:

The right of self-defense has been divided into two general classes, perfect and imperfect. A perfect right of defense can only obtain and avail where the party pleading it acts from necessity and is wholly free from wrong or blame in occasioning and producing the necessity which requires his action. If, however, he is in the wrong, if he is himself violating, or in the act of violating, the law, and on account of his own wrong has placed himself in such a situation that it becomes necessary for him to defend himself against an attack made upon himself, which is superinduced or created by his own wrong, the law limits his right of self-defense and regulates it according to the magnitude of his own wrong, and such a case will be one of imperfect self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary,

defendant shot and killed Stanton Malone on the 25th of December, 1893, no one witnessing the killing but the participants. Malone made a dying declaration as to how the killing occurred, and defendant testified as a witness for himself. It is sufficient to say of the versions given by these two that Malone's declaration made it an unlawful, and defendant's a lawful, killing. Malone, whom the record shows to have been a lewd and lascivious man, had insulted the sister of defendant by an indecent proposal, the exact terms of which are much controverted, but the fact itself is not disputable. He had immediately gone to the brother, and had words with him about it, during which, as decedent claims in his dying declaration, he asked the brother to go and see her, and fix the matter up. This conversation occurred at William Foutch's, where deceased remained for dinner. Defendant went to see his sister, and

returned. He brought back with him a double-barreled shotgun, which he left at the barn, and afterwards he and deceased went to the barn where the difficulty and shooting occurred. At whose instance they went to the barn is a matter of controversy, the parties giving different versions of this. But however that may be is not now material to be considered, inasmuch as defendant, in either aspect of the fact, has a right to a correct charge. The theory of the state was that there was no defense, or need for defense, on the part of defendant, who was never at any time assaulted or menaced by overt act of deceased, and that there was no question of self-defense in the case; and further that, whether defendant was so assaulted or menaced by deceased, defendant brought on the difficulty, and therefore could not rely on the plea of self-defense. On the contrary, defendant insisted that he did not

for his own safety, that he should take life or do serious bodily harm, then the law imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense which, but for such acts, would never have been occasioned.

It is a general maxim of the law that no man can take advantage of his own wrong; and the general rule founded upon this maxim, and applicable in all cases in which the accused seeks to set up the plea of self-defense, may be stated as follows:

In order that a prisoner in a criminal prosecution for homicide may successfully plead that his acts were justifiable upon the ground of self-defense, he must not be the aggressor, he must not bring on or encourage the difficulty, or produce the occasion which makes it necessary for him to commit the homicide or inflict the injury; and unless he successfully proves that he is without fault and is not the aggressor, and did not bring on or provoke the difficulty, or produce the occasion, he has no perfect right of self-defense, and his plea of self-defense will avail him nothing. In other words, the right of self-defense does not imply the right of attack. To this rule, however, there are some exceptions, as will appear upon reference to IX. *infra*.

The rule as above stated is supported by the following authorities arranged in order of states:

Alabama.

Myers v. State, 62 Ala. 599, 603; Cross v. State, 63 Ala. 40, 48; Ingram v. State, 67 Ala. 67, 72; Bain v. State, 70 Ala. 4, 7; Wills v. State, 73 Ala. 363, 366; McDaniel v. State, 76 Ala. 1, 7; Tesney v. State, 77 Ala. 33, 40; Harrison v. State, 78 Ala. 5, 12; Baker v. State, 81 Ala. 38, 40; Brown v. State, 83 Ala. 33; Jordan v. State, 81 Ala. 20, 32; Blackburn v. State, 86 Ala. 595, 598; Cleveland v. State, 86 Ala. 1, 9; Rutledge v. State, 88 Ala. 85, 89; Zaner v. State, 90 Ala. 651; Keith v. State, 97 Ala. 32, 34; Garrett v. State, 97 Ala. 18; Johnson v. State, 102 Ala. 1, 19; Crawford v. State, 112 Ala. 1, 28; Dabney v. State, 113 Ala. 38, 42; Henson v. State (Ala.) 25 So. 23, 25; De Arman v. State, 71 Ala. 351, 362; Dolan v. State, 81 Ala. 11, 17; Lewis v. State, 88 Ala. 11; Nabors v. State (Ala.) 25 So. 529, 531; Leonard v. State, 66 Ala. 461, 464; Storey v. State, 71 Ala. 331, 336; Eiland v. State, 52 Ala. 322, 328; Webb v. State, 100 Ala. 47, 53; Kimbrough v. State, 62 Ala. 248, 251; Watkins v. State, 89 Ala. 82, 89; Parker v. 45 L. R. A.

State, 88 Ala. 4, 7; Kirby v. State, 89 Ala. 63, 71, 72.

Arizona.

Foster v. Territory (Ariz.) 56 Pac. 738, 739.

Arkansas.

Johnson v. State, 58 Ark. 57, 64; Magness v. State, 66 Ark. —, 50 S. W. 554; Roberson v. State, 53 Ark. 516, 518.

California.

People v. Kennett, 114 Cal. 18; People v. Roemer, 114 Cal. 51; People v. Herbert, 61 Cal. 544, 547; People v. Westlake, 62 Cal. 303; People v. Lamb, 17 Cal. 323; People v. Travis, 56 Cal. 254; People v. Simons, 60 Cal. 72; People v. Gonzales, 71 Cal. 569; People v. O'Brien, 78 Cal. 41, 47; People v. Hecker, 109 Cal. 451, 30 L. R. A. 403.

Colorado.

Bush v. People, 10 Colo. 566, 574; Boykin v. People, 22 Colo. 496.

Delaware.

State v. Talley, 9 Houst. (Del.) 417, 424; State v. Warren, 1 Marv. (Del.) 487, 490, 491.

Florida.

Padgett v. State (Fla.) 24 So. 145, 147.

Georgia.

Stiles v. State, 57 Ga. 183, 188; Haynes v. State, 17 Ga. 465, 484; Lingo v. State, 29 Ga. 470, 484; Roach v. State, 34 Ga. 78, 85.

Illinois.

Wilson v. People, 94 Ill. 299; Hulse v. Tollman, 49 Ill. App. 490, 495; Adams v. People, 47 Ill. 376, 379; Kinney v. People, 108 Ill. 519, 528.

Indiana.

Runyan v. State, 57 Ind. 84, 26 Am. Rep. 52; Barnett v. State, 100 Ind. 171, 174, 176; Kingen v. State, 45 Ind. 518, 521; Presser v. State, 77 Ind. 274; Story v. State, 99 Ind. 413, 415; Wall v. State, 51 Ind. 453; Deliks v. State, 141 Ind. 26; Hittner v. State, 19 Ind. 48, 52; Deal v. State, 140 Ind. 354, 362.

Iowa.

State v. Perigo, 70 Iowa, 657; State v. Stanley, 33 Iowa, 528, 532; State v. Neeley, 20 Iowa, 109, 115; State v. Benham, 23 Iowa, 154, 72 Am. Dec. 417, 420.

Kansas.

State v. Rogers, 18 Kan. 78, 26 Am. Rep. 754, 759; State v. Rose, 30 Kan. 501.

Kentucky.

Onkley v. Com. 10 Ky. L. Rep. 885; Caskey v. Com. 15 Ky. L. Rep. 257, 258; Godfrey v. Com. 15 Ky. L. Rep. 3; Crane v. Com. 12 Ky. L. Rep. 181, 162; Massie v. Com. 16 Ky. L. Rep. 790, 793; Turner v. Com. 89 Ky. 78, 82; Logsdon v. Com. 19 Ky. L. Rep. 413, 414; Com. v.

bring on the difficulty, and that he acted in self-defense, but that if he were in any fault, or such an aggressor, it could not preclude him from relying on the plea of self-defense, inasmuch as, pending their difficulty, however it originated, defendant menaced him with such overt acts of violence as threatened his life, or great bodily harm, and he then shot in self-defense, as he might lawfully do. These were the respective theories of the state and defendant, supported by evidence tending to show the facts as each side claimed them to have existed. Under these circumstances, and upon these facts, the circuit judge charged, among other things, as follows: "If a party brings on a quarrel, with no felonious intent or malice, or premeditated purpose of killing or doing bodily harm, and a difficulty results, in which the person with whom he brought on the quarrel

is killed, it will not be murder, let the result be what it may." But "if one provokes a combat, or produces the occasion to kill, and kills his adversary, it is murder, no matter to what extremity he (the slayer) may have been reduced in the combat."

The first proposition is not technically accurate. The judge should have said: "If a party brings on a quarrel with another, with no felonious intent or malice, or premeditated purpose to kill or do great bodily harm, and a difficulty results, in which the person with whom he brought on the quarrel assaults the provoking party, or by overt act so menaces him as to endanger his life or threaten him with great bodily harm, or so as to induce the belief of the party thus assailed or menaced that he was in danger of death or great bodily harm, and upon reasonable grounds, and he thereupon kills his assail-

Hourigan, 11 Ky. L. Rep. 509; Bohannon v. Com. 8 Bush, 481, 8 Am. Rep. 474, 479; Haason v. Com. 10 Ky. L. Rep. 1054; Com. v. Barnes, 13 Ky. L. Rep. 163; Allen v. Com. 86 Ky. 642, and 10 Ky. L. Rep. 582.

Louisiana.

State v. Spears, 46 La. Ann. 1524; State v. Hopkins, 50 La. Ann. 1171, 1172.

Michigan.

People v. Miller, 49 Mich. 23; Galbraith v. Fleming, 60 Mich. 403, 407; People v. Macard, 73 Mich. 15, 21.

Minnesota.

State v. Tripp, 34 Minn. 26; State v. Shippey, 10 Minn. 223, 88 Am. Dec. 70, 73.

Mississippi.

Wesley v. State, 37 Miss. 327, 75 Am. Dec. 62; Helm v. State, 67 Miss. 562, 574; Thomas v. State, 61 Miss. 60, 67; Long v. State, 52 Miss. 23; Prine v. State, 73 Miss. 838; Thompson v. State (Miss.) 9 So. 298.

Missouri.

State v. Kloss, 117 Mo. 592, 603; State v. Starr, 38 Mo. 270, 275; State v. Eaton, 75 Mo. 586, 592; State v. Hudson, 59 Mo. 135, 138; State v. Maguire, 69 Mo. 197, 200; State v. McDaniel, 94 Mo. 301; State v. Jones, 78 Mo. 278, 285; State v. Rose, 92 Mo. 201, 207; State v. Bryant, 102 Mo. 24; State v. Hickam, 95 Mo. 322, 327, 331; State v. Underwood, 57 Mo. 40, 50; State v. Brown, 63 Mo. 439, 443, 64 Mo. 367, 373; State v. Linney, 52 Mo. 40, 41; State v. Talmage, 107 Mo. 545, 558; White v. Maxcy, 64 Mo. 552; State v. Parker, 96 Mo. 382, 393; State v. Johnson, 76 Mo. 121, 126; State v. Hardy, 95 Mo. 455, 457; State v. Thomas, 78 Mo. 327, 340; State v. Christian, 68 Mo. 138, 146; State v. Shoulitz, 25 Mo. 128, 153; State v. Peak, 85 Mo. 190, 192; State v. Hays, 23 Mo. 287; State v. Packwood, 26 Mo. 340; State v. Gilmore, 95 Mo. 334; State v. Vansant, 80 Mo. 67, 69, 79; State v. Rapp, 142 Mo. 443, 448; State v. Hicks, 92 Mo. 431, 435; Jones v. Gale, 22 Mo. App. 637, 673; State v. Gamble, 119 Mo. 427, 432; State v. Rider, 90 Mo. 54; State v. Hopper, 142 Mo. 478, 483; State v. Herrell, 97 Mo. 105, 109; State v. Culler, 82 Mo. 623; State v. Lewis, 118 Mo. 79; State v. Crawford, 115 Mo. 620.

New York.

People v. Cole, 4 Park. Crim. Rep. 35, 38; People v. Lamb, 2 Keyes, 373; Patterson v. People, 46 Barb. 625; People v. Sullivan, 7 N. Y. 316; People v. McLeod, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328, 350.

North Carolina.

State v. Bryson, 60 N. C. (2 Winst. L.) 86; State v. Brittain, 80 N. C. 481, 500.

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Ohio.

Martin v. State, 17 Ohio C. C. 406.

Oregon.

State v. Hawkins, 18 Or. 476, 487.

Pennsylvania.

Logue v. Com. 38 Pa. 268, 80 Am. Dec. 481; Com. v. Hare, 2 Clark (Pa.) 257.

Rhode Island.

State v. White, 18 R. I. 473, 480.

South Carolina.

State v. Merriman, 34 S. C. 40, 42; State v. Jacobs, 28 S. C. 36; State v. Beckham, 24 S. C. 283, 285; State v. Jackson, 32 S. C. 27, 30; State v. Wyse, 33 S. C. 583, 594; State v. Petsch, 43 S. C. 132.

Tennessee.

Rogers v. State, 95 Tenn. 448, 453; Rippey v. State, 2 Head, 217; Chambers v. Porter, 5 Coldw. 273, 282; Turner v. State, 89 Tenn. 547.

Texas.

Hollis v. State, 8 Tex. App. 620, 623; Levy v. State, 28 Tex. App. 203, 211; Gilleland v. State, 44 Tex. 356, 361; Sullivan v. State, 31 Tex. Crim. Rep. 486, 468; Meuly v. State, 26 Tex. App. 274; Reed v. State, 11 Tex. App. 509, 518, 40 Am. Rep. 795; Childs v. State (Tex. Crim. App.) 22 S. W. 1039; Coleman v. State (Tex. Crim. App.) 25 S. W. 772; Roberts v. State, 30 Tex. App. 201, 806; Carter v. State, 30 Tex. App. 551; Thumm v. State, 24 Tex. App. 667, 701; Wilson v. State (Tex. Crim. App.) 36 S. W. 587, 588; King v. State, 18 Tex. App. 277, 282; Brazzil v. State, 28 Tex. App. 584; Green v. State, 12 Tex. App. 445, 490; Beard v. State (Tex. Crim. App.) 29 S. W. 770, 771; Williams v. State, 25 Tex. App. 218, 225; Habel v. State, 28 Tex. App. 588; Franklin v. State, 30 Tex. App. 628, 641; Lee v. State, 21 Tex. App. 241; Crist v. State, 21 Tex. App. 361, 367; White v. State, 23 Tex. App. 154, 164; Thuston v. State, 21 Tex. App. 245, 248; Carter v. State, 37 Tex. Crim. Rep. 403; Saens v. State (Tex. Crim. App.) 20 S. W. 737; Varnell v. State, 26 Tex. App. 56, 67; Burris v. State, 34 Tex. Crim. Rep. 387, 391; Alexander v. State, 25 Tex. App. 260, 266; Allen v. State, 24 Tex. App. 216, 224; Peter v. State, 23 Tex. App. 684, 687; Bonnard v. State, 25 Tex. App. 173, 197; Cunningham v. State, 17 Tex. App. 89, 96; Stacey v. State (Tex. Crim. App.) 33 S. W. 348; Gonzales v. State, 28 Tex. App. 130, 136; Logan v. State, 17 Tex. App. 50; Rider v. State, 26 Tex. App. 334, 341.

Virginia.

Hash v. Com. 88 Va. 172; Honesty v. Com. 81 Va. 283, 298; Gaines v. Com. 88 Va. 682,

ing or menacing adversary, it is not murder."

The second proposition charged by the trial judge is contradictory to the first, and is not the law. It is true that such statements are to be found in many books,—that if one be the "aggressor" or be "in fault," or "provoke a difficulty," he cannot rely upon the plea of self-defense. But such general statements are only true when taken in the limited sense in which they must be understood, and with the qualifications with which judicial utterances that gave them existence have guarded their application. In order to make a man guilty of murder, who is the "aggressor" or "in fault," or who "provokes a difficulty" in which his adversary is killed, he must have provoked it with the intent to kill his adversary or do him great bodily harm, or to afford him a pretext for wreak-

ing his malice upon his adversary. *Smith v. State*, 8 Lea, 402; *Daniel v. State*, 10 Lea, 261; *Brown v. State*, 58 Ga. 212; *Hask v. Com.* 88 Va. 172; *Cotton v. State*, 31 Miss. 504; *Radford v. Com.* (Ky.) 5 S. W. 343; *Massie v. Com.* 15 Ky. L. Rep. 562. In order to deny to such party the right to rely on the plea of self-defense, it must appear that he was the "aggressor" or "in fault," or "provoked the difficulty" in such way and with such intent as the law contemplates in the use of these terms. It is not every "aggression" which produces a difficulty that is an unlawful one, within the meaning of this phrase, nor is it every "fault" which a man might commit that precludes him from defending himself when violently assaulted or menaced, nor is it every "provocation of a difficulty" which robs him of the right of self-defense. Cases already cited, and here-

698; *Lewis v. Com.* 78 Va. 732; *Valden v. Com.* 12 Gratt. 717, 730; *Brown v. Com.* 86 Va. 466, 470.

Washington.

State v. McCann, 16 Wash. 249; *White v. Territory*, 3 Wash. Terr. 397.

West Virginia.

State v. Cain, 20 W. Va. 679, 709.

United States.

United States v. Mingo, 2 Curt. C. C. 1, 5. English.

Anonymous, Kelyng, 58; *Reg. v. Knock*, 14 Cox, C. C. 1; *Reg. v. Smith*, 8 Car. & P. 160; *Mason's Case*, 1 East, P. C. 239.

This principle of law is also borne out by inference by the case of *People v. Cole*, 4 Park. Crim. Rep. 85, 88. In this case it is said that there must be an attack by the person killed upon the prisoner, an imminent, instant danger, in order that the latter may avail himself of the plea of self-defense.

And the above doctrine of the common law is re-enacted in § 721, Colo. Gen. Stat. See *Bush v. People*, 10 Colo. 566, 574.

In some of the earlier Alabama cases, however, the courts incline to the theory that it was sufficient if the accused was reasonably free from fault in provoking or bringing on the difficulty or producing the occasion.

This theory will be found expressed in the following cases: *Leonard v. State*, 66 Ala. 461, 464; *Storey v. State*, 71 Ala. 831, 836; *Wills v. State*, 73 Ala. 363; *Harrison v. State*, 78 Ala. 5, 12; *Watson v. State*, 82 Ala. 10, 11, 12; *Parker v. State*, 88 Ala. 4, 7; *Lewis v. State*, 88 Ala. 11, 13; *Baker v. State*, 81 Ala. 88.

And the expression or phrase "reasonably free from fault" is also to be found in *Lovett v. State*, 30 Fla. 142, 17 L. R. A. 705, 713.

But this theory would seem to have been inadvertently adopted, and is not a correct statement of the law upon the question of "freedom from fault," as the later cases in the Alabama courts show. Indeed, the latest cases in those courts have expressly declared that there can be no qualification of the requirement, and that the accused must have been expressly free from all fault or wrong doing on his part which has the effect of provoking or bringing on the difficulty. Again, to say that he must be reasonably free from fault only implies that although the accused may have been at fault in bringing on the difficulty, he may yet avail himself of the right of self-defense, and such is not the law.

This statement of the rule is fully substantiated and upheld by the cases cited below

which clearly enunciate the doctrine above set forth. *McQueen v. State*, 103 Ala. 12, 17; *Baldwin v. State*, 111 Ala. 11, 15; *Crawford v. State*, 112 Ala. 1, 28.

It also finds support in the case of *Compton v. State*, 110 Ala. 24, 31, 37, wherein it is said that although each of the parties may be equally at fault in provoking the difficulty, yet if the accused is not free from fault in precipitating the fatal termination the plea of self-defense will not avail him.

And the correctness of the above statement of the law is further shown by the decisions of the courts of that state to the effect that instructions to the jury which charge that the accused must be "reasonably" free from guilt are erroneous. *McQueen v. State*, 103 Ala. 12, 13; *Crawford v. State*, 112 Ala. 1, 28; *Henson v. State*, 112 Ala. 41; *Nabors v. State* (Ala.) 25 So. 529, 531.

And a charge which demands an acquittal of the accused, although he may have been at fault in bringing on or provoking the difficulty which results in the death of the deceased, is properly refused where there is evidence tending to show that the accused is not free from fault. *Webb v. State*, 100 Ala. 47, 58.

But a charge to the jury "that to warrant an acquittal on the ground of self-defense the accused must have been wholly without fault—that he must not have provoked or encouraged the difficulty by word or act"—asserts a correct rule of the doctrine of self-defense, and is free from error. *Rains v. State*, 88 Ala. 92, 96, 100.

The word "voluntary" when used with reference to the accused's acts in seeking the occasion was excepted to by the court in the case of *State v. Rapp*, 142 Mo. 443, 448, in which the court stated that the expression "voluntarily entering into the difficulty" was a portion of that heresy which perverted the administration of justice until it received its quietus in *Partlow's Case*, and stated that the "voluntary entering into a difficulty" was not an ingredient in any homicidal crime, and that, moreover, if it were true, as stated in the case of *State v. Gilmore*, 95 Mo. 554, that "self-defense is an affirmative, positive, intentional act," then it must needs follow that such act is voluntary.

And the case of *Milraine v. State*, 33 Tex. App. 577, distinctly declares that a person's own original act when unlawful limits his right to self-defense.

From this statement of the law it clearly appears that a perfect right of self-defense can only obtain and avail an accused when he has

inafter cited, illustrate the true meaning, and show the sense in which these words must be understood. They are really intended to imply the same thing, and what they do mean may be best indicated by suggestion of some things they do not mean, taking them up separately: First, as to the "aggressor." It is not intended that every one shall be held in law to be an aggressor, who says something provoking to another, which does cause a difficulty, for oftentimes such an aggression is a just one, and sometimes a necessary one; but, even when it is neither just nor necessary, the use of opprobrious language to another is not, for this reason alone, an aggression, in the sense of the law, for no mere words, however opprobrious, will justify an assault, or the overt menace of an assault; and hence, if one only uses such words, and is assaulted or so menaced, he may defend himself. And the same

thing is true of one in fault. He might be in such and other supposable fault, and yet not be deprived of a like right of self-defense; as, though one has threatened or abused him, he cannot go to him and assault him for it. So, when he uses to another opprobrious words, that other cannot assault him, or menace him by overt act of violence, and deny him the right of defense. As to "provoking a difficulty." It is not every provocation, just or unjust, which he may offer, that will justify an assault upon him, or the menace of one, from which he cannot defend himself, and to this, also, the limitations as to mere words used apply. After all, the aggression, the fault, or the provocation depends upon its character and its intent. If it is an assault, or the menace of one, by an overt act, or the provocation of a difficulty with intent to inflict death or great bodily harm in the event it is resisted,

acted from necessity and is wholly free from wrong or blame in causing or producing the necessity which requires his action, for the law will not allow him to avail himself of such a defense when by his own unlawful act he has produced the occasion, provoked the difficulty, and placed himself under circumstances which render it necessary to take life in order to preserve his own, or to protect himself from serious bodily harm. *People v. Kennett*, 114 Cal. 18; *People v. Roemer*, 114 Cal. 51; *Lovett v. State*, 30 Fla. 142, 17 L. R. A. 705, 713; *Mercer v. State* (Fla.) 26 So. 317; *State v. Partlow*, 90 Mo. 620, 621; *State v. Hickam*, 95 Mo. 323; *State v. Wyse*, 33 S. C. 583, 594; *State v. Petsch*, 43 S. C. 132; *Rippy v. State*, 2 Head, 217; *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795; *Habel v. State*, 28 Tex. App. 588; *Bush v. State* (Tex. Crim. App.) 51 S. W. 238.

Thus, a cause or necessity which originates in a quarrel provoked by him, or in a danger voluntarily brought upon himself by his own misconduct, is not in law reasonable or sufficient to support a well-grounded apprehension of imminent danger, and for this reason a real or apparent necessity brought about by the design, contrivance, or fraud of the accused will not avail as a defense for the commission of the crime. *People v. Westlake*, 62 Cal. 303; *Rogers v. State*, 95 Tenn. 448, 453; *People v. Farley* (Cal.) 57 Pac. 571; *Mitchell v. State*, 60 Ala. 23.

And if he willingly continues in the difficulty thus provoked, until he involves himself in the necessity of killing, he cannot be held guiltless, as the right of self-defense does not imply the right of attack. *People v. Westlake*, 62 Cal. 303.

In *Allen v. Com.* 86 Ky. 642, 648, it is said if one by his own wrongful act makes the harm or danger to himself necessary or excusable in the person who is inflicting, or about to inflict, it, then the former cannot, upon the plea of self-defense, excuse the taking of life or the infliction of great bodily harm.

The rule is based upon the doctrine universally accepted, that neither law nor justice will allow a party to attempt to take the life of another or inflict great bodily injury on him, and then, because the party attacked imperils the life of the assailant, allow the aggressor to kill his victim and then escape, upon the plea of self-defense or apparent danger. *Logsdon v. Com.* 19 Ky. L. Rep. 413, 414.

It also rests upon the doctrine that the plea of necessity is a shield for those only who are 45 L. R. A.

without fault in causing it and in acting under it. *People v. Hunt*, 59 Cal. 430, 435.

It also arises from the truism that a provoked attack is no defense. *Henry v. State*, 79 Ala. 43, 44.

And no matter how pressing a present impending necessity may be, it will not avail the accused without reference to the question whether he provoked or encouraged the difficulty, or was free from fault in bringing it on. *Baker v. State*, 81 Ala. 38, 40.

And if he has produced the occasion his fear of danger, although really entertained, will not justify him in taking the life of the deceased. *People v. Lamb*, 17 Cal. 323.

In all such cases the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. *Peter v. State*, 23 Tex. App. 684, 687; *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795; *King v. State*, 13 Tex. App. 277.

The rule applies in all cases in which the accused provokes the difficulty, even though he may have reasonable belief that his own life is in danger at the time he shoots or commits the deed. *Coleman v. State* (Tex. Crim. App.) 25 S. W. 772.

And in all such cases the law imputes to the accused his own wrong and its consequences. *Carter v. State*, 37 Tex. Crim. Rep. 403.

The rule hinges directly upon the doctrine that every man is presumed to intend the natural, probable, and necessary consequences of his own acts. *Lewis v. Com.* 78 Va. 732, 738; *Harrison v. Com.* 79 Va. 374, 52 Am. Rep. 634.

It also arises from the fact that self-defense is a defensive, not an offensive, act, and must not exceed the bounds of mere defense and prevention. *Thumm v. State*, 24 Tex. App. 667, 701; *State v. Gilmore*, 95 Mo. 554.

The accused must therefore not be disregarding of the consequences of any wrongful word spoken or act done by him. *Gibson v. State*, 89 Ala. 121, 124, 127; *Jackson v. State*, 77 Ala. 18, 25.

And the perfect right of self-defense may be destroyed entirely or abridged by the act of the party. *Meuly v. State*, 26 Tex. App. 274, 305.

And the right to self-defense will not arise until the accused has at least attempted to avoid the necessity of such defense. *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70, 73; *People v. Sullivan*, 7 N. Y. 396; *Reg. v. Smith*, 8 Car. & P. 160.

And an answer upon the ground of necessity, which shows that the accused provoked

made of malice to bring about that result and enable the provoking party to wreak his vengeance on the assailant, that is an "aggression" or "fault," and a "provoking of a difficulty," within the legal sense and meaning of the terms. If the "combat is provoked," or "the occasion to kill is produced," in the language of the charge, on this account, with this intent, and for this purpose, defendant cannot rely upon the plea of self-defense; otherwise he can.

Allsup v. State, 5 Lea, 362, cited, was this: Allsup had been, so far as the altercation was concerned, in one sense, the aggressor, but was not as to the first assault. He was held entitled to the plea of self-defense. In the 8 Lea case, which was one for assault and battery, the Smiths had gone to the prosecutor, and provoked an altercation with him, and called him a liar. Prosecutor

then picked up an ear of corn, but dropped it, and advanced on Smith, who struck him. Smith was held entitled to rely on such a plea. In the case of *Daniel v. State*, 10 Lea, 261, the charge was malicious shooting. The circuit judge had charged the jury that a person cannot be allowed to provoke a difficulty by his own improper conduct, or join willingly and voluntarily in a combat, and then escape under the plea of self-defense, and, if done willingly and voluntarily, it would make no difference which in fact struck the first blow, as both would be guilty. If both joined in the combat voluntarily and mutually. This court approved and applied the doctrine of the *Smith Case*, and held that this charge was erroneous, and said that "if provocation is sought for, and induced by this act of the slayer in order to afford him a pretext for wreaking his malice, it

or encouraged the difficulty, is sufficient to annul the effect of a plea that the accused was really, or to ordinary appearances, in imminent peril of life or limb from which he had no other reasonable means of escape. *McDaniel v. State*, 76 Ala. 1, 7.

So, he cannot justify his acts under the plea that he attacked and killed the deceased for fear of injury at some future time, as such a plea shows no necessity. *State v. Rose*, 30 Kan. 501; *Bush v. State* (Tex. Crim. App.) 51 S. W. 238, 239.

Again, the plea of self-defense cannot be used as a shield from the consequences of killing, no matter how imminent the danger in which the accused may find himself in the progress of the affray, if he himself has brought it on or provoked it. *State v. Underwood*, 57 Mo. 40, 50.

In all cases, therefore, where the accused has brought on or provoked the difficulty, the nature of the extremity to which he is reduced in the combat is of no consequence in considering the question of self-defense. *State v. Davidson*, 95 Mo. 155, 158; *State v. Talmage*, 107 Mo. 543, 461; *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31; *State v. Vaughan*, 141 Mo. 514, 521; *State v. Gamble*, 119 Mo. 427, 432; *State v. Hopper*, 142 Mo. 478, 483; *Saens v. State* (Tex. Crim. App.) 20 S. W. 737; *Cunningham v. State*, 17 Tex. App. 89, 96; *Varnell v. State*, 26 Tex. App. 56, 67; *White v. State*, 23 Tex. App. 154, 164; *State v. Hill*, 20 N. C. (4 Dev. & B. L.) 481, 34 Am. Dec. 896, 897; *State v. Hawkins*, 18 Or. 476, 481; *Honesty v. Com.* 91 Va. 283, 298; *State v. Peak*, 85 Mo. 190, 192; *Jones v. Gale*, 22 Mo. App. 637; *State v. Shoults*, 25 Mo. 128, 153; *State v. Lewis*, 113 Mo. 79; *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403; *Bush v. People*, 10 Colo. 566, 373; *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470, 473.

The rule will therefore apply in all cases in the absence of evidence showing that the accused has made a bona fide retreat from the affray. *State v. Vansant*, 80 Mo. 67, 69, 79.

And it applies, no matter how high the passion or how imminent the danger to the accused may become during the difficulty or conflict, if the same is brought about by his own wrongful act or conduct. *State v. Brown*, 64 Mo. 367, 373.

And therefore, one who commences an affray cannot, when he is about to suffer the penalty of his temerity, take the life of his adversary to avert the danger that threatens him. *People v. Stonecipher*, 6 Cal. 406, 410. 45 L. R. A.

And the rule is so strictly construed that it has been said that the party first at fault, that is the one beginning the affray, absolutely forfeits to the other his right to live, to the extent, at least, of the difficulty which he has created, and, having committed the first wrongful act, the plea of self-defense is foreclosed to him, and his life is the penalty, no matter what turn the affray may subsequently take. *People v. Conkling*, 111 Cal. 616, 626.

So, the law takes into consideration the fact that the accused's own wrongful act was in violation of law when it limits his right of defense and resistance while in the perpetration of such unlawful act. *Carter v. State*, 30 Tex. App. 551.

Indeed, it has been said that the doctrine has been so fully settled as to be beyond doubt or controversy. *Jackson v. State*, 77 Ala. 18, 25.

The acts, therefore, which an accused may do and justify under the plea of self-defense depend primarily upon his own conduct, and secondly upon the conduct of the deceased, and there is no fixed rule applicable to every case, though certain general well-established principles stand as guides for the acts of men, and as measures for the jury's determination of their deportment. *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403.

A mere colorable self-defense is, however, in no case sufficient where the accused has brought on or provoked the difficulty. *Gilleland v. State*, 44 Tex. 356, 361.

And the courts commit no error in refusing a charge to the jury on the ground of self-defense which ignores the question as to who commenced the difficulty in the first place. *Parker v. State*, 88 Ala. 4, 7.

The doctrine of provoking the difficulty can only be applied, however, where the accused seeks to justify himself upon the ground of self-defense. *Wilson v. State* (Tex. Crim. App.) 36 S. W. 588.

The accused himself must owe no duty to the deceased, be under no obligation of law to make his safety a secondary object; otherwise he is answerable to the law of the land without any immunity under the shield of necessity. *Haynes v. State*, 17 Ga. 465, 484.

So, the wrong which will preclude him from making the defense must relate to the assault in resistance of which the deceased was killed. *State v. Perigo*, 70 Iowa, 657.

And if there is nothing to show that the accused was acting in self-defense, but, on the contrary, that he was the aggressor, and provoked whatever demonstrations towards vio-

would not extenuate the offense." The court also said: "Provoking words and gestures might be used from heat of blood, in a sudden quarrel; and a fight might, under such circumstances, be engaged in, during which a party might have the right to defend himself from impending danger of death or great bodily harm." Nor is the rule changed because defendant had a dangerous weapon and used it. This is a fact, like all others, to be considered, but not of itself to deprive defendant of the right of self-defense, otherwise existing. *Fitzgerald v. State*, 1 Legal Rep. 53; *Aldrige v. State*, 59 Miss. 250; *Cartwright v. State*, 14 Tex. App. 486; *State v. Perigo*, 70 Iowa, 657; *Massie v. Com.* 15 Ky. L. Rep. 562. In the case cited of *Fitzgerald v. State*, 1 Legal Rep. 53, the special judge (Howell E. Jackson) held the charge of the trial judge erroneous, and that

it should have been that if the defendant, who had armed himself with a pistol, "advanced to his mother's gate, determined or intending not to fight, unless for his defense and protection, and a violent and dangerous assault was made upon him, which threatened him with death or great bodily harm, without his seeking or provoking it, and he killed his adversary to prevent his own death, or save himself from great bodily harm, it would be a killing in self-defense;" citing *Copeland v. State*, 7 Humph. 479. In *Aldrige v. State*, 59 Miss. 250, the court held that a person who enters a combat armed with a deadly concealed weapon may use it to protect his life, if his adversary, who struck the first blow, resorts to such a weapon, and will not be guilty of assault with intent to murder unless he intended from the first to use the weapon, if neces-

lence there were on the part of the deceased, the plea of self-defense is of no avail. *Keelling v. State*, 107 Ind. 503.

The doctrine has equal force and application in cases where several join together, conspire, or enter into a design to kill another, or do an unlawful act, and so become the aggressors, as in such cases the act of one will be the act of all, and the plea of self-defense will not avail any of them. *Carter v. State*, 37 Tex. Crim. Rep. 403; *State v. Paxton*, 126 Mo. 500, 506, 515; *Gibson v. State*, 89 Ala. 121, 128.

So, the rule equally applies to one who acts in consort with another in bringing about the difficulty, and takes part in the quarrel, and makes himself a party to it, and aids and assists in bringing about the fatal encounter. *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493, 499.

And one who provokes a difficulty for the purpose of killing the deceased, or seeks a pretext for so doing by provoking or bringing on the difficulty, is equally guilty with those who do the act, although he may not actually participate in the same; and he cannot claim self-defense. *State v. Paxton*, 126 Mo. 500.

Thus, there was no doubt of the accused's participation in, and responsibility for, whatever fault was his companion's in bringing on the difficulty, in *Kirby v. State*, 89 Ala. 63, 72, and he was therefore at fault equally with his companion, even though he said nothing until the assailants were approaching them, when he told them to come on; and the plea of self-defense was therefore not upheld. In this case the deceased and another initiated the altercation, which preceded the fatal shot, by cursing and abusing the accused and his companion, and their threats were directed against them, and the challenge of the deceased looked to a combat, and was addressed to the accused and his companion. The accused's companion replied to the curses and abuses of the parties, and dared them to the execution of their threats, and accepted their challenge and invitation, but the accused himself did not reply thereto, although he did not dissent from, or in any way discourage or discountenance anything his companion said or did, in behalf of them both, provoking or bringing on the trouble, but stood ready, armed with a rifle, to take the lives of the advancing parties if they should come as far as a certain point on the invitation and challenge of himself and his companion as made by the latter.

This phase of the question finds further support in *People v. Cochran*, 61 Cal. 548, 551, 45 L. R. A.

where the accused, as one of the mob riotously assembled for the purpose of breaking into the jail to release and hang a prisoner, shot and killed the deputy sheriff while in the performance of his duty guarding the jail.

And the plea of self-defense will not avail the accused where his acts are most clearly calculated to produce the occasion or provoke the difficulty,—especially when taken in connection with the conduct of his accomplice in the crime he is committing, or intends to commit, at the time when found by the deceased. *Franklin v. State*, 30 Tex. App. 628, 641.

So, the rule applies to the case of a voluntary helper of the one who provokes the difficulty, and he cannot with impunity resist, to extreme results, the assault provoked by his companion. *Bostic v. State*, 94 Ala. 45, 47.

See also herein *People v. Miller*, 49 Mich. 23; *Smurr v. State*, 105 Ind. 125, 135; *State v. Melton*, 102 Mo. 683, 688; *People v. Curtis*, 52 Mich. 616,—all *infra*, IV.

As to the doctrine of withdrawal and retreat in such cases, see *Bostic v. State*, 94 Ala. 45, 47; *Burris v. State*, 34 Tex. Crim. Rep. 387, 391,—*infra*, IX. a.

And the rule applies in cases where there was no felonious intention on the part of the accused at the time he entered into or provoked the difficulty, as well as where such intention existed. *Boykin v. People*, 22 Colo. 496; *Adams v. People*, 47 Ill. 376, 379; *State v. Hicks*, 92 Mo. 431, 435; *State v. Smith*, 37 Mo. App. 187, 143; *State v. Parker*, 96 Mo. 382; *State v. Cable*, 117 Mo. 380; *State v. Evans*, 128 Mo. 406, 412; *State v. Bryant*, 102 Mo. 24; *State v. Herrell*, 97 Mo. 105; *State v. Hardy*, 95 Mo. 455, 457; *State v. Davidson*, 95 Mo. 155, 158; *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31; *State v. Talmage*, 107 Mo. 543, 561; *State v. Lewis*, 118 Mo. 79, 84; *State v. Hopper*, 142 Mo. 478, 483; *Meuly v. State*, 26 Tex. App. 274; *White v. State*, 23 Tex. App. 154, 164; *Carter v. State*, 30 Tex. App. 551, 556; *Thuston v. State*, 21 Tex. App. 245, 248; *Varnell v. State*, 26 Tex. App. 56, 67; *Carter v. State*, 28 Tex. App. 355, 360; *Bonnard v. State*, 25 Tex. App. 173, 197; *Logan v. State*, 17 Tex. App. 50, 59; *Cahn v. State*, 27 Tex. App. 709; *Roach v. State*, 21 Tex. App. 249; *Williams v. State*, 2 Tex. App. 216, 225; *Alexander v. State*, 25 Tex. App. 260; *Reed v. State*, 11 Tex. App. 509, 518, 40 Am. Rep. 795; *Johnson v. State*, 26 Tex. App. 631; *Milrainey v. State*, 33 Tex. App. 577; *Sullivan v. State*, 31 Tex. Crim. Rep. 486, 488; *Carter v. State*, 37 Tex. Crim. Rep. 408, 406; *King v. State*, 13 Tex. App. 277, 282;

sary, to overcome his antagonist; and it was held to be error to instruct the jury that they might convict either of assault with intent to murder, or of assault and battery, because he enters a combat armed with a dangerous weapon, not exposed to view, so as to put his adversary on his guard, and in the fight strikes him with it, intending to kill or injure him. In *Cartwright v. State*, 14 Tex. App. 486, it is held that it does not always follow that a homicide cannot be justified or excused because the slayer, by his own wrongful acts, produced a necessity to take the life of the deceased in order to preserve his own, and that consideration must be addressed to the nature and quality of the wrongful acts by which it is claimed the right of self-defense is forfeited or abridged,

and that the right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act, unaccompanied by any demonstration, verbal or otherwise, of the wrongful purpose. In the case of *State v. Perigo*, 70 Iowa, 657, the defendant, after having held the deceased at bay with a pistol, stated that it was not loaded; thus leading the deceased to make an assault upon him, in resisting which he shot and killed the deceased. Held, that this would not preclude him from the plea of self-defense, if the killing could otherwise be justified on that ground, unless his purpose in stating that his pistol was not loaded was to create an occasion or excuse for taking the life of deceased; and an instruction that malice was proved by the selection and use of a deadly

Saens v. State (Tex. Crim. App.) 20 S. W. 737; Green v. State, 12 Tex. App. 445, 449; Gonzales v. State, 28 Tex. App. 130; Spearman v. State, 23 Tex. App. 224; Crist v. State, 21 Tex. App. 361; Thumm v. State, 24 Tex. App. 937, 701; Stacey v. State (Tex. Crim. App.) 33 S. W. 348; Hash v. Com. 88 Va. 172; State v. Cain, 20 W. Va. 879, 709.

There are some cases, however, which hold that a party may have a perfect right of self-defense though he may not be entirely free from blame or wrong in the transaction, and that it is not every wrongful act which will deprive the doer of his right of self-defense. *Carter v. State*, 37 Tex. Crim. Rep. 403, 406; *White v. State*, 23 Tex. App. 154, 164.

In the case of *Cartwright v. State*, 14 Tex. App. 486, 502, the court laid down the rule that the mere fact that the prisoner made preparation for the carrying out or doing of the wrongful act was not alone sufficient to deprive him of the right of self-defense,—especially when not accompanied by any demonstration showing that he intended his acts to be wrongful.

The case of *Meuly v. State*, 26 Tex. App. 274, also declares the same doctrine.

And in *Shannon v. State*, 35 Tex. Crim. Rep. 2, the court also followed its holding in *Cartwright v. State*, to the effect that the accused must willingly and knowingly use the language, or do the acts reasonably calculated to lead to an affray or deadly conflict, and unless the acts are clearly calculated or intended to have such effect, the right of self-defense is not compromised even though the party arms himself and goes there for the purpose of the difficulty. The same theory is also to be found in the cases of *Morgan v. State*, 34 Tex. Crim. Rep. 222; *Winters v. State*, 37 Tex. Crim. Rep. 582; *Alrhart v. State* (Tex. Crim. App.) 51 S. W. 214; *White v. State*, 23 Tex. App. 154, 164; *Carter v. State*, 37 Tex. Crim. Rep. 403; *Franklin v. State*, 30 Tex. App. 628, 640; *Thomas v. State* (Tex. Crim. App.) 51 S. W. 1109.

In *Cunningham v. State*, 17 Tex. App. 89, 97, it is said that the accused should not be deprived of his right of self-defense, where the occasion is accidentally, unintentionally, or innocently produced. *Gilleland v. State*, 44 Tex. 356, followed.

And in *Hash v. Com.* 88 Va. 172, the accused justified his actions as at the time of the difficulty he was engaged in a lawful act, namely, the removal of a fence upon his own property, and was not the aggressor.

And so in *Gilcrease v. State*, 33 Tex. Crim. Rep. 619, 630, the accused justified his actions, as he infringed no rights of the deceased in 45 L. R. A.

closing up a gate upon the premises of which the deceased was in possession with the permission of the accused, as the accused could not be deprived of his right to protect his life in a lawful manner by doing what he had a legal right to do.

And the right of self-defense was held to be available in the case of *Franklin v. State*, 30 Tex. App. 628, 642. In this case the act of the accused, although imprudent, did not amount to an immoral offense or wrong, as he had gone to secure a place to sleep, and by the permission of the wife of the deceased was in a bedroom adjoining that in which the wife was, merely awaiting the return of the husband.

And so in *Brinkley v. State*, 89 Ala. 34, 36, the plea of self-defense was sufficient as the accused was provoked or caused to commit the act by the wilful refusal of the deceased to desist in an indecent dance, and to leave the accused's house when requested to do so.

The plea of self-defense was also upheld in *Coryell v. State*, 130 Ind. 51, as the action of the accused in firing the fatal shot was aggravated and brought about in the first instance from the action of his wife in seeking to take a child from his custody, in which act the wife was supported by her own relatives, and a struggle ensued in which the accused acted on the defensive, but was so set upon that further retreat became impossible, and he was knocked down and forced to the floor, and was unable to free himself from his assailants, and was thus forced to use the pistol with which he fired the fatal shot.

And the mere fact that the accused is engaged in committing a trespass when he is attacked by the deceased does not necessarily constitute him a wrongdoer in the matter of the assault, or preclude him from making the defense of self-defense,—especially where violence is used against him, and there is a seeming intention on the deceased's part to take his life. *State v. Perigo*, 70 Iowa, 657, 666.

Thus, if the accused, who has a right to go to a place, goes there armed for the purpose of preventing the commission of a trespass upon his premises, and an altercation ensues by reason of the deceased insisting upon committing the trespass, although the accused has no right to use his arms unless forced to do so, yet if he does so in defense of his life his acts will be justified upon the ground of self-defense. *Wilson v. State* (Tex. Crim. App.) 36 S. W. 587, 588.

The cases of *White v. Territory*, 3 Wash. Terr. 397; *Miralney v. State*, 33 Tex. Crim. Rep. 577, 592; *Long v. State*, 52 Miss. 23; *Patterson v. State*, 75 Miss. 670, 675; and *Hunt*

weapon in a deadly manner, without lawful excuse, was held erroneous. In *Hash v. Com.* 88 Va. 172, it was held to be error to charge that a man cannot in any case justify the killing of another, upon the pretense of self-defense, unless he is without fault in bringing the necessity of so doing on himself, and the proper charge would have been that, although the slayer provoked the combat or produced the occasion, yet if it was done without any felonious intent,—for instance, merely an ordinary battery or trespass,—the accused may avail himself of the plea of self-defense. In *Cotton v. State*, 31 Miss. 504, it is held that the fact that the accused sought and brought about the difficulty, being at the time armed with a deadly weapon,

with which he killed the deceased, does not necessarily render him guilty of murder; for if he commence the contest, intending at the outset to inflict little or no violence on his antagonist, he may justifiably slay the other party, if the danger of his own destruction be immediate and impending, and otherwise unavoidable, and when the necessity to kill does not exist, if the killing be not in pursuance of a premeditated design to take life, but on a sudden quarrel.

Without considering other errors in the charge of the court,—which should all be remodeled on the line herein indicated,—it is sufficient to say that the error here pointed out is fatal to the conviction, and *the judgment must be reversed*, and cause remanded.

v. State, 72 Miss. 413,—are closely connected with the above case of *Wilson v. State* (Tex. Crim. App.) 36 S. W. 587, 588, and maintain the same doctrine.

The doctrine declared by the court in the above case of *Wilson v. State* is also followed in *State v. Evans*, 124 Mo. 397, 410, in which the court held that the mere fact that the accused expected an attack did not abate his right to arm himself in his own proper defense, nor to go where he would after thus arming himself, so long as he did no overt act or made no hostile demonstration towards the other party, and if in such a case the accused goes where he has a right to, and for business purposes, and an altercation ensues, he will not be deprived of his right of self-defense if he inflicts an injury upon the other party. *State v. Hudspeth* (Mo.) 51 S. W. 488, to the same effect.

So, in *Cotton v. State*, 31 Miss. 504, 512, the same principles are declared, the court stating that the fact that a man armed himself amounted to nothing unless he did so with a view of using the weapon if necessary to overcome his adversary. In this case the court considered that a man had a right under the law of that state to carry a deadly weapon, and held that the right to use it or not depended upon the nature of the difficulty in which he was involved, as he might begin a difficulty intending to inflict no injury, or next thing to none, and he might be so closely pressed as to be forced to use it in self-defense.

Again, in *Patterson v. State*, 75 Miss. 670, 675, the fact that the accused was armed with a loaded gun when he accosted the deceased, who was trespassing upon his premises, was held not sufficient to make him the aggressor.

Upon the question of intent as an element of simple assault, or assault and battery, see *note to Vosburg v. Putn.* (Wis.) 14 L. R. A. 226.

II. What amounts to provoking or bringing on the difficulty or producing the occasion.

a. In general.

The act or deed of the accused which will deprive him of his plea of self-defense is his act or fault in seeking and directly bringing about the occasion which results in the offense with which he is charged. *Hash v. Com.* 88 Va. 172.

And generally it may be said that any act of the accused in violation of law and reasonably calculated to produce the occasion amounts to bringing on the difficulty and bars his right of self-defense. *Franklin v. State*, 30 Tex. App. 623, 640. See also *State v. Beckham*, 24 S. C. 283, where there was no legal excuse for the accused's action in the first instance.

And the accused will be considered as pro-

voking or bringing on the difficulty in all cases where the killing of the deceased is imputed to malice, express or implied, on his part in committing the wrongful act which produces the necessity for his action. *Meuly v. State*, 28 Tex. App. 305.

And if it is shown that there is not the slightest reason to suppose that there would have been any trouble if the accused had not commenced the difficulty, he will be taken to have brought it about, and the plea of self-defense will be denied him. *Hulse v. Tollman*, 49 Ill. App. 490, 495.

And any pretext, design, or excuse resorted to by the accused in order to bring on the difficulty or provoke the occasion, or his use of a deadly weapon, will make him the aggressor, and amount to provoking the difficulty. *Mitchell v. State*, 60 Ala. 26, 33; *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403.

Any act of his which shows that he induced the difficulty through fraud, contrivance, or fault on his part will amount to bringing on the difficulty, and under such circumstances he cannot justify his acts under such a plea. *Mitchell v. State*, 60 Ala. 26, 33.

And if it is shown that he sought or induced the difficulty as a pretext for wreaking his malice, he will be taken to have produced the occasion. *State v. Jones*, 78 Mo. 279, 285; *White v. Maxcy*, 64 Mo. 552; *State v. Christian*, 66 Mo. 138; *State v. Starr*, 38 Mo. 270; *State v. Linney*, 52 Mo. 40; *State v. Underwood*, 57 Mo. 40; *Jones v. Gale*, 22 Mo. App. 637, 638; *State v. Culler*, 82 Mo. 623; *State v. Maguire*, 69 Mo. 197, 200; *State v. Parker*, 106 Mo. 217; *State v. Vaughan*, 141 Mo. 514; *State v. Herrell*, 97 Mo. 105, 110; *State v. Hays*, 23 Mo. 287; *State v. Packwood*, 26 Mo. 340; *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31; *State v. Berkley*, 92 Mo. 41; *State v. Gilmore*, 95 Mo. 554; *State v. Parker*, 96 Mo. 382; *State v. Brown*, 63 Mo. 439, 443; *State v. Cable*, 117 Mo. 380; *State v. Vansant*, 80 Mo. 67, 69; *Adams v. People*, 47 Ill. 376, 379; *Wilson v. People*, 94 Ill. 299; *Allen v. Com.* 86 Ky. 642. *Thumm v. State*, 24 Tex. App. 667, 701; *Hollis v. State*, 8 Tex. App. 620, 623.

So, he brings on the difficulty or produces the occasion where he induces the conflict under a pretext for stabbing the deceased. *Stewart v. State*, 1 Ohio St. 66, 74.

And so, where he forces the difficulty with a design to bring on a deadly issue. *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403.

Thus, in *Jones v. Gale*, 22 Mo. App. 637, 638, the act of the accused in arming himself with a rock previous to the assault, and bringing on the fight in order to wreak his malice, barred his right of self-defense.

So, if there is premeditation on the part of the accused, and he commences the attack, he will be considered the provoker of the difficulty, and cannot justify his acts as in self-defense. *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328, 350; *State v. Hill*, 20 N. C. (4 Dev. & B. L.) 491, 34 Am. Dec. 396, 397; *Adams v. State*, 35 Tex. Crim. Rep. 285, 295; *State v. McDaniel*, 94 Mo. 301; *DeArman v. State*, 71 Ala. 351, 362; *Presser v. State*, 77 Ind. 274, 278; *State v. Scott*, 41 Minn. 365, 378; *State v. Neeley*, 20 Iowa, 108; *Bush v. People*, 10 Colo. 566; *Myers v. State*, 62 Ala. 599, 603.

Thus, a previously formed design to take the life of the deceased by the accused makes him the aggressor provoking or bringing on the difficulty, and precludes his right to plead self-defense. *De Arman v. State*, 71 Ala. 351, 362.

And if he enters into a difficulty in which he contemplates interference by another, and arms himself with a deadly weapon with the intention of taking life if necessary, he will bring on the difficulty and cannot successfully plead self-defense. *Dabney v. State*, 113 Ala. 38, 42, 43; *Thompson v. State* (Miss.) 9 So. 298; *Ex parte Wray*, 30 Miss. 673.

And the act of the accused in arming himself, when taken in connection with other acts of his showing beyond question his intention to make use of them immediately the opportunity occurs, undoubtedly makes him the aggressor and amounts to provoking the difficulty, and thus deprives him of the right of self-defense. *Beard v. State* (Tex. Crim. App.) 20 S. W. 770, 771.

And the same result will follow if he draws a pistol with the intention of attacking his adversary's life, or under circumstances calculated to excite in his adversary the fears of a reasonable man that an immediate attack on him was intended. *Fussell v. State*, 94 Ga. 78.

And the accused's own violent conduct in entering the deceased's place of business with a pistol in his hand and accosting him in a rough manner, and thus inducing the deceased to throw his hand to his side and move towards the counter as if to obtain a pistol, amounted to provoking the difficulty, and the latter's conduct was the natural result of the accused's conduct and barred his right of self-defense. *Hoover v. State*, 35 Tex. Crim. Rep. 342, 344.

And the act of the accused, who was armed with a pistol, in hailing the deceased, who had an ax and was on his way to work, and in still pressing the difficulty, amounted to producing the occasion and provoking the combat in which the accused killed the deceased. *Crist v. State*, 21 Tex. App. 361, 367.

And the accused's acts brought on the difficulty in *Honesty v. Com.* 81 Va. 283, 299, as he armed himself with a deadly weapon, and without provocation rushed upon the deceased, who warned him not to approach or he would strike him, but the accused refused to notice the warning, and struck the deceased a cruel and unmanly blow which caused his death, in return for a slight blow on the arm inflicted upon him by the deceased when he rushed upon him after the deceased had warned him.

The fact that an hour or two before the difficulty the accused proposed to exchange knives with a party, assigning as a reason that his knife was too small, when taken in connection with a previous difficulty and bad feeling which existed between the parties and with other evidence that he was not free from fault in producing the necessity, and that he could have retreated with safety, sufficiently shows an act of preparation, and is a link in the chain

of circumstances proving that the accused provoked and brought on the difficulty. *Ford v. State*, 71 Ala. 385, 396.

The acts of the accused made him the aggressor, and brought on the difficulty, in *State v. McDonald*, 67 Mo. 13, 18, as he had previously declared his intention to kill and do grievous bodily harm, and such declaration furnished a key for his conduct when he met the deceased, and proved his purpose in provoking the difficulty.

And under article 603 of the Texas Penal Code, though a homicide may take place under circumstances showing no deliberation, yet if the person guilty thereof provokes the contest with the apparent intention of killing or doing serious bodily injury to the deceased, his actions will amount to producing the occasion, and his right of self-defense will be barred. *Johnson v. State*, 26 Tex. App. 631, 641.

So, if he draws a pistol or attempts to do so with an apparent hostile intention before any hostile movement is made by the deceased, his acts amount to provoking the difficulty, and the accused will be deemed the aggressor and cannot plead self-defense. *Coleman v. State* (Tex. Crim. App.) 25 S. W. 772.

Where the accused, a police officer, made an unlawful arrest, and was resisted by the deceased, his acts amounted to bringing on the difficulty and precluded his right of self-defense, as the violence offered against him was the reasonable consequence of his own misconduct. *Robertson v. State*, 53 Ark. 516, 518.

And the act of one who kills another in the attempt to illegally arrest him makes him the aggressor, and places him in the attitude of a trespasser. His acts amount to bringing on the difficulty, and furnishing the occasion, and his right of self-defense is barred. *Carter v. State*, 30 Tex. App. 551, 558; *Peter v. State*, 23 Tex. App. 684, 687; *King v. State*, 13 Tex. App. 277.

And in *People v. Johnson*, 139 N. Y. 358, the accused was the aggressor, and was considered as the producer of the difficulty, as his action in trying to break jail brought on the fight which ensued, and in which he killed the deceased, and wounded others who were trying to subdue him and prevent his escape.

And the accused's presence upon the premises was a trespass and wrongful act, in *King v. State*, 13 Tex. App. 277, and amounted to provoking the difficulty, although he entered the deceased's premises in a casual manner without any intention of injuring the deceased or his property, or of committing a felony, but his presence caused the difficulty which created the necessity of killing.

So one who is surprised by a husband after the actual or immediately before an intended criminal act upon the wife is the aggressor and provoker of the difficulty which subsequently ensues between himself and the husband, and he cannot lawfully defend himself against the husband's violence, and stand his ground and shoot or cut in order to repel the husband's attack upon him, even though the same may be dangerous, and his conduct will not justify his plea of self-defense. *Drysdale v. State*, 83 Ga. 744, 746, 6 L. R. A. 424. To the same effect, *State v. Candienne*, 50 La. Ann. 847, 855; *Franklin v. State*, 30 Tex. App. 628, 640; *Dabney v. State*, 113 Ala. 38, 42.

In *Franklin v. State*, 30 Tex. App. 628, 640, the acts of the accused raised a suspicion, and though wrongful were not illegal, but were most fearfully calculated to produce the occasion or provoke the difficulty which produced the shooting when taken in connection with

the conduct of the wife at the time that the husband entered.

And the acts of the accused brought on the difficulty in that he deliberately left the company in which he was in order to open his knife ready for use, and returned with it in his right hand and commenced the assault with his left, and, as soon as the anticipated demonstration was made, used the knife upon the deceased with deadly effect. *State v. Hudson*, 50 Mo. 135, 138.

And the act of the accused in voluntarily going off and arming himself in order to renew the difficulty and in returning was held to amount to provoking the difficulty, in *Murray v. State*, 36 Tex. 642, in which case there had been a previous difficulty between the parties and the deceased had prepared himself for the second meeting.

And where the accused started a quarrel and upon retreating swore that he would fix the other party, and came back later and renewed the quarrel by refusing to pay for liquor which he had purchased, and seized his revolver and shot and killed the deceased, his acts provoked the difficulty and barred his right of self-defense. *State v. Crawford*, 115 Mo. 620.

And the act of the accused in returning to the scene of the difficulty after the same has ended, for the purpose or with the intention of renewing or provoking it, with a preconceived intent to kill, will amount to provoking the subsequent difficulty, and bar his right of self-defense, in the absence of evidence showing that he declined the combat or retreated. *Johnson v. State*, 26 Tex. App. 631, 641.

So, the acts of the accused in following up the deceased upon his retiring to arm himself, and the subsequent continuance of the affray in which the deceased is killed by the accused, constitute the accused the provoker of the difficulty. *State v. McCann*, 16 Wash. 249.

And the act of the accused in drawing his pistol upon the deceased as he turned and walked away, at a meeting of the parties in which a previous difficulty was mentioned, was held to amount to provoking the difficulty, and to bar the accused's right of self-defense for the homicide inflicted in the conflict which followed. *People v. Tamkin*, 62 Cal. 468.

And the acts of the accused in entering the house in a disorderly manner, attended by disrespectful and unfriendly exclamations or salutations, accompanied with the fact that when ordered out or to declare their business they presented their revolvers in the deceased's face, amounted to provoking the difficulty, and constituted the accused the wrongdoer, in *Crawford v. State*, 112 Ala. 1, 30, 31, 32.

The accused was the aggressor in *Abbott v. People*, 86 N. Y. 460, 470, and the fact that there had been a previous quarrel between the parties, and that the deceased was reaching for a wrench and was about to turn around when the accused struck him, did not justify his attack upon the deceased, and his right of self-defense was therefore barred as he was the first assailant and stood in no immediate danger, and was not driven to the wall.

And the fact that the accused started for the deceased, who was on the other side of the street, and that the latter threw his hand up to his breast pocket, whereupon the accused fired the fatal shot, constituted him the aggressor and provoked the occasion, in *Lawrence v. State*, 36 Tex. Crim. Rep. 178, 179, and barred his right of self-defense, as, even if the deceased had a pistol and was about to draw it, such fact would not make out a case of self-defense in the accused.

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And the accused was held to have brought on the difficulty in *State v. Petsch*, 43 S. C. 132, in that he shot the deceased on the same evening that the latter had sent by a servant a bill for collection which the accused returned to the deceased unpaid, with an offensive and dirty message, and the deceased had said that he would see him either the next morning or that night, and the shot was fired by the accused when within 14 feet of the deceased, and after he had left his house and was walking on the street, and was approached by the deceased coming from his place on the other side of the street. In this case the accused testified to hearing a remark made by the deceased as he approached him, and that the deceased had his hand in his hip pocket, but the court upheld the conviction, and the plea of self-defense was barred, as the accused was not without fault and brought on the difficulty.

And the conduct of the accused, who accompanied a request for the deceased to repeat words spoken by him concerning the accused by drawing his pistol, made him the aggressor and provoked the difficulty, in *Coleman v. State* (Tex. Crim. App.) 25 S. W. 772, and the fact that the deceased sprang for his gun, and would have shot the accused if he could, did not justify his action.

And the accused was held to have provoked the difficulty in *Polk v. State*, 30 Tex. App. 657, 659, although he might not have originally intended to produce the occasion, as the outcome of the difficulty was the reasonable and natural consequence of his act. In this case the accused on the impulse of the moment resented insulting language used by the deceased by slapping or striking him with his hand, whereupon the deceased drew his pistol with intent to shoot, when he was killed by the accused.

And the act of the accused in making an unlawful and violent assault upon the other party as a punishment for words spoken by him regarding the accused amounted to provoking the difficulty in *Shipley v. Edwards*, 87 Iowa, 810. In this case after the accused had assaulted the other party there were blows by each and a clinch, and the parties fell and the other party was uppermost, and while in this position the assault complained of was committed by the accused. The theory of self-defense was therefore without any support as the accused by his own acts justified sufficient violence or force by the other party to repel the attack.

And the act of the accused in attempting to unlawfully deprive the deceased of his personal property and whose very act is one of aggression against which the deceased has a right to defend himself, will amount to producing the difficulty and constitute him the aggressor in the absence of evidence showing an attempt to withdraw before the killing. *Helms v. United States* (Ind. Terr.) 52 S. W. 60, 63.

And the acts of the accused in unlawfully removing an obstruction in a hostile manner and in violation of the peace were held to have provoked the attack made upon them by the other party who charged them with an assault with intent to murder, and the right of self-defense was therefore barred. *State v. White*, 18 R. I. 473, 480.

And the act of the accused in striking the other party with the intention of committing a mere personal chastisement amounts to provoking the difficulty inasmuch as it is almost sure to be followed by dangerous if not deadly results.—especially where the parties, as in that case, were armed with deadly weapons.

State v. Rogers, 18 Kan. 78, 26 Am. Rep. 754, 759, 760.

And in *Thumm v. State*, 24 Tex. App. 667, 701, the accused was the aggressor and brought on the difficulty. He, in the first instance, approached the deceased, and wounded him until he fled from the room and passed out into the porch of the building, while the accused was in such a position inside the building that he could have resisted and secured himself against the effects of the bullets afterwards fired at him by the deceased as the latter was not advancing upon him; but, instead of doing so, he fired and killed the deceased. In this case the accused was looked upon as still cautiously and coolly following up the deceased.

And where it was shown that the accused made an assault upon a witness for the prosecution in an unwarranted and vicious manner, his acts amounted to bringing on the difficulty when such witness was making no demonstrations and exhibited no hostility whatever toward the accused, either by word or act, but his conduct was peaceable and orderly and not calculated to induce the accused to reasonably believe in good faith that he was in danger of great bodily harm. *Martin v. State*, 5 Ind. App. 453.

The acts of the accused amounted to bringing on the difficulty, in *Graham v. State* (Tex. Crim. App.) 33 S. W. 537, as he assaulted the deceased in the first instance and drew his hoe upon him, which the deceased took from him, but made no attempt to strike the accused who then drew his pistol, which when the deceased saw, he proposed to go and get his pistol and fight; whereupon the accused made overtures to surrender his weapon and fight a fair fight, to which the deceased acceded, but the accused refused to give up his pistol, and shot the deceased in order to prevent him getting his pistol.

As to when the fact that the accused was armed or made preparation will not make him the aggressor, see cases in I. *supra*.

b. In seeking or returning to the deceased.

And the same rules apply in cases in which the accused seeks the deceased with an intention to provoke a difficulty or to commit a felony, and carries his plans into effect, as the right of self-defense which will justify homicide cannot avail in any case where it appears that the difficulty was sought for at the time and place by the party with such intention. The fact that the accused has sought the deceased for the purposes of the difficulty and then brought it on amounts to provoking the same. *Tesney v. State*, 77 Ala. 33, 40; *State v. Benham*, 23 Iowa, 154, 72 Am. Dec. 417, 420; *State v. Neeley*, 20 Iowa, 108; *State v. Stanley*, 33 Iowa, 526, 532; *Allen v. Com.* 86 Ky. 642, 648; *Bohannon v. Com.* 8 Bush. 481, 8 Am. Rep. 474, 479; *Com. v. Barnes*, 13 Ky. L. Rep. 163; *Farris v. Com.* 14 Bush. 362; *State v. Scott*, 41 Minn. 365, 375; *Thompson v. State* (Miss.) 9 So. 208; *State v. Brown*, 63 Mo. 439, 443; *State v. Rider*, 90 Mo. 54; *State v. Herrell*, 97 Mo. 105, 109; *State v. Hawkins*, 18 Or. 476; *Roach v. State*, 21 Tex. App. 249, 254; *People v. Hite*, 8 Utah, 461, 477; *Hughes v. People*, 116 Ill. 330, 335.

Thus, if he seeks the deceased at the latter's place of business with the intention of provoking a difficulty, and a difficulty ensues in which he inflicts the injury upon the deceased, the occasion is induced by him, and his plea of self-defense is barred. *State v. Brown*, 63 Mo. 439, 448.

And if he seeks the deceased with the intention

of raising a disturbance he is the wrongdoer from the commencement. *State v. Merri-man*, 34 S. C. 40, 42.

And the accused provoked the difficulty in a case where he coolly, deliberately, and avowedly sought the deceased with the express intention of killing him, if he questioned his conduct in regard to a certain matter, and the deceased, who was not armed, did question his conduct and had a right to do so, and the accused was armed and ready to execute his threat. *Adams v. State*, 35 Tex. Crim. Rep. 285, 295.

And where one pursues another to his place of refuge with malice and desire for revenge, and invites and brings on an attack upon himself in order that he may have an opportunity to kill, he provokes the occasion, and cannot plead self-defense. *Wilson v. People*, 94 Ill. 299.

And the same rule applies to one who seeks his adversary and is at the time armed with a deadly weapon and provokes the attack which is made upon him by the deceased for the purpose of using such weapon in the emergency which follows. He produces the occasion and cannot invoke the plea of self-defense. *State v. Scott*, 41 Minn. 365, 373; *Hunt v. State*, 72 Miss. 418.

The act of the accused in taking his gun and following after the deceased without any provocation such as the law would recognize as provocation for the use of a deadly weapon brought on the difficulty and barred the plea of self-defense, in *State v. Shipley*, 10 Minn. 223, 88 Am. Dec. 70, 74.

And the act of the accused in going to the deceased's store after an affray, in which the deceased had knocked him down with a hook, had ceased for a sufficient length of time for reason to resume its way and to give the accused time to realize the situation, produced the occasion and barred his right of self-defense,—especially as it was not shown that the deceased continued the combat after he knocked the accused down. *People v. Robertson*, 67 Cal. 646, 650.

And he provokes the difficulty when he, knowing that ill-feeling exists between the deceased and himself, goes to the house contrary to the express orders of the deceased not to do so, and upon again being told not to enter continues to do so, when the difficulty ensues which results in the death of the deceased. *Davis v. State*, 92 Ala. 20, 28.

In *Waller v. State*, 89 Ala. 70, 82, there had been a difficulty over money matters between the parties, and the accused looked up the deceased, followed him to a house, saw him within, and heard him cursing and abusing him. He replied in like words and continued to advance. The deceased jumped up and seized his gun and started for the door from which the accused stood about 30 feet distant. The parties fired almost simultaneously and the deceased was instantly killed. The accused was at fault as he could have avoided the difficulty and killing by retiring or going away in the first instance.

And the accused brought on the difficulty and provoked the occasion where he sought the deceased for the purpose of chastising or beating him on account of an alleged abuse of the accused's father, or for other like reasons, and in pursuance of such purpose armed himself with a pistol which he used in order to save his own life or his body from great harm. *Gibson v. State*, 80 Ala. 121, 128.

So, the accused produced the attack where there were mutual threats and ill-feeling between the parties, and he looked up the deceased with the avowed purpose of using vio-

lence upon him if he did not take back certain statements he had made concerning him, and the parties came together under circumstances which showed that they were looking for each other, and an encounter ensued in which the accused killed the deceased. *Gilleland v. State*, 44 Tex. 356.

So, the accused may provoke the difficulty by voluntarily returning to the vicinity in which the deceased is with a deadly weapon for the purpose of renewing a difficulty. *State v. Neeley*, 20 Iowa, 100, 115; *Allen v. State*, 66 Miss. 385; *State v. Crawford*, 115 Mo. 620; *Rogers v. State*, 95 Tenn. 448, 453; *Johnson v. State*, 26 Tex. App. 631, 641; *State v. Hudson*, 59 Mo. 136, 138.

Thus, the act of the accused in going to his home, loading his gun, and returning to the place where the deceased was in order to compromise a difficulty which existed between the parties, amounted to bringing on the difficulty, in *Allen v. State*, 66 Miss. 385, as the accused did not take the road in order to meet the deceased, but went on to a bank and accosted him, not by way of compromise or of peace, and shot the deceased as he turned and presented his gun.

In *Rogers v. State*, 95 Tenn. 448, 453, the accused was the aggressor and produced the difficulty, as, although he was in danger during the colloquy that occurred when he first started to use insulting language to the deceased's mother which was the act which brought on the difficulty, he left the scene of danger, went to a place of safety, armed himself with a gun with which he deliberately returned, and in an angry and overbearing manner demanded the deceased to withdraw his hand from his pocket, and then shot and killed him.

The acts of the accused in following the deceased also amounted to bringing on the difficulty, in *Hughes v. People*, 116 Ill. 330, 335, as it was shown that if he had remained in his store the deceased, who was passing the store, would not have interfered with him. In this case the killing occurred some distance from the accused's store, and it was shown that he must have gone in search of the deceased and thus produced the difficulty.

So, the accused's acts in entering the deceased's house at night and persistently refusing the deceased's explanation, denial, and apology for a supposed insult to the accused's wife, and the act of the accused in defiantly and insolently forcing a quarrel and conflict, and in drawing a pistol from his pocket and shooting the deceased in the back after he had fled and sought shelter behind the counter in the storehouse, and in backing out of the house brandishing the weapon, made him the aggressor and provoked the difficulty, in *Gaines v. Com.* 88 Va. 682. In this case the accused had armed himself with a loaded pistol, and had nursed his purpose and brooded over the matter for some days previous.

And the accused provoked the difficulty where after being cautioned he went by the shop of the decedent, not in the discharge of any duty, but in order to provoke the deceased to begin the difficulty, and found the deceased sitting on the door step with a rifle, the accused being also armed with a policeman's club in his hand and a revolver under his arm, and after some words had passed between them each fired at the other, and the accused was struck in the thigh, and discharged four or five shots from his pistol at the deceased which resulted in death. *Zaner v. State*, 90 Ala. 651.

In *State v. Trammell*, 40 S. C. 331, the accused returned, and, contrary to the wishes and

against the protest of a restaurant proprietor, went into the kitchen of the restaurant and provoked a quarrel or difficulty with one of the waiters, who, he alleged, had insulted him, but who, it was proved, had subsequently asked pardon. In this case the accused shot the waiter and claimed in self-defense that the latter was advancing upon him with a carving knife, but the court considered that his action in going into the kitchen and again renewing the quarrel with the waiter brought about the difficulty.

And it was held that one who stopped at the shop of the deceased in order to quarrel with him provoked the difficulty as he was not acting lawfully in so doing and could not avail himself of the plea of self-defense in killing the decedent if he then killed him, even though such killing might have been necessary in order to preserve his life or his person from an imminent and enormous injury. *State v. Murdy*, 81 Iowa, 603, 614.

In a case in which the parties were not on friendly terms, and when they met the accused addressed the deceased, and claimed that the deceased then put his hand in his pocket, whereupon the accused produced his pistol and fired, the latter provoked the occasion, as the evidence showed that he armed himself and sought the deceased with the intention of provoking the difficulty, and that he expected it might be deadly. *State v. Hawkins*, 18 Or. 476.

Where the accused followed the deceased, and accosted him in relation to a previous difficulty, he brought on, and was the aggressor in, the difficulty, as he was not in any real or apparent danger which he could not easily and safely have avoided by retreat. *Rutledge v. State*, 88 Ala. 85, 89.

And where the accused had previously threatened the deceased's life and determined to kill him, and, seeing him, went out with his loaded gun for that purpose, he brought on the difficulty,—especially as he intended to use the gun if necessary for the purpose of killing. *Patterson v. State*, 75 Miss. 670, 676.

The accused's right to plead self-defense was also denied, where, although he did not intend to provoke a difficulty in seeking a business interview with the deceased, a difficulty ensued on account of abuses heaped upon him by the deceased in which he voluntarily slew the deceased in the heat of passion engendered by such abuse, in connection with the previous wrongs done him by the deceased without time for cool reflection. *Bonnard v. State*, 25 Tex. App. 173, 177.

In *State v. Campbell*, 107 N. C. 948, the deceased had been engaged in a dangerous affray some hours previous to the difficulty in which he was killed, and when on his way home carrying a pistol in his hands he was followed and arrested by the prisoner at the command of a justice of the peace without a warrant. He resisted the arrest and was killed. It was held that the arrest was without authority, and that the killing was not justifiable upon the ground of self-defense, and therefore the excuse offered that the arrest was made by the order of a justice of the peace was no justification, and the prisoner was looked upon as the aggressor and provoker of the difficulty.

And in all cases of this description the mere fact that the deceased strikes the first blow or fires the first shot, or throws his hand to his pocket as if to produce and use a deadly weapon, will not affect the position of the accused when his intention is to inflict the injury. *Adams v. State*, 35 Tex. Crim. Rep.

285, 295, in which case the intention was to kill the deceased if he did question the conduct of the accused or mentioned a certain matter. To the same effect, *Davis v. State*, 92 Ala. 20, 28; *State v. Neely*, 20 Iowa, 109, 115; *Allen v. State*, 66 Miss. 385; *State v. Crawford*, 115 Mo. 620; *Rogers v. State*, 95 Tenn. 448, 453; *Johnson v. State*, 26 Tex. App. 631, 641; *State v. Hudson*, 50 Mo. 135, 138; *Levy v. State*, 28 Tex. App. 203; *State v. McDaniel*, 94 Mo. 301; *Myers v. State*, 62 Ala. 599, 603; *State v. Scott*, 41 Minn. 356, 373; *State v. McDonald*, 67 Mo. 13, 18; *State v. White*, 18 R. I. 473, 480.

And it would also seem that the rule would be the same if the accused sought an interview with the deceased with no hostile intention, and the deceased became enraged and committed an assault upon the defendant inflicting pain and bloodshed and under the passion thus engendered accused shot and killed the deceased, although in such a case, as there would be adequate cause, the crime would not amount to murder. *Bonnard v. State*, 25 Tex. App. 173, 197, relying on *Hill v. State*, 8 Tex. App. 142; *Foster v. State*, 8 Tex. App. 249.

And one who arms himself and seeks another for the purpose of an affray or an altercation, and thus provokes and urges on the difficulty, to a point where there is an appearance of an attempt to use deadly weapons, provokes and brings on the difficulty, and he cannot claim that he acted in self-defense simply on the ground of apparent danger, as he is the active cause of such danger, and must abide by the condition of things which his own lawless conduct has produced. *State v. Hawkins*, 18 Or. 476, 481.

In all such cases, however, if the act of the accused in going or returning to the scene of the difficulty is peaceful there is no wrong done. *State v. Merriman*, 34 S. C. 40, 42.

And if the accused is in a place where he has a right to be, and is not engaged in an unlawful enterprise, he cannot be said to be the provoker of the difficulty in seeking the deceased if he meets him there, and his right of self-defense remains so long as he does nothing to commence the quarrel. *Long v. State*, 52 Miss. 23; *Crane v. Com.* 12 Ky. L. Rep. 161, 162; *Bohannon v. Com.* 8 Bush, 481, 8 Am. Rep. 474.

Thus, one who goes in good faith to work upon his own premises cannot be said to be the aggressor or to be provoking a quarrel or engaging in a misdemeanor or felony so as to deprive him of the right of self-defense, even though he may have reason to believe that his presence on the land may be offensive to another,—especially where there is no evidence that he went onto the land to taunt or provoke the deceased for the purpose of killing, or for any other purpose, and it is clearly shown that the time had come for him to assert his rights, and hold his possession, which the deceased, aided by others, was trying to take from him. *Milrainey v. State*, 33 Tex. App. 577, 592.

So, in *Johnson v. State*, 26 Tex. App. 631, 641, the plea of self-defense was held available as the act of the accused showed that he merely returned to the place of the difficulty for the sole purpose, and with the honest intention, of demanding a return of money, under an honest belief that the same belonged to him and had been wrongfully taken from him, and the second difficulty ensued by reason of the deceased's refusal to comply with his demand when he was assaulted by the deceased with a deadly weapon.

It would be otherwise, however, if he returned with the intention of renewing or pro-

voking the difficulty in order to get a pretext for killing the deceased, unless he proved that after entering into the difficulty he declined the combat and retreated. *Johnson v. State*, 26 Tex. App. 631, 641.

So, the mere fact that the accused looked up the deceased who had made certain charges against him, and after finding him proceeded some distance on the highway with him, and then killed him, is not of itself sufficient to prove that the event was brought about by the defendant's own wrongful act, as the act of the defendant in seeking the deceased was not in the first place wrongful or unlawful,—especially where his purpose was merely to find out whether the deceased had made charges against the defendant. *Maslie v. Com.* 16 Ky. L. Rep. 790, 793.

In such a case the acts of the parties after the meeting took place should be taken into consideration in considering the question of fault in bringing on the difficulty.

And the accused will not be considered as the provoker of the difficulty when he goes to the house of the deceased without any intention of injuring him, and his presence is in one sense wrongful, although not illegal, nor calculated to provoke the occasion; and in such a case his right of self-defense would not be abridged. *Franklin v. State*, 30 Tex. App. 628, 641.

And so the mere fact that before seeking the deceased the accused may have armed himself or made preparation for the carrying out or doing of the wrongful act is not alone sufficient to deprive him of his right to self-defense, if his acts when he meets or sees the deceased are not accompanied by any demonstration showing that he intended his acts to be wrongful. *Cartwright v. State*, 14 Tex. App. 486, 502; *Shannon v. State*, 35 Tex. Crim. Rep. 2; *Meuly v. State*, 26 Tex. App. 274.

He may arm himself expecting an attack, and yet his right to arm himself in his own proper defense is not gone where he does no overt act or makes no hostile demonstration. *State v. Hudspeth (Mo.)* 51 S. W. 483, 486; *State v. Evans*, 128 Mo. 410; *Cotton v. State*, 31 Miss. 504, 512; *Patterson v. State*, 75 Miss. 670, 675; *Hunt v. State*, 72 Miss. 413.

A party can arm himself and go where a person is, but after reaching there if he does not provoke the difficulty, or do some act, or make some statement reasonably calculated to provoke the difficulty, he cannot be convicted of provoking the difficulty. *Thomas v. State (Tex. Crim. App.)* 51 S. W. 1109.

And the question whether a party has the right to arm himself and go to the place of the homicide is said to depend upon circumstances. There is no question, however, but that he has not the right to arm himself and seek the deceased and kill him. *Rush v. State (Tex. Crim. App.)* 51 S. W. 238, 239.

In *State v. Packwood*, 26 Mo. 340, 364, the court reversed the judgment of the court below upon an indictment for murder upon the plea of self-defense, as the evidence did not show that the accused went to the deceased's house with the intention of provoking the difficulty, neither did it show that he did not provoke it after he got there, and even the state's evidence was clear and uncontradicted that he neither used any language nor did any act, actively or passively, or so conducted himself as to provoke a difficulty.

And so in *Hunt v. State*, 72 Miss. 413, the mere fact that the accused procured a pistol with a view to bring on the fight or of using it in any way in the fight, was held not to abso-

utely deprive him of his right of self-defense. In this case the accused went to the house of the deceased for the purpose of whipping him, and was profane and abusive, and refused to go away, and the deceased picked up a hoe and went out followed by the accused who advanced upon him with a stick, and the accused was knocked down three times by the deceased, and he then drew his pistol and shot the deceased as he was again approaching him with the hoe.

The holding in this case would seem to be based upon the theory that there was no evidence in the case sufficient to show that the accused went to the house of the deceased with the intention of committing the felony, or to kill the deceased, as he did not use his pistol until he had been assaulted three times, and then only when it might be said that his life was in danger. There might also be room for assuming that the accused was retreating or withdrawing from the difficulty as the shooting did not take place until he was outside of the yard of the premises, and then only when the deceased was again advancing upon him.

In *Alhrart v. State* (Tex. Crim. App.) 51 S. W. 214, wherein it was sought to hold the accused for manslaughter upon the ground that he sought the deceased with the intention of assaulting him, the court held that no matter what his purpose was in seeking the deceased, if when he met him he did nothing to provoke the difficulty, and the deceased assaulted him, his right of self-defense was protected.

And it has been held by the same court that the mere seeking of a party for the purpose of bringing on a difficulty is not the gist of the offense, but it is doing the acts that produce or provoke the difficulty that deprives him of the right of self-defense. *Mosee v. State* (Tex. Crim. App.) 51 S. W. 250, 251; *Thomas v. State* (Tex. Crim. App.) 51 S. W. 1109.

The mere fact that the defendant went to where the deceased was is not of itself sufficient to deprive him of the right of self-defense upon the ground of bringing on the difficulty. *Allen v. Com.* 86 Ky. 642, 647.

In any case of this character, therefore, the mere fact that the defendant sought the deceased for the purpose of settling the previous trouble will not be evidence of the fact that he provoked the difficulty, although, on the other hand, if he sought the deceased for the purpose of having a friendly talk, and then and there provoked the difficulty, the law of provoking the difficulty would apply. *Thomas v. State* (Tex. Crim. App.) 51 S. W. 1109.

It is the person's own original act when unlawful that limits his right to self-defense. He must have sought the difficulty with the deceased, and unless it is shown that he was the aggressor or trespasser his actions may be justified, and the wrong which will preclude him from making the defense must relate to the assault in resisting which the deceased was killed or the injury was inflicted.

This theory is in keeping with the decisions of the courts in *Cartwright v. State*, 14 Tex. App. 486, 502; *Cunningham v. State*, 17 Tex. App. 89, 97; *Gilleland v. State*, 44 Tex. 356; *Wilson v. State* (Tex. Crim. App.) 36 S. W. 597, 598 and the other cases which follow them collected in *I. supra*. It also finds support in the doctrine that the necessity which will deprive the defendant of his plea of self-defense must be intentionally produced, and must not be merely accidental or innocent. See *I. supra*.

The doctrine is further supported by the cases of *Winters v. State*, 37 Tex. Crim. Rep. 582; *Morgan v. State*, 34 Tex. Crim. Rep. 222; *Carter v. State*, 37 Tex. Crim. Rep. 404; and *Abram v. State*, 36 Tex. Crim. Rep. 44. 45 L. R. A.

c. Abuse or other act provoking attack by other party.

Generally any act of the accused done for the purpose of inducing his adversary to make an attack upon him in order that he may have an opportunity to kill amounts to bringing on the difficulty. *Carter v. State*, 37 Tex. Crim. Rep. 403.

And any act of the accused whereby he puts himself in the way of being assaulted in order that when hard pressed he may have a pretext for taking the life of his assailant amounts to bringing on the difficulty. *State v. Hicks*, 92 Mo. 431, 435; *State v. Peak*, 85 Mo. 190, 192; *Mitchell v. Com.* 33 Gratt. 872, 879.

The act of the accused in purposely provoking an assault by the deceased in order to afford an opportunity to slay him, and goading the deceased to madness and provoking his assault upon the accused, who thereupon kills him, amounts to provoking the difficulty, and makes the accused the aggressor, and bars his right of self-defense. *State v. Culler*, 82 Mo. 623; *State v. Hays*, 23 Mo. 287.

In *Johnson v. State*, 69 Ala. 253, 255, the act of the accused in placing a pistol under the chin of the prosecuting witness in an angry and insulting manner provoked and brought on the difficulty and commenced the battery, and so precluded him from pleading self-defense.

And the numerous devices resorted to by the accused and indulged in by him with the intention of inducing the deceased to strike him in order that he might have an excuse for using his cane and also a pistol which he carried in his pocket, in which he placed his hand on several occasions on the pretext of using it, and stepped back as if to retreat, but suddenly returned and shook his cane under the deceased's nose and then drew his pistol and fired the fatal shot, produced the occasion, in *State v. Bryant*, 102 Mo. 24, 31.

And the act of the accused in trying to make the deceased believe that he had the intention of killing him, and his action in holding his hands behind him, which caused the deceased to believe that he had a pistol, and thus excited his fears, amounted to bringing on the difficulty, in *Lingo v. State*, 29 Ga. 470, 474, and barred his right of self-defense.

And the fact that the accused entered into the difficulty without any intention to kill the deceased, and that the latter resorted to deadly weapons before the mortal wound was inflicted by the accused, does not remove from the latter the blame in bringing on the difficulty, and he will not be entitled to plead self-defense. *Stacey v. State* (Tex. Crim. App.) 33 S. W. 848.

The same doctrine is also declared in *Kinney v. People*, 108 Ill. 510, 526; *Davis v. State*, 92 Ala. 20, 28; *State v. Neeley*, 20 Iowa, 109, 115; *Allen v. State*, 96 Miss. 885; *State v. Crawford*, 115 Mo. 620; *Rogers v. State*, 95 Tenn. 448, 453; *Johnson v. State*, 26 Tex. App. 631, 641; *State v. Hudson*, 59 Mo. 135, 138.

And the accused will be considered as producing the occasion where he by words induces another to prepare for the conflict. *State v. Scott*, 41 Minn. 865, 875; *Moore v. People* (Colo.) 57 Pac. 857; *State v. Jones* (Kan.) 8 Crim. L. Mag. 143, 155; *Gibson v. State*, 80 Ala. 121, 124.

And if the words used by the accused lead to the difficulty he cannot claim self-defense as he is not free from fault. *Baldwin v. State*, 111 Ala. 11; *McQueen v. State*, 103 Ala. 12.

The act of the accused in using the first words of insult brought on and provoked the difficulty in *Howell v. State*, 79 Ala. 283, 284,

and barred his right of self-defense, no matter whether he fought willingly or unwillingly.

So, the act of the accused in bantering the deceased to fight in order that he might have an opportunity of taking his life, or committing a deadly harm upon him, amounted to provoking the difficulty, in *Bush v. People*, 10 Colo. 566, 575.

And where the accused from the first, by his abuse and assault, goaded the deceased into an assault upon him, he provoked the difficulty, and precluded his right to plead self-defense, and the shooting on his part was utterly without justification, as it was shown that he must have known that he was not in danger of any serious injury. *Barnett v. State*, 100 Ind. 171, 174.

So, in *Isaacs v. State*, 25 Tex. 174, 178, the profane language and angry gesticulations of the accused provoked the deceased to strike him, and were therefore considered the means whereby the difficulty was produced,—especially as the blow inflicted by the deceased was not followed up by him in any manner which would raise a reasonable expectation or fear of death in the mind of the accused whose life was not in danger. In this case after the deceased had retreated from the difficulty the accused drew a dagger and returned and killed him.

In *Myers v. State*, 62 Ala. 599, 603, the offensive remarks and overture to fight made by the accused the morning after a quarrel between the parties, and his movements in making the first hostile demonstrations and advancing upon the deceased in a threatening manner, produced the attack by the deceased upon him, and amounted to the bringing on of the difficulty and producing the occasion, and prevented his plea of self-defense.

So, the accused's assault upon the deceased and his impertinent and insulting questions causing an angry reply and a striking motion on the deceased's part, followed up by a series of brutal assaults by the accused, amounted to bringing on the difficulty in *State v. Kloss*, 117 Mo. 591, and the circumstance that the attention of the accused was called to the fact that the deceased was getting his gun was held not to justify the killing of the deceased so as to warrant the plea of self-defense.

And in *State v. McDonald*, 67 Mo. 13, 18, the accused used language of an insulting character without provocation, and seized a deadly weapon before using such language, and his acts in so doing were held to provoke the difficulty and to justify a reasonable apprehension on the part of the deceased that the accused intended to strike him with such weapon, and also his attack upon the accused in the first instance.

So, the use of insulting language and the seizure of a pistol by the accused from a bystander, and the firing of the same from behind such person by the accused, amounted to bringing on the difficulty, in *Godfrey v. Com.* 15 Ky. L. Rep. 3. In this case the accused had also made previous threats, and a feeling of revenge was entertained by him, against the deceased.

And the acts of the accused in *State v. Lewis*, 118 Mo. 79, amounted to bringing on the difficulty and barred his right of self-defense, as, after he had been released by a magistrate from an arrest at the instance of the deceased, he subsequently insulted the deceased upon the street and drew his pistol and shot the deceased as he turned round and made an effort to pull his hand out of his pocket as if about to strike the accused.

And insulting language used by the accused 45 L. R. A.

In a little dispute between the parties as to the continuance of the trial, which remarks the deceased told him he must take back, provoked the difficulty in *Turner v. State*, 89 Tenn. 547. In this case the deceased made no threats or assault and did not engage in any difficulty, and the accused drew his pistol and shot him.

So, the acts of the accused in refusing to leave the deceased's store in which he had no right to be, upon request, and his insulting and abusive language used at the time, produced the occasion and caused the deceased to assault him, in *People v. Robertson*, 67 Cal. 446, 650, and his right of self-defense was therefore barred. See also *Hinton v. State*, 24 Tex. 454, 460; *King v. State*, 13 Tex. App. 277; *Crawford v. State*, 112 Ala. 30, 31,—all of which are similar cases.

And the words spoken by the accused, which were foul and abusive, and were continued with numerous repetitions and variations down to the fatal termination of the affair, provoked the occasion in *State v. Bryant*, 102 Mo. 24, 31.

And an inquiry made by the accused of the deceased, not only calculated to provoke an altercation and angry discussion, but intended for that purpose, constitutes the bringing on of the difficulty, and makes the accused a wrongdoer, and bars his right of self-defense. *Jackson v. State*, 81 Ala. 33, 35.

But it has been held that mere trivial remarks or acts made or done as a joke, not calculated to excite anger, although done for the purpose of annoying, will not alone bar the right of self-defense. *Bennyfield v. Com.* 13 Ky. L. Rep. 446.

And so, in *Allen v. Com.* 86 Ky. 642, 648, it was said that even though such remarks might have to some extent contributed to the occasion, they would not bar the right of self-defense, provided they were not used as a shelter for an intended wrong.

And the same principles were involved in the case of *Boatwright v. State*, 89 Ga. 140.

And in *Brown v. State*, 58 Ga. 212, 215, a verdict of guilty was reversed, although the deceased had been provoked by the accused by opprobrious words, but such words would not call for or justify the action of the deceased in advancing upon the accused with a weight in his hands with which to strike the accused.

See also *Wilson v. People*, 94 Ill. 299; *State v. Scott*, 41 Minn. 365, 373; *Hunt v. State*, 72 Miss. 413; *Zaner v. State*, 90 Ala. 651; *Bonnard v. State*, 25 Tex. App. 173, 197,—all *supra*, 11. b; *Kirby v. State*, 89 Ala. 63, *supra*, 1.

III. Threats.

The question as to how far threats made by the deceased against the accused will justify the act of the latter in killing the former may be more properly treated of in considering the question of the accused's justification for acts occasioned by threats made against him. This phase of the subject will not therefore be considered in this note.

It may, however, without attempting to exhaust the authorities upon this question, be stated as a general rule that if the accused sought the deceased and brought on the difficulty he cannot avail himself of threats made against his life by the deceased as a justification of his acts on the ground of self-defense, as mere opprobrious epithets, however vile, do not justify an assault. *Levy v. State*, 28 Tex. App. 203, 211; *Turner v. Com.* 89 Ky. 78, 82; *State v. Brown*, 63 Mo. 439, 443; *State v. Gamble*, 119 Mo. 427.

With reference, however, to the question of threats made by the accused against the de-

ceased, the rule is that, if by threats or otherwise the accused intended to and did produce the occasion or difficulty with a view of killing the deceased, his right of self-defense is gone. *Smith v. State*, 15 Tex. App. 338, 347.

This is exemplified by the case of *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31, in which the accused made threats against a certain third party, and expressed an intention of going to the deceased's house on a certain date for the purpose of carrying out his purpose, the threats being admitted in evidence against him in order to show his animus in going there upon the day in question.

And so, in *Allen v. Com.* 10 Ky. L. Rep. 582, 704, the fact that the accused made a threat toward the deceased shortly before the killing, together with the fact that he went armed to the house of the deceased and began an unpleasant and angry conversation with him, was looked upon as sufficient to show that his act in killing the deceased was not solely in self-defense, and as sufficient to warrant a failure of the plea of self-defense.

And threats made by the accused the evening before the difficulty were admitted in evidence in *Moore v. People* (Colo.) 57 Pac. 857, and it was left for the jury to say whether or not they were applied to the deceased where there was no direct evidence that they were applied to any particular person.

This principle is further exemplified by the cases of *Patterson v. State*, 75 Miss. 670, 675, II. c. *supra*, and *Godfrey v. Com.* 15 Ky. L. Rep. 3.

In *Gilleland v. State*, 44 Tex. 356, II. c. *supra*, there were mutual threats, and the parties came together under circumstances showing that they were looking for each other, and there was no self-defense.

IV. Where relative or other party is the aggressor.

The doctrine of freedom from guilt, as expressed in the preceding sections of this note, applies with equal force to all cases in which a father, brother, husband, or other relative is the aggressor and has produced or brought on the difficulty in which the accused has interfered on his behalf, and in so doing has committed the offense for which he stands charged. Generally speaking, then, in all such cases the accused will not be allowed the benefit of the plea of self-defense unless such plea would be available to the relative or other party, in whose behalf the accused has interfered, in case he himself had committed the offense or wrongful act, as the rights of the one interfering are affected by the principle that the party bringing on the difficulty cannot avail himself of the doctrine of self-defense, nor can he take advantage of his own wrong. *Bush v. People*, 10 Colo. 566, 576; *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493, 499; *Gibson v. State*, 91 Ala. 64, 70; *Whitley v. State*, 91 Ala. 110; *Karr v. State*, 106 Ala. 1; *Caskey v. Com.* 15 Ky. L. Rep. 257, 258; *Stanley v. Com.* 86 Ky. 440.

A son can only interpose or interfere to prevent an injury to his father in the same manner that any other person can interfere for the same purpose, and if the father's assault upon the other party was an unlawful one the son will stand in no better position than the father. *Pinson v. State*, 23 Tex. 579, 583.

For this reason if a father at the time of the son's interference is himself a trespasser, the right of the son to repel the attack upon his father and to justify his actions upon the 45 L. R. A.

ground of self-defense does not arise. *Waddell v. State*, 1 Tex. App. 720, 722.

Therefore, the right of a son to defend his father is coextensive with the right of the father to defend himself, and the son cannot rely upon his own freedom from fault in bringing on the difficulty as a defense, where he knows that the father has provoked the attack. *Karr v. State*, 106 Ala. 1.

So, if a son fights in defense of his father his act in so doing will receive the same construction as that of his father, and if the father was the aggressor in bringing on the difficulty he cannot claim self-defense, and the same rule would apply to the action of the son. *State v. Brittain*, 89 N. C. 481, 500.

In *Obler v. Neal*, 1 Houst. (Del.) 449, 450, which was an action of assault and battery in which the accused sought to justify his actions in defense of his father, his plea was of no avail, as the facts showed that his father was the aggressor and committed the first assault, and was a trespasser from the beginning of the combat, and was not himself justifiable in the assault and battery committed by him upon the plaintiff, and the accused was therefore looked upon as a cotrespasser with his father.

A son cannot inflict any injury upon one who has been unlawfully assailed by his parent because the fortune of the fight turns against the assailant, his parent. *Waddell v. State*, 1 Tex. App. 720, 722.

In a case in which the accused, along with his father, without license or right, went to a barn on the complainant's premises in which the complainant was, with the evident design of forcing it open against his resistance, and they participated in a conflict in which the complainant made a thrust at them with a pitchfork which the father ward off, and then wrenched from the complainant's hands, whereupon the accused knocked the complainant down, it was held that their first act was one of unlawful force, and even though it might be true that the complainant was not justified in resisting with his pitchfork, yet it was equally true that the accused was not under any apprehension from the complainant's reputation as a man of violence, and that the accused and his father sought the affray and were wanton aggressors. *People v. Miller*, 49 Mich. 23. *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162, and *Abbott v. People*, 86 N. Y. 460, relied upon.

So, a father will not be justified in killing the adversary of his son, where the son has provoked and brought on the conflict in which the son has so placed himself in imminent danger. *State v. Linney*, 52 Mo. 40, 41; *Bush v. People*, 10 Colo. 566, 575.

In *State v. Hays*, 67 Mo. 692, the accused's plea of self-defense, in the supposed defense of his son, was rejected in a prosecution for felonious assault, where the facts did not show that the party upon whom he made the assault was doing an act which he had no right to do, namely, arresting the son, for the reason that it was the accused's duty to judge for himself and see whether the information that he had received, and upon which he acted in making the assault, was correct.

The doctrine that self-defense is of no avail where the accused is the aggressor particularly holds in the case of a brother who seeks to set up such defense, where the evidence shows that both were participants and principals in the encounter that resulted in the killing of the deceased. *Smurr v. State*, 105 Ind. 125, 135.

So, one cannot strike to relieve his brother from peril unless the latter is free from fault in bringing on the difficulty which placed him in peril. *Gibson v. State*, 91 Ala. 64, 70.

And although it may be the general rule that a brother may lawfully defend his brother when in peril, and if need be take life in such defense, yet this rule does not apply where both the brothers are in fault and unite in wrongfully bringing on the fatal encounter. *Smurr v. State*, 105 Ind. 125, 135.

The accused was not justified in killing the deceased in defense of his brother when the deceased was engaged in the performance of a lawful act, namely, defending himself against a sudden assault of the brother. *People v. Travis*, 56 Cal. 251, 255.

In *State v. Melton*, 102 Mo. 683, 688, the brother and the accused both sought and brought on the difficulty, and there was evidence which tended to show that they both went to the place where the assault occurred with the intention of creating the difficulty with the party assaulted. As, therefore, the brother was in the wrong, the accused's right to the plea of self-defense was no greater than that of his brother, and the accused could not therefore justify his assault upon the ground of the defense of his brother.

But in *People v. Curtis*, 52 Mich. 616, which was an information for murder which was the result of an altercation and a riotous affray, the court upheld the right of one to interfere on behalf of his brother, where the latter was in personal danger, no matter whether the brother was to blame or not; and if in such a case a deadly weapon is used, such fact does not *per se* show malice when neither of them started the affray and there was no period of cooling time or opportunity to withdraw. In this case, however, it would seem that neither brother brought on or provoked the difficulty.

But if the act of the party in whose behalf the accused engaged in the difficulty was lawful the act of the latter would also be lawful.

This proposition is exemplified by the case of *Bush v. People*, 10 Colo. 566, 581, wherein the accused's brother was the owner of land whereon the deceased had erected a shanty without his knowledge or consent, and was then in possession, and the owners with other parties entered upon the premises for the purpose of forcibly ejecting those in possession and removing the shanty. In this case the court committed error in instructing the jury that if they found that the accused in company with his brother or son, after entering upon the land in furtherance of the common design, was aiding and advising him therein, and was aware at the time that the difficulty had arisen from such entry and design, then the killing would not be justifiable and the accused should be found guilty, for the reason that if the act of the brother in entering upon the land was lawful the act of the accused in accompanying and aiding him was also lawful.

In some cases, however, of this particular class, the question of notice has formed a material point in determining the right of the accused to justify his actions upon the ground of self-defense.

The rule is well stated by the court in *Foster v. State*, 8 Tex. App. 248, 252. The question whether one who interposes on behalf of one who is the aggressor is justified in taking life upon the ground of a reasonable expectation or fear of death or grievous bodily harm depends upon his knowledge of the antecedent facts, and his guilt must rest upon his guilty knowledge and guilty intent. *Guffee v. State*, 8 Tex. App. 187, to the same effect.

This rule is exemplified by the case of *Karr v. State*, 106 Ala. 1, wherein it is said that a son cannot rely upon his own freedom from

fault in bringing on the difficulty when he has knowledge that his father, on whose behalf he interfered, provoked the attack.

It also finds support in the cases of *Bush v. People*, 10 Colo. 566, 576, and *State v. Linney*, 52 Mo. 40. In these cases, however, the doctrine was held to apply when the accused had notice that the one he assisted had provoked the difficulty.

So, the same duty to retreat or withdraw from the conflict is imposed upon the aggressor in this class of cases. And if the brother, father, or other relative in whose behalf the accused interferes is the aggressor, and has nor withdrawn or retreated, or declared his bona fide intention of so doing before the accused interferes on his behalf, the plea of self-defense will not avail the accused.

Thus, in *Smurr v. State*, 105 Ind. 125, 135, the court held that if a brother in whose defense the accused engages is in fault, and has not retreated or attempted to retreat, the interference of the accused is not justifiable or excusable. To the same effect, *State v. Greer*, 22 W. Va. 800, 819; *Bush v. People*, 10 Colo. 566, 576.

And even if the accused has any occasion to fear harm from the deceased to himself or to his brother at the time of the fatality, it is his duty to withdraw from a conflict which the evidence justifies the jury in finding he has wrongfully brought on. *Deal v. State*, 140 Ind. 354, 362.

In *Whitley v. State*, 91 Ala. 110, the court did not expressly pass upon the question whether one may not lawfully strike in defense of his brother when engaged in a personal encounter where he has no knowledge that the latter is in fault in bringing on the difficulty or might have avoided it by retreat; but it held that where there was an opportunity to retreat after such interference he could claim no greater right than the other, and that neither of them could invoke the doctrine of self-defense.

See generally, as to the duty of the aggressor to retreat, IX. *infra*.

V. In case of mutual combat.

The general rule hereinbefore stated holds good in cases of mutual combat entered into, where death or serious bodily injury is likely to result. *Habel v. State*, 28 Tex. App. 588, 599; *King v. State*, 4 Tex. App. 54, 30 Am. Rep. 160; *Crist v. State*, 21 Tex. App. 361; *Thumm v. State*, 24 Tex. App. 667; *Williams v. State*, 25 Tex. App. 216.

Thus, if one goes and arms himself to engage in a combat with deadly weapons on an invitation accepted, or upon mutual agreement, and engages in it, he cannot justify his actions on the ground of self-defense. *Evans v. State*, 44 Miss. 762, 767; *State v. Petsch*, 43 S. C. 132.

And self-defense is not available as a plea to one who by prearranged duel, or by consent, has entered into a deadly mutual combat in which he slays his adversary. *People v. Hecker*, 100 Cal. 451, 80 L. R. A. 403.

Both parties will be the aggressors where there is a mutual combat between them, and the killing of one by the other will amount to manslaughter at the least; yet, if in such a case the survivor proves that he refused to continue the fight and retreated as far as he safely could do before he inflicted the mortal injury, and that the killing was necessary in order to protect his own life, or to prevent great bodily harm to himself, he may justify his actions. *State v. Spears*, 46 La. Ann. 1524, 1526.

If, however, the counter assault be so sud-

den and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then as the graver wrong; of the deadly assault is upon his opponent he would be justified in slaying forthwith in self-defense. *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403.

In *Gilleland v. State*, 44 Tex. 356, there were mutual threats and illfeeling between the parties, and they came together under conditions which showed that they were looking for each other. The plea of self-defense was therefore of no avail. See III., c. *supra*.

It was also denied in the case of *Presner v. State*, 77 Ind. 274, 278, where the accused entered into a mutual combat armed with a dangerous weapon, and struck the deceased therewith when struck by the latter with his fist.

In *Harris v. State* (Ala.) 26 So. 515, the court held that although the accused might not have done anything to bring about the difficulty, yet she would be guilty of an assault and battery if she struck the prosecuting witness in a mutual combat, or if she struck a blow after the necessity to strike had passed, and followed and relied upon *Howell v. State*, 79 Ala. 284.

As to retreat in cases of mutual combat, see *Story v. State*, 99 Ind. 413, 415, *infra*, IX. a.

VI. Former quarrel induced by deceased.

In some cases the accused has sought to free himself under the plea of self-defense, upon the ground that the quarrel preceding the one in which the homicide occurred was superinduced by the deceased. In such cases, however, the plea of self-defense will be of no avail where the first quarrel has ended, and there has been a cessation of the conflict, or the deceased has withdrawn therefrom, and the subsequent difficulty is provoked or brought about by the accused himself, as he is the aggressor in bringing on or renewing the affray, even though in so renewing the difficulty he has no intention of killing or of doing serious bodily harm. But the rule would be the reverse if there was no cessation from the time the deceased struck the first blow or commenced the difficulty. *Bean v. State*, 25 Tex. App. 346, 356.

This rule is well exemplified by the cases of *Tidwell v. State*, 70 Ala. 33, 46, and *Stillwell v. State*, 107 Ala. 16, 20.

In the former of these cases it is said that if the quarrel in which the assault was made had been quieted, and the parties subsequently came together on friendly terms, and the accused assailed the deceased and killed him, and there was no act or word from the deceased which could impress the accused with any apprehension that he was in peril of life or of grievous bodily harm, the plea of self-defense will be of no avail, and the fact that a former assault was made by the deceased upon the accused is not a fact to be considered as having a tendency to show that the homicide was in self-defense. *Tidwell v. State*, 70 Ala. 33, 46.

In the latter case after deceased had assaulted the accused the latter picked up a poker with which to return the blow, but was prevented by a bystander and put the weapon down, but, after the deceased had started away and got to the door of the house, the accused again picked up the weapon and followed and struck the deceased over the head therewith and caused his death. The use of the weapon in such a case was looked upon as not merely the result of passion, but of revenge or malice, and the accused was the aggressor *ab initio*, for the reason that although the deceased was

the first to bring on the quarrel he desisted and retired. *Stillwell v. State*, 107 Ala. 16, 20.

It is also supported in *Hadley v. State*, 58 Ga. 309, as follows: And if one is in the place where he has a right to be and to stay, and is unlawfully assaulted with a weapon likely to produce death, and escapes from the place and runs to his dwelling house some 60 yards distant, where he procures a pistol and returns instantly and finds his assailant upon the premises with no weapons, and making no hostile demonstrations, he cannot lawfully shoot at the assailant; and in such a case he will be legally convicted of an unlawful shooting and the plea of self-defense will not avail him.

So, where, after an encounter, the parties separated, and the deceased withdrew and closed himself up in his house, into which the accused subsequently gained admission through a fraudulent statement, and brought about a new encounter in which he killed the deceased, the plea of self-defense was not successful, even though he did not bring about the first difficulty, and was free from fault therein, as he was clearly the aggressor in the second encounter. *Drake v. Com.* 14 Ky. L. Rep. 677, 678.

And in a case in which there was a conflict in the evidence as to who created the difficulty and fired the first shot, but the undisputed fact showed that there was a passage of angry words between the parties accompanied by a show of violence on the deceased's part and a disclaimer by the accused of certain threatening and abusive language attributed to him by the deceased, in which the deceased closed the controversy with the reply, "That settles it then," and returned the pistol he had displayed to his pocket and walked off with his back towards the accused, who stopped the deceased before he was out of hailing distance and exclaimed, "We had as well settle this thing now," accompanying the words with a display of a pistol held in both hands which he used with deadly effect, the accused was the aggressor and his plea of self-defense was of no avail as his acts amounted to a renewal of the difficulty after it had been abandoned by the deceased. *Allen v. State*, 24 Tex. App. 216, 224.

In *Mason's Case*, 1 East, P. C. 239, the accused was indicted and convicted of wilful murder of his brother, and the court held that even blows previously received would not extenuate homicide or deliberate malice and revenge, especially where it was to be collected from the circumstances that the provocation was sought for the purpose of coloring the revenge.

Where the evidence showed that after the accused was shot he proceeded some distance further in the direction of the deceased, and that the latter attempted to use the ax only after the former was shot and had advanced into the house, and the accused knew that the relations between himself and the deceased were such as to warn him that any attempt by him to enter the deceased's residence would be resented or resisted, the charge to the jury should hypothesize the accused's freedom from fault, not only in going to the house, but also in entering therein after he was shot and putting himself in reach of the ax or other weapon used by the deceased, and he was not relieved of the duty to retreat when after being assaulted he advanced into further peril and thereby unnecessarily exposed himself in a position out of which escape with safety was impracticable. *Davis v. State*, 92 Ala. 20, 28.

As to seeking the deceased for the purpose or intention of provoking, or returning to the place where the deceased is for the purpose of renewing, the difficulty, see II. b. *supra*.

VII. Burden of proof of freedom from fault.

The rule is that the fault of the accused when shown is an answer to the plea of self-defense, but its existence is not presumed so as to impose on him the burden of its disproof, as it is for the prosecution to prove that he was in fault in the first instance. *Gibson v. State*, 89 Ala. 121, 127; *Keith v. State*, 97 Ala. 32, 34; *McDaniel v. State*, 76 Ala. 5; *Brown v. State*, 83 Ala. 33; *Cleveland v. State*, 86 Ala. 1, 9.

It must be shown that the accused sought the difficulty with the deceased, or that he forfeited his right of self-defense by so doing. *Tillery v. State*, 24 Tex. App. 251, 270, 274.

And if the facts do not show that the accused was the aggressor or trespasser his acts may be justifiable. *White v. Territory*, 3 Wash. Terr. 397.

The burden of such proof rests upon the state when a case of self-defense is made out by the accused, and if it appears that he was not free from fault in bringing on or provoking the difficulty, the law will not shield him from the consequences of committing a homicide, the result of his own fault, although at the time of the killing there was a pressing necessity to strike in order to save his own life, and there was no mode of escape. *Holmes v. State*, 100 Ala. 80, 84.

In order to make the plea of self-defense available the accused must be without fault, and the court may so charge the jury without any invasion of the rule as to the burden of proof, especially where such phrase is only a part of the charge which clearly and correctly defines the doctrine of self-defense, and does not misplace the burden of proof,—especially when the accused's evidence tends to prove his plea, and that of the state shows that he was in fault in bringing on the necessity for his actions. *Wilkins v. State*, 98 Ala. 1.

It must be shown that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. *People v. Batchelder*, 27 Cal. 69, 85 Am. Dec. 231, 237.

If the accused shows a real or apparent pressing necessity to take life in self-defense, the burden is on the state to show that he was in fault in bringing on or provoking the difficulty, and not on the accused to prove that he did not provoke it, as the state holds the affirmative of these negative propositions. *Gibson v. State*, 89 Ala. 121, 128; *Brown v. State*, 83 Ala. 33; *McDaniel v. State*, 76 Ala. 1.

But after the intentional killing of the deceased by the accused has been proved by the prosecution, the burden rests on him to prove a pressing necessity to take life in self-defense, unless the fact arises from the evidence produced against him, and in such cases the *onus* is upon him to show that he could not safely retreat without apparently increasing his peril. *Cleveland v. State*, 86 Ala. 2; *Lewis v. State*, 88 Ala. 11; *Gibson v. State*, 89 Ala. 121, 127; *Nabors v. State* (Ala.) 25 So. 529, 531.

In the last-named case the court considered the earlier case of *Brown v. State*, 83 Ala. 33, in so far as it asserted a different rule, to be overruled by the *Cleveland* and other later cases.

The rule as declared in the *Cleveland* and other cases above cited therewith is further supported by the case of *State v. Petsch*, 43 S. C. 132.

And in *State v. Stanley*, 33 Iowa, 526, 532, it is held that the fact that there may have been a change of conduct or action on the accused's approaching the deceased, and that such

change will entitle him to a plea of self-defense, must be proved by him.

VIII. Question for the jury.

The general rule in all cases in which the accused seeks to free himself from liability upon the ground of self-defense is that the fact whether an act done or the words spoken by the party are of a character to provoke a difficulty and did so provoke it is a fact to be considered by the jury, and it is for the jury to consider and determine the question whether the accused acted in self-defense, and also whether from the facts proved he by his own wrongful acts brought about the danger, if any, to himself. *Baldwin v. State*, 111 Ala. 11; *McQueen v. State*, 103 Ala. 12; *Logsdon v. Com.* 19 Ky. L. Rep. 413, 414.

In all cases therefore where the issue is raised as to who provoked the difficulty, the court should lay before the jury the circumstances indicated by the evidence raising the issue of such provocation. *Morree v. State* (Tex. Crim. App.) 51 S. W. 250, 251.

And such question must be determined by the jury upon the evidence. *State v. Hopkins*, 50 La. Ann. 1171, 1172.

And if the evidence shows that the accused returned to the scene of the difficulty and applied opprobrious epithets to the deceased and threatened to kill him in the hearing, although not in the immediate presence, of the deceased, the question what constitutes a wrong which will deprive the accused of the right to plead self-defense should be expounded to the jury without giving undue prominence to specific facts proved or attempted to be proved for the purpose of showing the existence of the wrong. *Boner v. Com.* 19 Ky. L. Rep. 409, 410.

And if it is questionable which party was in the wrong, it is for the jury to determine from the evidence who was the assailant in the affray which resulted in the death, and the court should not assume that one party or the other was first or chiefly in fault when that fact is in issue. *State v. Hatch*, 57 Kan. 420, 424.

Where there is testimony that one was the aggressor by using the first provoking remark, and by striking the first blow, and the other evidence conflicts with this, it is for the jury to determine which line of the testimony they believe; and the court, no matter what was the disparity in the number or even in the manner of opposing witnesses, is in no sense charged with the duty of deciding such controverted issue of fact, as it is a question of fact for the jury, and not of law for the court. *Gibson v. State*, 91 Ala. 64, 69.

In some cases it becomes necessary for the court to explain to the jury the meaning and application of the phrase "wrongful act" where the accused sets up the plea of self-defense, and where it is claimed that he brought on the difficulty by his own actions.

Thus, in *Massie v. Com.* 16 Ky. L. Rep. 790, 793, in which the accused sought the deceased for the purpose of having a certain charge cleared up, it was held that the term "wrongful act" should have been explained to the jury, and that a charge to the jury which made the meeting in itself an unlawful act, or from which the jury could infer that it was such, was erroneous, and the wrongful act in such a case related to what subsequently transpired at the meeting, and not to the accused's act in seeking the deceased, as such act was not in itself wrongful or unlawful.

And in cases which involve the accused's right to be in or at, or to go to, a certain place—

where he meets the deceased, the jury should not be charged or instructed generally that if the accused "brought about a meeting" between himself and the deceased, as such instruction would be too general in its language for the reason that it might lead the jury to believe that by so going he "brought about the meeting," and that his act alone deprived him of his right of self-defense, even though they might believe that after his arrival he was in no way or to any extent the aggressor. *Crane v. Com.* 12 Ky. L. Rep. 161, 162.

IX. The question of withdrawal.

a. In general.

See, as to withdrawal in cases in which a relative or other party is the aggressor, IV. *supra*.

Although the general rule of law in all cases in which the accused is the aggressor is as defined in the prior sections of this note, yet it is not of absolute and unmixd application, and the courts admit of exceptions thereto in some cases.

Thus, even though the accused may in the first instance have intentionally brought on the difficulty and provoked the occasion, yet his right of self-defense will revive, and his actions will be held justifiable upon the ground of self-defense in all cases where he has withdrawn from the affray or difficulty in good faith as far as he possibly can, and clearly and fairly announced his desire for peace; and in such cases if he is pursued by the other party, who again brings on the difficulty, his right of self-defense, though once lost, revives, and may be successfully pleaded by him in defense of any action, either civil or criminal, arising out of the occasion, as his actions will be justified even to the extent of taking life if necessary in order to save his own.

The above statement of the law finds support in the case of *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470, 473, in the following language: The conduct of the accused, relied upon to sustain the plea of self-defense, must have been so marked in the matter of time, place, and circumstance, as not only clearly to evince the withdrawal of the accused in good faith from the combat, but also such as fairly to advise his adversary that his danger has passed, and to make his conduct thereafter the pursuit of vengeance rather than measures taken to repel the original assault; and when this is made to appear, however criminal the previous conduct of the accused may have been, he cannot be hunted down and his life put in jeopardy, and denied the right to act upon that instinct of self-preservation which spontaneously arises alike in the bosoms of the just and unjust, and the right is not forfeited by previous misconduct. See also *Brazzil v. State*, 28 Tex. App. 584; *Roberts v. State*, 30 Tex. Crim. Rep. 291, 306.

For this reason, therefore, it is not true that the right of self-defense can never arise at any stage of a difficulty when one is defending himself against dangers of any kind that he may have unlawfully provoked. *Patterson v. State*, 75 Miss. 670, 675.

The following cases, arranged in order of states, affirm the above doctrine:

Alabama.
Parker v. State, 88 Ala. 4, 7; *Stillwell v. State*, 107 Ala. 16, 20; *Crawford v. State*, 112 Ala. 1, 33; *Elland v. State*, 52 Ala. 322; *Bostic v. State*, 94 Ala. 45, 47; *Johnson v. State*, 58 Ark. 57, 64; *Feiker v. State*, 54 Ark. 489; *Alkin v. State*, 58 Ark. 544, 550.
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California.

People v. Miller (Cal.) 57 Pac. 770; *People v. Roemer*, 114 Cal. 51; *People v. Kennett*, 114 Cal. 18, 21; *People v. Bush*, 65 Cal. 129, 133; *People v. Simons*, 60 Cal. 72; *People v. Button*, 106 Cal. 628, 28 L. R. A. 501; *People v. Batchelder*, 27 Cal. 69, 85 Am. Dec. 231, 237; *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403; *People v. Robertson*, 67 Cal. 646, 650; *People v. Morine*, 61 Cal. 367, 369; *People v. O'Brien*, 78 Cal. 41, 48; *People v. Scott*, 123 Cal. 434; *People v. Gonzales*, 71 Cal. 569; *People v. Daniels*, 70 Cal. 521, 523; *People v. Wong Ah Teak*, 63 Cal. 544, 545; *People v. Reed* (Cal.) 52 Pac. 835, 836; *People v. Westlake*, 62 Cal. 303.

Colorado.

Boykin v. People, 22 Colo. 496, 504.

Delaware.

State v. Warren, 1 Marv. (Del.) 487, 490, 491.

Florida.

Padgett v. State (Fla.) 24 So. 145, 147; *Merced v. State* (Fla.) 26 So. 317.

Georgia.

Roach v. State, 34 Ga. 78; *Stiles v. State*, 57 Ga. 183, 188; *McPherson v. State*, 22 Ga. 478, 490.

Illinois.

Hopkinson v. People, 18 Ill. 264; *Adams v. People*, 47 Ill. 376; *Greschla v. People*, 53 Ill. 295; *Kinney v. People*, 108 Ill. 519, 526; *Galney v. State*, 97 Ill. 271.

Indiana.

Hittner v. State, 19 Ind. 48, 52; *Deal v. State*, 140 Ind. 354, 362; *Presser v. State*, 77 Ind. 274, 277; *Story v. State*, 99 Ind. 413, 415.

Iowa.

State v. Neeley, 20 Iowa, 109; *State v. Stanley*, 33 Iowa, 526, 532; *State v. Archer*, 69 Iowa, 420, 425; *Shipley v. Edwards*, 87 Iowa, 310.

Kansas.

State v. Hatch, 57 Kan. 420, 424; *State v. Rogers*, 18 Kan. 78, 26 Am. Rep. 754, 759.

Kentucky.

Massie v. Com. 16 Ky. L. Rep. 790, 793; *Crane v. Com.* 12 Ky. L. Rep. 161, 162; *Fitzgerald v. Com.* (Ky.) 6 S. W. 152; *Barnard v. Com.* (Ky.) 8 S. W. 444, 445; *Luby v. Com.* 12 Bush, 5, 7; *Cogswell v. Com.* 17 Ky. L. Rep. 822, 824; *Allen v. Com.* 86 Ky. 642; *Terrell v. Com.* 13 Bush, 246.

Louisiana.

State v. Candelene, 50 La. Ann. 847, 855; *State v. Spears*, 46 La. Ann. 1524, 1526; *State v. Thompson*, 45 La. Ann. 969, 970; *State v. Tucker*, 38 La. Ann. 536, 789.

Massachusetts.

Com. v. Riley, Thacher, Crim. Cas. 471, 475; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70, 74.

Mississippi.

Evans v. State, 44 Miss. 762; *Patterson v. State*, 75 Miss. 670, 675; *Smith v. State*, 75 Miss. 542, 552; *Cotton v. State*, 31 Miss. 504, 512.

Missouri.

State v. Partlow, 90 Mo. 608, 59 Am. Rep. 31; *State v. Cable*, 117 Mo. 380; *State v. Herrell*, 97 Mo. 105; *State v. Gilmore*, 95 Mo. 554; *State v. Vaughan*, 141 Mo. 514, 521; *State v. Vanzant*, 80 Mo. 67, 69, 79; *State v. Gamble*, 119 Mo. 427, 432; *State v. Parker*, 106 Mo. 217.

Nevada.

State v. Kennedy, 7 Nev. 374, 376; *State v. Smith*, 10 Nev. 106, 121.

New York.

People v. Johnson, 139 N. Y. 358; *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 323, 350.

Ohio.

Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470.

Oregon.

State v. Hawkins, 18 Or. 476.

Tennessee.

Rippy v. State, 2 Head, 217; Turner v. State, 89 Tenn. 547.

Texas.

Meuly v. State, 26 Tex. App. 274; Roberts v. State, 30 Tex. Crim. Rep. 291, 306; Brazzil v. State, 28 Tex. App. 584; Carter v. State, 37 Tex. Crim. Rep. 403; Roach v. State, 21 Tex. App. 249, 254; McSpotton v. State, 30 Tex. App. 617, 618; Burris v. State, 34 Tex. Crim. Rep. 387; Johnson v. State, 26 Tex. App. 631, 641; Jackson v. State, 28 Tex. App. 108, 111; Peter v. State, 23 Tex. App. 684, 687; Carter v. State, 30 Tex. App. 551.

Utah.

People v. Hite, 8 Utah, 461, 477.

Virginia.

Brown v. Com. 86 Va. 466, 470.

Washington.

State v. McCann, 16 Wash. 249.

West Virginia.

State v. Cain, 20 W. Va. 679, 703; State v. Greer, 22 W. Va. 800, 819; Brown v. Com. (Va.) 10 S. E. 745, 746; State v. Evans, 33 W. Va. 417, 421.

Wisconsin.

Frank v. State, 94 Wis. 211.

United States.

Rowe v. United States, 164 U. S. 546, 555, 557, 41 L. ed. 547, 551; Helms v. United States (Ind Terr.) 52 S. W. 63.

England.

Reg. v. Smith, 8 Car. & P. 160.

The same rule applies under § 197 of the California Penal Code. People v. Button, 106 Cal. 628, 28 L. R. A. 591.

And § 721, Colo. Gen. Stat. also re-enacts the common-law rule as above stated. Bush v. People, 10 Colo. 566, 574.

And the rule holds good even though the accused was in the wrong, and commenced the affray with no intent to kill or inflict great bodily harm, and the other party being then provoked made a deadly assault. State v. Hatch, 57 Kan. 420, 424; State v. Rogers, 18 Kan. 78, 26 Am. Rep. 754.

The doctrine is based upon the principle that though a man should be in the wrong in the first instance yet a space for repentance is always open. State v. Cable, 117 Mo. 380; State v. Partlow, 90 Mo. 608, 59 Am. Rep. 31; Johnson v. State, 58 Ark. 57, 64.

But he must clearly announce his desire for peace. Roberts v. State, 30 Tex. App. 291, 306; Brazzil v. State, 28 Tex. App. 584.

And the evidence must show that the accused ceased his attack upon the deceased with the intention of withdrawing from the difficulty. Fitzgerald v. Com. (Ky.) 6 S. W. 152.

The above rule is well expressed by the court in the case of Stoffer v. State, 15 Ohio St. 47, 86 Am. Dec. 470, as follows: While the aggressor remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own, and in such a case he brings the necessity upon himself by his own criminal conduct, but when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as, at the same time, to manifest his own good faith and to remove any just apprehension from his adversary, he is again remitted to his right of self-defense, and may make it effectual by opposing force to force, and when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it. 45 L. R. A.

In the case of People v. Conkling, 111 Cal. 616, 626, the true principle is stated to be that, where a person has been feloniously assailed, and the felon has desisted from his attempt and taken to flight, the right to pursue for the purpose of private defense ceases as soon as in the reasonable belief of the assailed, the danger has ceased to be immediate and impending.

In State v. Greer, 22 W. Va. 800, 819, it is said that it is only the faultless that are exempt from the necessity of retreating while acting in self-defense. If from the fierceness of the attack, or for other reasons, they (the faultless) are unable to retreat they will be excused by the law for not doing so.

And the law of self-defense is so strictly applied that in order to reduce the offense to killing in self-defense two things must appear from the evidence and the circumstances of the case: first, the accused must prove that before the mortal blow was given he declined further combat and retreated as far as he could with safety, and secondly, he must show that he necessarily killed the deceased in order to preserve his own life and to protect himself from great bodily harm. State v. Evans, 33 W. Va. 417, 421; State v. Cain, 20 W. Va. 679; People v. Johnson, 139 N. Y. 358. In the latter case it is also said that there must be reasonable grounds for believing that he is in great peril.

He must retreat as far as the fierceness of the assault will permit him. Story v. State, 99 Ind. 413, 415.

Yet the party withdrawing from a combat is not required to retreat further when it cannot be done without probable death, and when the only apparent means of escape is to turn and attack his pursuer. State v. Partlow, 90 Mo. 608, 59 Am. Rep. 31.

If after retreating he is urged by mere necessity, and so kills his adversary for the preservation of his own life, the killing is excusable, and he may plead self-defense. Com. v. Riley, Thacher, Crim. Cas. 471, 475.

And if after abandoning and retreating from the difficulty impending violence is offered against him during his flight, he can resort to any means necessary for his protection. Felker v. State, 54 Ark. 489.

So, in the case of mutual combat where both parties are in the wrong neither can right himself except by retreating to the wall, and where one, contrary to his original expectation, finds himself so hotly pressed as to render the killing of the other necessary to save his own life, he is guilty of a felonious homicide if he kills him, unless he first actually puts into exercise this duty of withdrawing from the place. Story v. State, 99 Ind. 413, 415.

If there is reason to believe that the accused, although the aggressor in the first instance, did retreat or withdraw from the contest, he should be given the benefit of such belief. Hittner v. State, 19 Ind. 48, 52.

Thus, the question of abandonment of the contest is involved and should be considered in a case where the accused, tried for murder, went to the deceased's house for the purpose of beating him, but retreated from the fight, and while so doing was knocked down three times, when he drew his pistol and shot the deceased. Hunt v. State, 72 Miss. 413.

So, the doctrine of retreating from the difficulty by the accused, equally applies to those who are engaged with him in the attack, and are his voluntary helpers therein, and coconspirators with him.

Thus, in Bostic v. State, 94 Ala. 45, 47, the

court held that both the party who provokes a difficulty and his voluntary helper must clearly retire from the conflict; and to restore him to the full measure of *se defendendo* his conduct must plainly show that his purpose has ceased to be hostile.

And in such cases the accused is responsible to the same extent as if he had done the acts committed by any one of the coconspirators engaged, and to reinstate himself to his right of self-defense he must not only have abandoned the difficulty himself in good faith unequivocally, but his coconspirators must also have done so. He is responsible for their acts. *Burris v. State*, 34 Tex. Crim. Rep. 387, 391. See also *Gibson v. State*, 89 Ala. 121, 127, to the same effect.

In order, however, to make a withdrawal available as a defense it must not be colorable. *Johnson v. State*, 58 Ark. 57, 64; *Parker v. State*, 58 Ala. 4, 7.

The retreat must not be merely for gaining fresh strength or taking some new advantage for an attack. *Ibid.*

It must be a retreat or flight, and not a mere design to protect himself under the shield of the law. *Hittner v. State*, 19 Ind. 48, 52.

So, if the intention of abandoning the conflict is not real and bona fide on the part of the accused, he will still continue to be regarded as the aggressor. *Roach v. State*, 21 Tex. App. 249, 254.

In accordance with the rule, as above expressed, therefore, a mere retreat and firing back will not be sufficient: the difficulty must have ceased, or he must have shown to his adversaries an unequivocal intention to abandon the difficulty. *Burris v. State*, 34 Tex. Crim. Rep. 387.

In cases in which the accused has retreated from the difficulty in good faith, and in which he is pursued by the deceased who renews the difficulty, the first difficulty has nothing to do with the second except as it illustrates the malice by which the parties might be actuated in engaging in the second encounter, and the question of provoking the difficulty should be expressly limited to the acts and conduct of the parties in the last affray or encounter. *Brazill v. State*, 28 Tex. App. 584; *Carter v. State*, 30 Tex. App. 551; *Peter v. State*, 23 Tex. App. 684.

And if the deceased persists in attacking the accused after the latter has desisted in his attack upon the deceased, the fact that the accused was at fault in bringing on the difficulty in the first instance will not deprive him of the right of self-defense. *People v. Farley* (Cal.) 57 Pac. 571.

This is so for the reason that the right of the deceased to employ force also ceases, and as soon as a new attack is made by the deceased the right of the accused to defend himself revives, and his plea of self-defense will be justifiable. *Terrell v. Com.* 13 Bush, 246.

And in such cases the assailant will not be considered the aggressor if he is pursued, and the quarrel is renewed, as the right to pursue and kill the retreating assailant ceases as soon as the assailed has reasonable ground for believing that the danger has ceased to be immediate and impending. *Luby v. Com.* 12 Bush, 5, 7.

So, the rule holds good even in a case where the accused intended to provoke an assault and was not acting in good faith for the purpose of protecting his own person, but abandoned the assault, and his adversary then advanced upon him for the purpose of taking his life, or in- 45 L. R. A.

licting great bodily harm. *Barnard v. Com.* (Ky.) 8 S. W. 444, 445.

And in such a case the accused will be justified in striking the mortal blow if he cannot escape without so doing. *Johnson v. State*, 58 Ark. 57, 64; *People v. Westlake*, 62 Cal. 303; *Rippy v. State*, 2 Head, 217; *State v. Neeley*, 20 Iowa, 109; *Roach v. State*, 34 Ga. 78; *Elland v. State*, 52 Ala. 322; *Evans v. State*, 44 Miss. 762; *Galney v. State*, 97 Ill. 271.

In such cases the party renewing the difficulty cannot invoke the doctrine of self-defense, but will be treated as an aggressor *ab initio*. *Stillwell v. State*, 107 Ala. 16, 20; *People v. Farley* (Cal.) 57 Pac. 571.

In *Anonymous*, Kelyng, 58, the accused was not allowed to avail himself of the plea of self-defense, even after he had retreated to the wall, where he was actuated by malice in the first instance, and struck the first blow.

The right to plead self-defense after retreating from the difficulty was denied the accused in the case of *Cogswell v. Com.* 17 Ky. L. Rep. 822, 824, not upon the ground that such plea was not available after a retreat, but owing to the peculiar and special form of the charge made against the accused in that case, which was one of shooting at a party without wounding him. The guilt of the accused was proved by the fact that he, in the first instance, attacked the party and shot at him, his subsequent actions not entering into the case at all.

In that case it was held that if in the first instance the accused attacked such party by shooting at him with a pistol without wounding him, he was guilty of the offense of shooting regardless of what occurred subsequently to that act, and if he was not justified in so shooting on the ground of self-defense or apparent necessity he could not then retreat from the affray or difficulty so as to escape punishment for such act, although the other party might have pursued him after such retreat and justified him in shooting the second time. *Cogswell v. Com.* 17 Ky. L. Rep. 822, 824.

In the case of *Cotton v. State*, 31 Miss. 504, 513, the court stated that a man may begin a difficulty intending to inflict no violence, or next thing to none, on his antagonist, and may be so closely pressed as to be forced to use his weapon in self-defense. And after quoting the rule laid down by Blackstone: "If the slayer has not begun the fight, or (having begun) endeavors to decline any further struggle, and afterwards being closely pressed by his antagonist kills him to avoid his own destruction, this is homicide, excusable by self-defense,"—concludes by saying that in such case the party having commenced the difficulty can only use his weapon in self-defense, or take the life of the other party when the danger is imminent or impending or unavoidable.

Now, taking the first and last statements of the court in this case aside from the quotation from Blackstone, a doubt might arise whether the court meant to say that the accused would be justified in killing his opponent without retreating from the combat or offering to do so, or declaring his intention of quitting.

The statement of the court, leaving out the quoted rule, amounts to this: A man may begin a difficulty without any intention of inflicting an injury or next door to none, and may be so closely pressed as to be forced to use his weapon in self-defense, or take the life of the other party when the danger is imminent or impending or unavoidable. Without the quotation therefore it would seem as if the court meant to say that under such circumstances as therein stated the doctrine of retreat did not

apply to one who brings on the difficulty and inflicts the mortal wound in order to free himself from the imminent peril in which he has placed himself.

It would seem, however, that the accused who commences the difficulty, no matter whether his intention be felonious or not, would be bound to abandon the difficulty before resorting to extreme measures against his antagonist. In all cases, no matter what the intention of the party at the time of the commencement of the difficulty may be, if the necessity which gives rise to the killing is produced by the first assailant himself, he, upon every principle of law and reason, ought not to be allowed to shield himself behind or take advantage of his own wrong.

The views above expressed are fully borne out by the opinions of the courts in the following cases, and may be expressed as follows:

Where one is the first wrongdoer, but his unlawful act is not felonious but a mere simple assault, or a mere trespass, even though forcible, and this unlawful act is met by a counter assault of a deadly character, the right of self-defense to the wrongdoer is not lost, for as his acts did not justify upon the part of the other the use of a deadly means for their prevention, his killing by the other would be criminal, and one may always defend himself against the criminal taking of his life. But in contemplation of the weakness and passions of men, and of the provocation which, though inadequate, was wrongfully put upon the other, it is the duty of the first wrongdoer, before he can avail himself of the plea, to have retreated to the wall, to have declined the strife and withdrawn from the difficulty, and to have killed his adversary, under a necessity actual or apparent, only after so doing. *People v. Hecker*, 109 Cal. 451, 30 L. R. A. 403, 407.

An attempt to kill or inflict great bodily harm, made in resisting a forcible trespass against personal property, does not deprive the party assaulted of the right to kill his assailant without retreating and declining, or making known to his adversary his willingness to decline the strife, where the assault is so sudden and perilous as to render retreat and declination impossible; but as he is the first wrongdoer, although his wrong does not justify the attack upon him, he must retreat and decline the combat, if possible, before resorting to the killing of his adversary. *Ibid.*

Where one is making a felonious assault upon another, or has created appearances justifying that other in making a deadly counter attack in self-defense, the original assailant cannot slay his adversary and avail himself of the plea, unless he has first and in good faith declined further combat, and has fairly notified him that he has abandoned the contest, and if the circumstances are such arising either from the condition of his adversary caused by the aggressor's acts during the affray, or from the suddenness of the counter attack, that he cannot so notify him, it is the first assailant's fault, and he must take the consequences, as the deceased, acting upon the appearances created by the wrongful acts of the aggressor, would have been justified in killing him. He whose fault created these appearances cannot make the natural and legal acts of the deceased looking to his own defense a justification for the homicide; before doing so he must have destroyed these appearances and remove, to the other's knowledge, his necessity, actual or apparent, for self-preservation. *Ibid.*

And the imminence of the danger of the first felonious assailant does not relieve him 45 L. R. A.

from the necessity of so declining before availing himself of the right of self-defense. *Ibid.*

And the principles set forth and declared by the court in the above case were approved of in the cases of *People v. Kennett*, 114 Cal. 18, 21; and *People v. Roemer*, 114 Cal. 51.

While the party who first commences a malicious assault continues in the combat, and does not put into exercise the duty of withdrawing in good faith from the place, although he may be so fiercely pressed that he cannot retreat, or is thrown upon the ground, or is driven to the wall, he cannot justify taking the life of his adversary, however necessary it may be to save his own, and must be deemed to have brought upon himself the necessity of killing his fellow man. *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470, 473.

And in the case of *Bush v. People*, 10 Colo. 566, 575, the court cited the language of the court in the last preceding case wherein it is said while he who made the first assault remains in the conflict, to whatever extreme he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct.

And if the conflict which is brought about by the accused is of such a character as to prevent him from notifying the other party that he desires to abandon the contest, he must take the consequences, as the fault is his own. *State v. Smith*, 10 Nev. 106, 121.

Where one without legal cause commences a combat and finds himself getting the worst of the fight, and undertakes to withdraw, but his adversary pursues him so closely that he finds it necessary for his own protection to take the life of his adversary, he cannot avail himself of the plea of self-defense, as that would be allowing him to take advantage of his own wrong. *State v. Beckham*, 24 S. C. 283, 285.

See also *Davis v. State*, 92 Ala. 20, 28, *supra*, VI.

b. Retreat sufficient.

In the following cases the acts of the accused were held to establish a sufficient retreat from the difficulty, and to entitle him to rely upon the plea of self-defense successfully.

Thus, where he abandoned his intention of inflicting the injury or killing the deceased before the killing took place, and the deceased was afterwards killed by him by the accidental discharge of a pistol he was taking away from the deceased in order to prevent the infliction of grievous bodily harm on himself. *McPherson v. State*, 22 Ga. 478, 490.

So, where the accused had retreated in good faith and the deceased pursued him and placed him in immediate danger of loss of life, or of suffering great bodily harm, and the accused then, in order to avert such danger, killed the deceased, his plea of self-defense was upheld. *Cogswell v. Com.* 17 Ky. L. Rep. 822, 824.

And his plea of self-defense was upheld where after retreating and ceasing the attack the accused was attacked by the deceased in such manner as to give him reasonable grounds to believe that the deceased intended to kill him or do him great bodily harm, as the accused had the right to renew the attack upon the deceased for the purpose of defending himself. *Fitzgerald v. Com.* (Ky.) 6 S. W. 152; *Terrell v. Com.* 13 Bush, 246.

And the right of self-defense revived in the accused's favor in *State v. Spears*, 46 La. Ann. 1524, 1526, as he quit the combat in good faith, and sought to adjust the difficulty between himself and the deceased amicably, when the

deceased made a hostile demonstration against him.

And the accused's plea was upheld where he quit the combat and retreated in good faith and was pursued by the other, who continued to follow him up with vengeance and hostility, and it became absolutely necessary for him to turn and fell his pursuer in order to preserve his own life. In such a case he is justified whether he was the aggressor in the beginning of the difficulty or not. *State v. Thompson*, 45 La. Ann. 969, 970; *State v. Tucker*, 38 La. Ann. 536, 789.

So, the doctrine that the aggressor in a fight or difficulty cannot plead self-defense in justification of a homicide unless and until he has withdrawn from or attempted to withdraw from it in good faith will not be applied in the case of a husband who, upon entering into his own house, is there brought face to face with a scene calculated to throw him into a condition of frenzy, under the influence of which he commits an act which, though not legally excusable, comes near the border line of justification, and where upon finding such state he shoots at his wife's paramour, or at her, or at both indiscriminately, and is then seized upon by the wife and her paramour, the wife declaring that they will kill him, whereupon he fires the fatal shot, *State v. Cancienne*, 50 La. Ann. 847, 855.

The plea of self-defense was held good in *Jackson v. State*, 28 Tex. App. 108, 111, where after the accused had abandoned the difficulty he was pursued by the deceased and his wife, who both acted together and renewed the difficulty which resulted fatally to the deceased.

And the accused had abandoned the difficulty and his right to plead self-defense was perfect, and in no manner abridged by his previous felonious intent, in *Brazzil v. State*, 28 Tex. App. 584, where, after the deceased had crossed the street and secured his safety beyond all question, and the conflict, so far as the accused was concerned, was entirely and completely at an end, and he was not even threatening to renew it, the deceased renewed the difficulty by returning to the scene of the conflict armed, and rushing upon the accused in an angry manner and refusing to listen to his caution and entreaties to stop.

And where the accused went to the deceased's house to commit an offense against the law, but abandoned such intention and attempted to avoid the difficulty with his adversary, but was pursued, his right of self-defense revived to the extent that he had the right to kill his adversary to prevent being killed, or any serious bodily harm to himself. *McSpotton v. State*, 30 Tex. App. 617, 618.

One who under the provocation of offensive language assaults the person uttering it, but in such a way as to show that he has no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, and in good faith withdraws from further contest, has the right of self-defense when the person assaulted, in violation of law, pursues him with a deadly weapon and seeks to take his life, or do him great bodily harm. *Rowe v. United States*, 164 U. S. 546, 555, 557, 41 L. ed. 547, 551.

c. Retreat insufficient.

The doctrine of retreating from the difficulty did not, however, relieve the accused from responsibility for his acts in the following cases in which he brought on or provoked the difficulty.

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Where after nightfall he, with three others, went to the deceased's house expecting a difficulty, and one of the parties brought on an altercation with the deceased, who then drew a pistol and shot, the ball passing through the party's clothes, and the deceased was pursuing him at the time the accused attempted to disarm him, and the injury was then inflicted upon the deceased, of which he died, the evidence showing that the accused had previously stated that he would stand up for his party. *Bostic v. State*, 94 Ala. 45, 47. In this case the act of the accused in striking in the defense of one of his party was not justifiable until the latter had clearly manifested a desire and purpose to withdraw from the conflict, nor even then if the blow was struck pursuant to a formed design or purpose to stand up to him in the event of a personal encounter ensuing.

In *Crawford v. State*, 112 Ala. 1, 34, the accused with others unlawfully entered a house in which the deceased was a guest exposing deadly weapons. They were ordered out by him and a struggle ensued, after which the deceased followed them to the door where he was shot by the accused, who contended that although he had incited and provoked the difficulty he was withdrawing and retreating from the contest and leaving the house when he was followed by the deceased, who pointed his gun at him. The court found that the acts and conduct of the accused did not so clearly manifest a desire for peace, and show that he was abandoning and retiring from the contest, as to remove from the mind of the deceased all reasonable apprehension of a continuance of the difficulty and of the imminent peril in which he was involved. In this case the deceased did not pass beyond the door of the dwelling, and he had a right to follow the parties so long as they were in the house with arms in their hands, and the appearances of the imminent peril they were creating continued.

So, in *People v. Westlake*, 62 Cal. 303, it was not shown that the accused, who was the assailant, had changed his mind or conduct, or honestly endeavored to escape from the combat, or that he could not have escaped without striking the mortal blow, and therefore the court held that it must be true as a legal proposition that where the accused sought and brought upon himself a difficulty with the deceased in which he willingly continued until he involved himself in the necessity to kill, the law would not hold him guiltless, as the right of self-defense which justifies a homicide did not include the right of attack.

And a successful plea of self-defense in withdrawing from the difficulty is not made out by the accused who brought on the first difficulty, where the subsequent dealings and actions of the parties practically make it one entire transaction.

Thus, in *State v. Spears*, 46 La. Ann. 1524, 1527, the invitation of the deceased to the accused to fight it out in the road where he was hiding to protect himself from the assaults of the deceased was a continuance of the conflict, and the accused's acceptance of the invitation was at the most but a change to mutual combat. The plea of self-defense upon the ground that he had retired and retreated from the first difficulty was therefore disallowed.

Facts which showed that the accused commenced an assault in which he killed the deceased at a time when the latter was in deadly peril from the former, and was justified in resorting to any necessary measures of defense against the attacks of the accused, clearly ex-

cluded the supposition that the accused had made any sufficient effort to retreat so as to justify his actions upon the ground of self-defense. *State v. Smith*, 10 Nev. 108, 121.

Neither did the doctrine apply where the accused first provoked the contest for the purpose of bringing on a deadly conflict, and the deceased left the scene, went across the street, armed himself with a pistol, and returned and invited the accused to come to where he was for the purpose of further prosecuting the difficulty which ended in the death of the deceased,—especially as the accused awaited the deceased's return, and promptly renewed the difficulty with deceased as previously begun by him, and did not desist until he had killed the deceased. *Roberts v. State*, 30 Tex. Crim. Rep. 291, 306.

In this case the acts of the accused showed no abandonment, as he remained at the position he then occupied until the deceased could arm himself and return to the scene of the difficulty, and immediately re-engaged in the contest, and the fact that he remained at the spot on the invitation of the deceased made no difference.

So, one cannot rely upon self-defense for killing another whom he has assaulted in such a manner as to render him incapable of understanding the former's intention to withdraw from the conflict, although such intention is bona fide, and the other attempts to kill him

with a deadly weapon. *People v. Button*, 106 Cal. 628, 28 L. R. A. 591, 598.

See also *Thumm v. State*, 24 Tex. App. 667, 701, *supra*, II. a, in which case there was no retreat and the defendant might have avoided the fatal ending of the difficulty produced by him.

d. As a question for the jury.

The question of good or bad faith in the retreating party where he is the aggressor is of the utmost importance, and should be submitted to the jury in connection with the fact of retreat itself,—especially where there is any room for conflicting inferences on this point from the evidence. *Parker v. State*, 88 Ala. 4, 7.

Thus, where the evidence tends to show that the accused did abandon the difficulty, but that it was renewed by the deceased, the jury should be instructed upon the law as applicable to cases in which the accused has abandoned the difficulty. *Jackson v. State*, 28 Tex. App. 108, 111.

And in cases in which the accused seeks to avail himself of the plea of self-defense, the question as to whether his withdrawal from the conflict is valid and done in good faith, or whether it is a mere device to obtain some advantage over his adversary, is for the jury. *Rowe v. United States*, 164 U. S. 546, 555, 557, 41 L. ed. 547, 551. E. W.

GEORGIA SUPREME COURT.

Mary Ellis RICHARDS, Admr., etc., of
Virginia E. Henderson, Deceased, et al.,
Appts.,

v.

EAST TENNESSEE, VIRGINIA, & GEORGIA
RAILWAY COMPANY et al.

(106 Ga. 614.)

- *1. The jurisdiction of equity over the estates of wards of chancery is broad, comprehensive, and plenary.
2. When one holds title to realty in trust for the benefit of a mother and her minor children during the life of the mother, but is not clothed with the title to the legal fee in remainder, which vests in the children, he may apply to a court of equity for a sale of the entire property, including the legal as well as the equitable estate, the purpose of the application being for the benefit of the children as well as the mother. The moment such an *ex parte* petition comes before the chancellor, and discloses the fact that the legal as well as equitable estate of infants is involved, they become his wards, and the case is one concerning "an estate of the wards of chancery;" and accordingly the chancellor has jurisdiction to grant, in term, an order to sell the entire property, the minors being properly made parties and represented before him.
3. The petition of the trustee for the

*Headnotes by LEWIS, J.

NOTE.—For jurisdiction of equity to sell infant's real estate, see also *Roche v. Waters* (Md.) 7 L. R. A. 533; *Wilson v. Hughes* (W. Va.) 39 L. R. A. 292.

For jurisdiction to authorize mortgage of infant's property, see *Warren v. Union Bank* (N. Y.) 43 L. R. A. 256.

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sale of the premises in dispute having been made and passed upon prior to the act of 1876 requiring personal service on minors, the appointment of a guardian *ad litem* for them, and his appearance and answer to the petition, were sufficient to give the court jurisdiction of their rights.

4. Where such a trustee petitions for the sale of the entire property embraced in the conveyance to him for the purpose of supplying the immediate necessities of all the beneficiaries, including the children, and of making permanent investments for their benefit, an order granted to sell the property in accordance with the petition in effect directs an absolute sale of the entire estate, both legal and equitable. This is true, notwithstanding the fact that the order of the judge appointing a guardian *ad litem* states the case as an "application to sell trust property."
5. Since the first Code went into effect, on the 1st of January, 1863, it has never been necessary, in order to give the chancellor jurisdiction to direct a sale of the legal and equitable estate of minors in the same property, that a regular proceeding in equity be instituted; but such a sale may be ordered by the judge without a jury upon an *ex parte* petition, and at the term of the court when the petition is filed or presented. (a) In the absence of any legislative provision to the contrary, it would seem that equity has inherent jurisdiction to order a sale of the legal estate of minors for reinvestment whenever to the minors' interest. Be this as it may, the present case is distinguishable from one where the sole purpose is to sell such an estate for reinvestment. This is so because the petition for sale now under consideration involved equitable rights, over which the superior courts of this state clearly had jurisdiction.

6. Where such a petition had entered thereon "January Adjourned Term, 1871," and the order of sale had entered on it, at the place of the judge's signature, "January Adjourned Term, May 12th, 1871," and it appeared that the judge was actually on that day holding a regular session of such adjourned term, this was sufficient to authorize the presumption that the order in question was granted in open court, during its regular session in the transaction of term business, and was therefore a proceeding in term, and not at chambers. The facts that the petition was not filed, that the case was not entered on the regular docket of causes for trial, that no process was attached to the petition, and that the order of the sale directed a record of the proceedings on the minutes, as is usually the case when such orders are granted at chambers, were not sufficient to overcome this presumption.—especially in view of the principle that the court should adopt that construction which treats the order as completely legal, and not as partially illegal, and to that extent void.

7. Even if the proceedings to sell the property were defective on account of the omissions to file the petition, attach process, and docket the case, these were mere irregularities, which did not render void the judgment of a court that had jurisdiction over the persons and subject-matter of the suit,—especially where the interests of innocent purchasers are involved, with whose rights equity is always loath to interfere.

8. Where one, for value, purchases land, and thereby acquires all title thereto owned by a mother, who held the same under her father, and whose equitable title thereto was superior to any equity which her minor children had therein at the time of the purchase, the vendee's title cannot be defeated by a decree in favor of the children rendered upon a suit subsequently brought in their interest by the mother against the estate of her father for the recovery of the premises; the purchaser from the mother not being a party to this suit, and therefore not bound by the decree.

(*Simmons, Ch. J., dissents.*)

(March 4, 1899.)

APPPEAL by plaintiffs from a judgment of the Superior Court for Floyd County in favor of defendants in a proceeding to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. T. W. Alexander and Hooper Alexander, for appellants:

The estate in remainder taken by the plaintiffs as established by the decree in Clarke county and by the executrix's deed in pursuance thereof, was a legal estate, and was not embraced in "the trust estate," for—

1. The language of the Clarke county decree, as well as the executrix's deed, expressly declares that the remainder shall go to the children (these plaintiffs) "free from and relieved of the trust."

2. Even in cases where there was room for doubt on this subject in the language of the deed, this court has always held that the trustee took an estate no larger than was necessary.

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Rogers v. Pace, 75 Ga. 436; *Franke v. Berkner*, 67 Ga. 264; *Bull v. Walker*, 71 Ga. 195; *Vanzant v. Bigham*, 76 Ga. 759; *Wingfield v. Virgin*, 51 Ga. 139; *Varner v. Gunn*, 61 Ga. 54; *Augusta v. Radcliffe*, 66 Ga. 469; *East Rome Town Co. v. Cothran*, 81 Ga. 359.

No legal authority ever existed for the trustee to sell this legal estate in remainder, for—

1. Upon the presentation of the petition by the trustee to Judge Harvey in May, 1871, he passed an order appointing a guardian *ad litem*, and in that order expressly recited that the application was for leave to sell "the trust property."

The precise language of the papers excludes the hypothesis that leave was granted to sell anything else, even if the chancellor could have ordered anything else sold.

2. Even had Judge Harvey ordered a sale of the fee, his act would have been beyond his authority and void under the repeated rulings of this court on the subject of the chancellor's power, at chambers, to sell legal estates.

Rogers v. Pace, 75 Ga. 436; *Arrington v. Cherry*, 10 Ga. 429; *Milledge v. Bryan*, 49 Ga. 397; *Pughsley v. Pughsley*, 75 Ga. 96; *Taylor v. Kemp*, 86 Ga. 181.

Aside from the general want of authority in the chancellor to pass such an order, as shown by these cases, there was a special want of authority for the reason that the children were not represented by a guardian except in relation to the sale of the trust property.

Loyless v. Blackshear, 43 Ga. 327; *Hill v. Printup*, 48 Ga. 453.

Prescription would not commence to run against plaintiffs, nor could they sue, until the termination of the particular estate by the death of the *cestui que vie*.

Bull v. Walker, 71 Ga. 196.

To get possession it was necessary for defendants to have plaintiffs' right and title established by the decree of the Clarke superior court and to admit it and take under it. They are now claiming as an equity that their money paid for establishing this title in plaintiffs. And yet when the term expires for which they took possession under plaintiffs they refuse to recognize the title they hold under, and seek to set up a paramount title by a legal fiction without even pretending to connect themselves with it.

Wood v. McGuire, 17 Ga. 303; *Miller v. Surls*, 19 Ga. 331, 65 Am. Dec. 592; *Castleberry v. Weaver*, 30 Ga. 534; *Roe, Hightower, v. Doe, ex dem. Williams*, 38 Ga. 597; *Harrison v. Hatcher*, 44 Ga. 638; *Manes v. Slater*, 48 Ga. 589; *Scott v. Singer*, 54 Ga. 689; *Long v. Bullard*, 59 Ga. 355; *Brown v. Driggers*, 62 Ga. 354; *Brown v. Cantrell*, 62 Ga. 257; *Fletcher v. Horne*, 75 Ga. 135; *Blacklock v. Newhill*, 78 Ga. 245; *Conley v. Thornton*, 81 Ga. 154; *Wolfe v. Baxter*, 86 Ga. 705.

The silence of the minutes and the docket are conclusive that this proceeding was not held in open court.

Armstrong v. Lewis, 61 Ga. 686.

Mr. C. N. Featherston, for appellees:

If the plaintiffs ever had title they were

devested of it, as to the Hollow Ware tract, by the sale under the decree of the Floyd superior court of May 18, 1871.

The fact that the proceedings were irregular did not make them any the less those of the court, instead of the judge at chambers.

Dean v. Central Cotton Press Co. 64 Ga. 670; *McGowan v. Lufburrow*, 82 Ga. 524.

Designating the person empowered to sell as trustee did not impair that power.

Blake v. Black, 84 Ga. 397.

The plaintiffs, then minors, were duly represented and consented to that decree, by their guardian *ad litem*.

If the superior courts in Georgia have jurisdiction to render such a decree,—that is, for the sale of land of an infant for his benefit where the title is held directly by him,—then the sale made by Jones in pursuance of that decree is valid, and divested the plaintiffs' title.

Sharp v. Findley, 59 Ga. 723, 71 Ga. 664; *Rakestraw v. Rakestraw*, 70 Ga. 806; *McGowan v. Lufburrow*, 82 Ga. 523; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Bosfil v. Fisher*, 3 Rich. Eq. 1, 55 Am. Dec. 627; *Thorington v. Thorington*, 82 Ala. 489; *Ex parte Jewett*, 16 Ala. 409; *Re Salisbury*, 3 Johns. Ch. 347; *Huger v. Huger*, 3 Desauss. Eq. 18; *Dodge v. Cole*, 97 Ill. 333, 37 Am. Rep. 111.

The plaintiffs in fact never had any title to the property in dispute.

At the time the title to the property was sought to be conveyed the title was not in the estate of Branch, but had passed to and was then in B. F. Ralls.

The twenty years' possession to vest title under Civ. Code, § 3588, need not all be after the Code took effect, but may be part before and part after.

Shiels v. Roberts, 64 Ga. 370.

The defendant is not estopped to set up this outstanding title, because also claiming, as a separate defense, title from the plaintiff.

Ga. Civil Code, § 5065.

Had the defendant not asserted title under the Jones deed, it could undoubtedly have stood upon its possession alone, until the plaintiff showed a better title.

White v. Cook, 73 Ga. 176; *Sutton v. McLeod*, 29 Ga. 594; *Jones v. Sullivan*, 33 Ga. 486; *Roe, Brumbalo, v. Doe, ex dem. Baxter*, 33 Ga. 81; *Way v. Lowery*, 72 Ga. 63.

The grantee is not estopped to deny the title of his grantor.

Crowall v. Sheredd, 5 Wall. 269, 18 L. ed. 572; *Wakins v. Holman*, 16 Pet. 25, 10 L. ed. 873; *Blight v. Rochester*, 7 Wheat. 535, 5 L. ed. 516; *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049; *Bybee v. Oregon & C. R. Co.* 139 U. S. 663, 35 L. ed. 305.

The exceptions to the rule are cases where from the peculiar stipulations of the deed, or peculiar relations of the parties, or character of the transaction, it would be "against conscience," or "against the moral policy of the law," to permit the title to be disputed.

Blight v. Rochester, 7 Wheat. 547, 5 L. ed. 519; *Robertson v. Pickrell*, 109 U. S. 614, 27 L. ed. 1051.

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Messrs. McCutchen & Shumate and Shumate & Maddox also for appellees.

Lewis, J., delivered the opinion of the court:

On March 30, 1890, Virginia Henderson, Pauline Floyd, Charles Ralls, and Mary Ellis, all and the sole surviving children of Sarah A. C. Ralls, who died in 1888, sued the railway company for a tract of land in the Coosa division of Rome, known as those parts of city lots 136 and 157 lying back of a line parallel with, and 120 feet from, the front of said lots, on formerly South street, but now First avenue, together with the improvements thereon, and for rents, etc., since January 1, 1888. There was a verdict for the plaintiffs for the premises in dispute, and rents at the rate of \$75 per month, whereupon defendant moved for a new trial, which was granted, and the plaintiffs excepted.

It appears from the record that the legal title to the premises was originally in James C. Branch, of Clarke county, who was the father of Mrs. Sarah Ann C. Ralls, and that the latter, with her husband, was put in possession of the land by Branch about the year 1849. They remained in possession until 1869, or, at least, while it appears that during a portion of the period between 1849 and 1869 they were not actually living on the premises, it does not appear that anyone during this whole time had any control or dominion over the land except Sarah Ann C. Ralls or her husband. During such possession valuable improvements were placed by them upon the land. In 1869 Mrs. Sarah Ann C. Ralls brought her petition, beginning: "Georgia, Floyd County. To the Honorable R. D. Harvey, Judge of the Superior Courts of Rome Circuit, and Exercising Jurisdiction in Chancery." The recitals in the petition were in substance as follows: That petitioner is the daughter of James C. Branch; that her husband, for three years, from depression and weakness of mind, had been wholly unable to attend to any business; that J. C. Branch had held in trust for her separate use lots 156 and 157 in Rome, which he had given her in the year 185-, and which she had resided upon and improved ever since as her separate estate; that her father, said Branch, who had held the title to said property, had died, and she had no trustee. In order that the trust might not fail, she prayed that some proper person be appointed trustee, with power to hold the property for her sole and separate use; and, having full confidence in Jones, she prayed that he be so appointed, "and clothed with the legal title" to the property. She further alleged that it was for the best interests of herself and her estate that the property be sold, a cheaper residence bought, and so much of the surplus as needed applied to buy necessities for herself and children; therefore, that the trustee be so empowered to sell and reinvest, etc. This was signed by solicitors for complainant. No entry of filing appeared upon the petition. Jones con-

sented to accept the trust July 15, 1869, and on July 20, 1869, an order was granted by Judge Kirby appointing him trustee, and empowering him to sell, reinvest, etc., as prayed. Under this order, Jones, as trustee, sold to Wadsworth a small triangle off of the rear of the lot for \$175. This portion of the property will hereinafter be designated as the "Wadsworth Triangle." It passed from Wadsworth, by successive conveyances, to the defendant. Later on, Mrs. Ralls, for herself, and as next friend and natural guardian of her children (not naming them), brought a bill in Clarke superior court, alleging that she was the daughter of James C. Branch, deceased, who had purchased of Shorter lots 157 and 158 in the Coosa division of Rome, Georgia; that Branch had repeatedly expressed his purpose to convey in trust to her, for the benefit of herself and children, this property, according to the terms of the trust deed executed by him to one Black, a copy of which was annexed; that the portion of the purchase money paid by Branch for the property was her own, previously advanced her by him as a part of her share of his estate; that she and her children had been in peaceable and uninterrupted possession of the property for nearly twenty years previous to the death of Branch, had paid the taxes, and made various improvements thereon during all that time; that Branch died testate, leaving various persons named as legatees; that the property did not form part of the estate of Branch, nor did the title to it vest in his legatees and heirs, but was in complainant and her children, subject only to the trust as stated in the deed to Black. The prayer was that the title be vested in Jones, as trustee of herself and her children, subject only to the conditions in that deed. The legatees and heirs of Branch and the executrix of his will were made parties defendant. They jointly answered the bill, admitting the allegations as true. At the February term, 1871, there was a verdict that in 1851 Branch purchased of Shorter, and gave to Mrs. Ralls, the land in question; that she had since been in possession thereof; that the land had been paid for by Branch in part with her money, which he had before given her; that he had intended to convey the land to her and her children under the same terms and limitations contained in the trust deed to Black; that she had paid the taxes and made improvements on the faith of that understanding; that the title to said property vested in the said Sarah Ann C. Ralls and her children, and that the executrix of Branch do execute to Jones, "in trust for the benefit of the said Sarah Ann C. Ralls and her children," a deed to the land, under the same terms and limitations as are contained in the Black deed. The decree followed the verdict. The deed made in pursuance of this decree by the executrix of Branch was dated February 14, 1871, and conveyed the land to Jones, "as trustee for said Sarah Ann C. Ralls and her children, and successors of said trustee, . . . to have and to hold 45 L. R. A.

unto said B. F. Jones, as trustee as aforesaid, and his successors in trust, forever, in fee simple, for the sole and separate use of the said Sarah Ann C. Ralls and her present children, and any future child or children of hers, free from all debts, etc., of her present husband, as well as of any future husband she may ever have, and, after the death of said Sarah Ann C., to her children, free from and relieved of the trust." This conveyance followed the Black deed, the latter containing a warranty to Black as trustee, as aforesaid, to be by him held for the purpose and use hereinbefore named.

After this decree a supplementary petition to the one first above mentioned was brought, of which the following is the substance, so far as is material: The petition began: "Georgia, Floyd County. To the Honorable R. D. Harvey, Judge of the Superior Courts of Rome Circuit, and Exercising Jurisdiction in Chancery." The complainants or petitioners were Jones, trustee for Mrs. Ralls and her children, who were minors, and Mrs. Ralls. The allegations were "that, since the foregoing petition and order was granted, petitioners, by a bill in chancery against the administratrix of said J. C. Branch, and against the guardian of his minor children and heirs, in Clarke superior court, obtained the decree above mentioned, and a deed to the property in pursuance thereof; that it was still for the interest of the family of Mrs. Ralls and her children that the property should be sold, and a farm or other home be bought, and, if a farm, stocked with part of the funds for the use of the family, upon which they can live and earn a support; that the house is very much decayed, and will soon be worthless, unless repaired, and petitioners are without means to repair it; that the family is destitute of means of support; that they are living in the house, have no income, and are in need now of daily food and raiment; that petitioner can sell a portion of the property to the Rome Hollow-Ware & Stove Foundry, by taking half of the purchase money in the stock of that company, and believe that this will be a paying investment." The prayer was: "They pray your honor to authorize said sale and investment, and also to authorize and order the sale of the balance of said property, and the investment of the proceeds as hereinbefore prayed, and that so much of the proceeds as is needed be expended for such supplies as the family needs." The petition was signed by B. F. Jones, as trustee, and by Sarah A. Ralls. Opposite these signatures appeared the words, "January Adjourned Term, 1871." No entry of filing appeared on this supplementary petition, which was attached to the original petition; and in the backing of it the words, "July Term, 1869," were changed to "January Adjourned Term, 1871."

The following orders and answer of guardian *ad litem* were read in evidence from the minutes of the court to wit: "In the matter of B. F. Jones, trustee of Sarah Ann C. Ralls and children, which is an application for the

sale of the trust property, and investment of the proceeds thereof, ordered, that H. D. Cothran be appointed guardian *ad litem* for the minor children of Mrs. Ralls [naming them], and that he answer said application." This was dated May 10, 1871, and signed by R. D. Harvey, as judge. The answer of Cothran, as guardian *ad litem*, stated that he had read the petition and application, and found that the facts therein stated were true; that he was familiar with the condition and circumstances of the family of Mrs. Ralls, and with the condition of the property; and that he concurred in the petition, and recommended that the prayer thereof be granted. The following order was passed by the court upon the application: "Upon hearing the foregoing petition, and answer of the guardian *ad litem*, and upon examination of all the papers and copy papers therein referred to, it is ordered by the court that Jones, trustee, have leave to sell the portion of the property to the Rome Hollow-Ware & Stove Foundry, and invest one half of the proceeds in the foundry, and that the balance of the money arising from the sale be expended in providing for the immediate necessities of Mrs. Ralls in paying costs, etc., and that Jones, trustee, be authorized to make sale of the balance of the property, and purchase a farm or other home with part of the money, stock the farm, if a farm, provide for and pay the necessary expenses of the family as they may arise from time to time, and that this petition and order, and papers accompanying the same, and the certified copies of the papers in the equity cause in Clarke superior court, etc., be entered on the minutes of the court, and that the petition and order of Judge Kirby be also entered *nunc pro tunc*." This was signed by R. D. Harvey, as judge of the superior courts of the Rome circuit, "Jan'y Adjourned Term, May 12, 1871." It was admitted that the minutes of Floyd superior court show that the court was in session at the January adjourned term, 1871, on the 10th, 11th, and 12th of May, 1871, and that on May 12, 1871, the court took a recess from May 12th to May 29th, 1871; that the foregoing proceedings were recorded as of May 30, 1871; and that said adjourned term finally adjourned on June 7, 1871; also, that the minutes of May 10th, 11th, and 12th made no reference to said proceedings. Under this last order the balance of the premises in dispute were sold, and defendant claimed under a purchaser at this sale. It was contended by counsel for plaintiffs: (1) That the intention of the judge in ordering a sale of the property was to sell only a trust estate, and this was held by Jones in trust only during the lifetime of Mrs. Ralls. (2) That, if such was not his intention, the order as well as the sale thereunder were void in so far as they undertook to convey the fee in remainder that belonged to the children,—the order being passed at chambers, and the court being without jurisdiction to grant the same. On the other hand, it is claimed by the defendant: (1) That the order was not granted at chambers,

but in term, and that the sale thereunder conveyed the legal title to the entire fee.

(2) That the evidence showed an outstanding title in the husband of Mrs. Ralls, by virtue of his marital rights, superior to any title set up by the plaintiffs, and that they could not recover in this action. (3) That inasmuch as the plaintiffs went into possession of, and were enjoying the proceeds of the sale of, some of the trust property (not including any of the land in dispute), they thereby ratified the sale of the entire estate, and were estopped from denying the validity of the order under which it was had at different times. (4) That, even if plaintiffs were entitled to recover, their claim for rents and mesne profits should be offset by improvements placed upon the property by it and those under whom it claimed which greatly enhanced the value of the property for rent, etc. There were various grounds in the motion for a new trial, but the above will cover all the material questions of law involved. Among the errors complained of in the motion for new trial was a charge of the court to the effect that the proceedings had in May, 1871, before Judge Harvey, by which leave was granted to Jones, trustee, to sell this property, did not authorize him to sell anything more than a life estate. It seems that while the judge held this order was granted in term, and not at chambers, yet it was not the purpose of the order to authorize a sale of anything except the life estate.

1. The jurisdiction of courts of equity over the persons and property of infants dates from a very early period in the history of these courts. In its inception, this jurisdiction belonged to the King of England, the same constituting a part of his powers, as *parens patriæ*, to protect his subjects, and was transferred by him to the court of chancery. This jurisdiction is broad, comprehensive, and plenary. In all suits or legal proceedings, of whatever nature, in which the personal or property rights of a minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary to fully protect such rights. Should such proceedings be instituted, and it should appear to the court that the infant is unrepresented by anyone fully charged with the power and duty of protecting his interests, it is the duty of the court to appoint a guardian *ad litem* for the minor. But the court's duty does not end here. The minor, in such an action, becomes a ward of the court of chancery; and the chancellor himself is, in legal contemplation, the infant's guardian. He continues to look after and protect the rights of the minor, and the appointed representative is but a mere agency through which the court is required to act in giving this protection. To this end the chancellor may compel the guardian to answer the suit, and, whenever it should appear that it is to the interest of the ward to resist the proceeding, he can compel the guardian to take such steps as are necessary to have properly adjudicated the rights of

his ward. He can, *sua sponte*, refuse to allow any admissions or concessions made by the guardian against the interest of his ward, and, whenever such guardian is derelict in the performance of his duty, the court can discharge him and appoint another in his stead. In short, this general supervisory power which a court of chancery can exercise over the rights of a minor extends throughout the proceeding, and the plenary jurisdiction of a court of equity in such matters cannot now be questioned. See 6 Am. & Eng. Enc. Law, p. 723, § 12; 10 Enc. Pl. & Pr. pp. 588 *et seq.*, and authorities cited; 10 Am. & Eng. Enc. Law, pp. 692 *et seq.*

2. It follows from the above principles that whenever an application is presented to the chancellor, seeking a sale or other disposition of land in which minors have an interest, either legal or equitable, they become wards of chancery. Such was the nature of the petition in *Sharp v. Findley*, 71 Ga. 654. On page 665 of that volume, Chief Justice Jackson, delivering the opinion of the court, says: "The very minute this petition came before this chancellor, and disclosed the fact that the land of infants was involved, his wards were before him, and the case was concerning 'an estate of the wards of chancery.'" In the case of *McGowan v. Lufburrow*, 82 Ga. 532, Justice Simmons (now chief justice), after citing approvingly the opinion of Chief Justice Jackson, above quoted, says: "Here, as we have shown, was an application before the chancellor concerning the estate of infants. According to this decision, just as soon as the application was presented to him they became his wards, or the wards of chancery. He thereby obtained power and jurisdiction over their persons and their property." In 10 Enc. Pl. & Pr. p. 589, the same principle is announced in the following words: "Whenever a suit is instituted in the court of chancery relative to the person or property of an infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance and protection." See also authorities cited, including the case of *Sharp v. Findley*, 71 Ga. 654.

3. It is contended by counsel for plaintiffs that the deed executed under the decree of the superior court of Clarke county on February 14, 1871, by the executrix of the estate of James C. Branch, conveyed the land in dispute to B. F. Jones, as trustee for Sarah Ann C. Ralls and her present children, and any future child or children of hers, during the lifetime of the said Sarah Ann C. Ralls, and after her death the property passed to her children, relieved of the trust; that under this deed the children, who are the plaintiffs in this case, took an equitable estate as joint usees with their mother during her life, and a legal estate in remainder in the fee, to take effect in possession at her death. Under the authority of *Franke v. Berkner*, 67 Ga. 264, we think this is a proper construction to place upon the terms of that deed. It might, however, with some

degree of plausibility, be contended that it was the purpose of the deed above referred to, to convey, not only an estate for life to the trustee, but also the entire fee during the lifetime of the life tenant, Sarah Ann C. Ralls. The instrument conveys the property to Jones, "as trustee for the said Sarah Ann C. Ralls and her children, and successors of said trustee." In the habendum clause the following words are used: "To have and to hold unto the said B. F. Jones, as trustee as aforesaid, and his successors in trust, forever, in fee simple, for the sole and separate use of the said Sarah Ann C. Ralls and her present children, and any future child or children of hers." It is true, the deed states that after the death of the said Sarah Ann C. Ralls the property passes to her children free from and relieved of the trust. We do not think there can be any question that the grantor has the right to convey to the trustee the fee-simple title, and at the same time limit the duration of the trusteeship. He could, for instance, have in this case clothed the trustee with the legal title to the fee during the lifetime of Mrs. Ralls, and at the same time have provided that at her death the trust should cease, and the fee should pass from the trustee to the remaindermen. In fact, whether the conveyance limited the trust, as to its duration, or not, the law would necessarily fix a limitation. In this case the trust would have been at an end when the minors arrived at age, the mother being *sui juris* under the act of 1886. We cannot conceive of a case in which there could be no end to the exercise of such a trust. It might with some force be contended, therefore, that if the words "in trust forever, in fee simple," above quoted from the deed, have any force or effect whatever, they clothe the trustee with the legal title to the entire fee during the lifetime of Mrs. Ralls. The words "in fee simple" do not occur in the deed which was construed by the court in *Franke v. Berkner*, 67 Ga. 264, and this distinction might be drawn between that case and the one now under consideration. We think, however, the principle decided in that case, as above indicated, would constrain us to hold that the words, "after the death of the said Sarah Ann C. Ralls, free from and relieved of the trust," limit the estate the trustee took, and it did not include the legal remainder. Such seems to be the idea of Chief Justice Bleckley in the opinion rendered by him in *East Rome Town Co. v. Cothran*, 81 Ga. 365: "Where the conveyance limits the estate to less than a fee, the trustee never has a fee; but, where the law passes the fee by executing the trust, the fee which was before in the trustee passes out of him into the beneficiary." This view seems to have been adopted by counsel for both parties in the argument, and in the consideration of this case we will treat it as a correct construction of the instrument in question. Assuming, therefore, that, when the trustee made his application for the sale of this property, he was not clothed with any title to the fee in remainder, it is neverthe-

less true that if the purpose of his application was to sell the entire fee, including the remainder which was vested in the minors, the moment the petition was presented to the chancellor he saw that the interests of these minors were involved, not only in the life estate, but in the remainder, and from that time they became wards of chancery. As to what proceedings should be had in order to bring legally into operation the protective powers of a court of chancery in such a case is a matter for legislative regulation. If no special procedure is provided by statute, it would seem that the rules governing the procedure in ordinary cases in equity would apply, and should be followed. In this state we think that the statute not only recognizes the complete and plenary jurisdiction of chancery in such cases, but also clearly indicates the nature of the procedure that should be had. Section 4863, Civil Code, declares: "All proceedings *ex parte*, or in the execution of the protective powers of chancery over trust estates, or the estates of the wards of chancery, may be presented to the court by petition only, and such other proceedings be had therein as the necessity of each cause shall demand." The following section provides that a court of equity is always open for such purpose, and the judge can, either in vacation or at chambers, receive and act upon such petition. Section 4865 provides, among other things, that in an application for the sale of trust property, where any person is interested besides the applicant, notice must be given to such person before the court can proceed. The following section (4866) provides, "If minors are interested and they have no guardians, guardians *ad litem* must be appointed and notified before the cause proceeds." The proceedings in this case on which was based the order of the judge of May 12, 1871, was not only an effort to sell a trust estate in the property, but, as we shall hereafter see, the entire fee, whether encumbered with the trust or not. It was presented to the court by the petition of the trustee and of the life tenant, Sarah Ann C. Ralls. It involved not only a trust estate, but minors being interested, not only as beneficiaries of that estate, but also as remaindermen, it involved the estate of the wards of chancery. It was also a proceeding *ex parte*, or at least in the nature of such a proceeding; for the ostensible purpose of the petition was for the benefit of all concerned, and there were apparently no adverse interests to be considered in passing upon the application. The proceeding that was instituted, therefore, was literally and substantially in accord with the provisions of § 4863 of the Civil Code, above quoted, and it embraces the very subject-matter of chancery jurisdiction clearly contemplated and recognized by that section. Minors were interested. They had no guardian. A guardian *ad litem* was appointed, in compliance with the provisions of § 4866 of the Civil Code. This was before the act of 1876, which requires personal service on minors in all such cases. Before the passage of that 45 L. R. A.

act an appointment of a guardian *ad litem* for a minor, and notification of him before the cause proceeded, was all that was required to have the interests of a minor properly represented in any cause in court. See *Harvey v. Cubbage*, 75 Ga. 792; *Adams v. Franklin*, 82 Ga. 168.

4. It is contended by counsel for plaintiffs that when the judge granted the order of May 12, 1871, authorizing a sale of this property, upon the supplemental petition of Jones, trustee, and Sarah A. C. Ralls, it was his purpose simply to authorize a sale of the trust estate, and not a sale of the fee in remainder, and that, in the light of the entire proceedings had, this was the legal effect of the order. There can be no question that the purpose of the petition was to obtain authority to sell the entire fee to the property. There is nothing whatever in the petition to indicate a contrary purpose. The object of the petition was—First, to supply the immediate wants and necessities of the beneficiaries, among whom were included all the remaindermen; and, second, to invest the residue of the proceeds of such sale in a farm or other permanent home for these beneficiaries and remaindermen, upon which they could live and earn a support. Upon this application a guardian *ad litem* was appointed, and in his answer he concurred in the petition, found the facts therein stated were true, and recommended that the prayer thereof be granted. The order granting the sale had direct reference to the petition and answer, and granted leave to sell the property, and apply the proceeds of the sale thereof as prayed for. Whenever one seeks to sell property, or negotiates for its sale, the presumption is that his purpose is to convey an absolute estate, unless a less estate is expressly mentioned and limited. See Civil Code, § 3083. The only reason urged in support of the plaintiffs' contention is the construction they place upon the phraseology used by the judge in granting the order appointing a guardian *ad litem* for the minors. That order is as follows: "In the matter of B. F. Jones, trustee for Sarah Ann C. Ralls and children, which is an application for the sale of the trust property, and investment of the proceeds thereof according to the prayer of the said petition, it is ordered that H. D. Cothran be, and he is hereby, appointed guardian *ad litem* for the minor children [naming them] of the said Sarah Ann C. Ralls, and that he answer said application." It is insisted that, by virtue of the terms of this order, the judge regarded the application only as one for the sale of such interest in the property as was covered by the trust, that he therefore appointed a guardian to represent the minors as to this interest, and that his purpose in granting the order for the sale was only to sell the trust estate, and not the fee in remainder. In the first place, we regard the words in the first part of the order only as an effort on the part of the judge to state the case. He named one of the petitioners and stated the case as an application for the sale of trust property. If

minors were interested in a suit, praying, not only for injunction, but for other substantial, equitable relief, and a court should appoint a guardian to represent their interests, it would hardly be contended that, simply because, in his order appointing the guardian, he stated the case as an application for injunction, such guardian would only be empowered to represent the interests of the minors in so far only as they were interested in the prayer for injunction, and could not represent their entire interests in the suit. This guardian *ad litem* was appointed to represent the minors in the proceeding that was then before the court. To determine what is the extent of their interest in such proceeding, one would naturally look to the petition itself, and not simply be content with what the judge had denominated the petition in his order. The two should be construed together, and, so construed, we think there can be no question that the legal effect of this order was to clothe the guardian *ad litem* with full power and authority to represent the entire interests, legal and equitable, of these wards in chancery. Besides, we think the construction given the words "application for the sale of the trust property" is entirely unauthorized. In the light of the nature of this petition, and its object,—to sell the entire fee for the purpose of a reinvestment in a permanent home,—to hold that the judge contemplated restricting the power of sale to the life estate would simply be an absurdity, and would be entirely at variance with the clear and unmistakable meaning of the final order that he passed in the case. The terms, then, "trust property," as used in the order, meant simply a designation and identification of the particular thing involved. He simply meant the land itself which was encumbered with the trust. In the case of *Headen v. Quillian*, 92 Ga. 220, it appears that a trust estate was granted by deed for the use of the wife of the grantor for her life or widowhood, and after her death the property passed to her children. In that case the fee in remainder was a legal estate, which vested in the children when the deed was executed. The trust only covered the life estate of the wife. The deed gave the trustee, with the consent of the life tenant, power to sell "said trust estate." It was held that this authorized a sale of the entire fee. Chief Justice Bleckley, delivering the opinion of the court, on page 222, says: "There can be no rational doubt that by the terms 'said trust estate,' as an object of sale, the maker of the deed intended and understood the land itself which the deed conveyed. . . . To hold that he contemplated restricting the power of sale to the estate for life would attribute to him a technical narrowness utterly strange to his thoughts, and at complete variance with his real state of mind." The principles embodied in this decision, and in several others by this court to like effect, is embodied in § 3171, Civil Code. We dare say that never was an instance where a trust deed or other instrument lim-

ited the estate which the trustee took for life with remainder over, in which, the trustee applying for and obtaining an order to sell and reinvest the proceeds, that a sale of the entire fee, and not simply of the life estate, was contemplated both by the application and by the order of sale. It is true, there are a number of cases decided by this court in which it has been held that such a sale conveyed only the life estate, and not the fee; but not in a single case that we are aware of has the decision of the court been based upon the idea that the purpose, either of the applicant or the judge, was to sell only such interest in the property as was encumbered with the trust. We think, therefore, the court below erred in the conclusion that the judge, by his order of 1871, only intended to direct a sale of the trust or life estate.

5. It is insisted for plaintiffs that, before jurisdiction exists to sell the legal estate of minors, there must be a regular proceeding in equity. To sustain this position the case of *Milledge v. Bryan*, 49 Ga. 397, is cited and relied upon. In that case the trust had ceased, and the legal estate in the property had vested in the children. No interest in the land sought to be sold was encumbered with any trust whatever. It was simply held that the judge of the superior court had no jurisdiction to grant an order in chambers authorizing a sale of the whole estate, either to pay a debt, or to raise money to educate the children. But Judge Trippe, in delivering the opinion in that case, from which counsel make the above quotation, expressly stated that the orders were passed by the judge in chambers several years before the Code went into operation, and that the only authority that could be claimed for the power exercised by the judge was the act of February 20, 1854. In reference to that act (see Acts 1853-54, pp. 59, 60), it will be seen that the judges of the superior courts are authorized, at chambers, where all parties at interest are represented and consenting, and where there is no question of fact in dispute, to appoint or remove trustees, and to order the sale or division of trust or other property, or the investment of trust or other funds. This act was intended to meet the decision in the case of *Arrington v. Cherry*, 10 Ga. 429, where it was held that a judge at chambers has no power, upon petition, to order a sale of trust property. While the terms of the act do not seem to restrict the jurisdiction at chambers over trust property alone, but the words "other property" are used, yet this expression is so indefinite, general, and uncertain that the court, having in view the evident object of the act, limited its application in *Milledge v. Bryan*, to trust estates alone. When the first Code, however, went into effect, on the 1st of January, 1863, the law on the subject was changed. Sections 4863, 4864, Civil Code, are not a codification of the act of 1854, or any other special statute that we are aware of. Section 4863 does not leave it uncertain as to what proceedings may be presented

to the court by petition only; and which are not required to be brought by regular bill or petition in equity. It includes "all proceedings *ex parte*, or in the execution of the protective powers of chancery over trust estates, or the estates of the wards of chancery." In the act of 1854 no reference is had specially to any estate except trust estates. In the case at bar the proceeding to sell the property in question was not only an *ex parte* one, but it related also to the trust estate, and, as heretofore shown, to the estate of the wards of chancery. It therefore embraces all three of the subjects contemplated in the above section of the Code, while either one would have given the court jurisdiction under the form of procedure that was had. When the court, therefore, in *Milledge v. Bryan*, 49 Ga. 397, called attention to the fact that the orders of the judge in question were several years before the Code went into operation, it doubtless had in mind the change which the Code had brought in the old law; and hence this decision, if it has any bearing on this case, is really authority against the plaintiff in error.

As an original proposition, speaking for myself, I would not be prepared to hold that the judge in this case did not have jurisdiction to grant the order at chambers authorizing the sale of this entire property, including the legal estate in remainder. Section 4864 of the Civil Code expressly declares that "the judge in vacation and at chambers may receive and act upon such petitions." In the cases of *Sharp v. Findley*, 71 Ga. 666, and *Iverson v. Saulsbury*, 65 Ga. 728, this court, in construing this section, held it to confer jurisdiction to finally act at chambers in proceedings contemplated by this chapter in the Code. In the case, however, of *Rogers v. Pace*, 75 Ga. 436, it was held that the chancellor had no power to decree a sale of such a legal estate in remainder at chambers in vacation, and that a sale of the *corpus* under a decree so rendered conveyed only the trust estate of the life use. The reasoning of Justice Blanford in *Rogers v. Pace*, on page 438, seems conclusive, as far as it went; but it was based solely upon the provisions of § 2327 of the old Code, which only authorized the sale of the *corpus* of a trust estate by order of the judge in vacation. That section was evidently an effort to codify the act of 1854 above cited. No reference whatever is made in the opinion to provision of the law embodied in § 4864 of the present Civil Code, and which we think, beyond question, had direct application to just such a proceeding as was had in this case. We are constrained to believe, therefore, that the last section cited, and other provisions in that same chapter, were entirely overlooked by the court when the decision in *Rogers v. Pace* was rendered. It is true, *Rogers v. Pace* has since been cited approvingly by this court in other cases; but we think, upon a careful review of all those later cases, none of them involve the identical question now under consideration, and which was decided in *Rogers v. Pace*. In *East Rome Town Co.* 45 L. R. A.

v. Cothran, 81 Ga. 359, the sale of the legal estate in remainder there declared invalid was under an order of court, upon the petition of the trustee and life tenant, to which the remaindermen, who were minors, were never made parties. See 81 Ga. 366. In that case it is worthy of note that there was subsequently an effort, by petition, to which the minors were parties, to ratify the sale of their interest in the land previously had. The order of ratification was granted at chambers. On page 367, Chief Justice Bleckley, who delivered the opinion, states that the order of ratification, though had at chambers, might have cured all defects in the title, had the judge not been disqualified. If the judge had jurisdiction to grant an order of ratification at chambers, it seems to us it would necessarily have followed that he would have had like power to grant the original order of sale at chambers, had the minors been properly made parties to the proceedings and represented before him. In *Lamur v. Pearre*, 82 Ga. 354, the trustee represented the life tenant only. It was simply held in that case that the interests of the remaindermen were not conveyed by the sale of the trustee under proceedings of the court to which they were not made parties. Of course, this would have been true whether the order was granted in term or at chambers. In *Taylor v. Kemp*, 86 Ga. 161, the life tenant applied for and obtained an order to sell the entire fee in the land. The application was made by him as trustee, but in point of fact he was not trustee for anyone, and the property was not really encumbered with any trust. It does not appear in that case that the remaindermen were even made parties to that suit. In *Fleming v. Hughes*, 99 Ga. 450, it was decided that the judge of the superior court had no power at chambers to order a sale of the fee upon petition of one who was simply trustee for the life tenant. It does not appear that the remaindermen were made parties to that proceeding. In the case of *Walker v. Pope*, 101 Ga. 865, there was an attempt by one who assumed to act as trustee for an adult life tenant to sell the entire fee, including the vested remainder of the children. There was no pretense that the children were parties to that proceeding and were bound by it, but it was sought to bind them by a subsequent settlement, by their consent, with the life tenant; and the question in the case was one simply of ratification by the remaindermen, and estoppel as against the rights of subsequent innocent purchasers. Under the view we take of this case, the decision in *Rogers v. Pace*, even if correct law, does not control the main issue here involved. We have indulged in criticisms of that case, and have referred above to the main authorities relied upon by plaintiffs in error to support its correctness, with a view of showing that the rule therein laid down should be restricted to what was actually decided, and not extended so as to further curtail the powers of a chancellor over the estates of his wards. As far as this court has ever gone is to de-

clare that the chancellor has no power to grant at chambers an order for the sale of the legal estate of minors. It has been nowhere intimated, that we are aware of, in the decisions of this court, or in any opinion by any of its members, that since the adoption of the Code it is necessary there should be a regular petition or bill in equity filed, process attached, copy served, and all other proceedings had as are usual in ordinary suits in equity.

The question as to whether or not a court of equity has inherent jurisdiction to order the sale of the legal estate of minors for the purpose of reinvestment is still an open one in this state. We confess that, after a thorough investigation upon this subject, we have met with considerable difficulty in arriving at a conclusion entirely satisfactory, and the difficulty has not been completely removed by the investigation of the numerous authorities bearing directly upon the subject. There is a hopeless and an irreconcilable conflict of authority on the question among the decisions of the courts of last resort in the United States as well as among the numerous text writers, and in the courts of England. From 10 Enc. Pl. & Pr. pp. 733 *et seq.*, we quote the following: "At common law, the guardian or trustee of an infant had no right to change the nature of an infant's property from realty to personalty, or *vice versa*; and it is still a disputed question, upon which the authorities are conflicting whether even a court of equity can authorize such a conversion, in the absence of statutory authority, and by virtue of its general jurisdiction over the estates of infants, except for the purpose of paying debts, and for the maintenance of the infant. The jurisdiction has been claimed and exercised in many cases, the rule being broadly declared to be that chancery has jurisdiction to order a conversion of realty into personalty whenever it clearly appears to be for the infant's interest to make such a conversion. But in England and in many American courts a contrary doctrine prevails, and it is held that a court of equity has no inherent jurisdiction to direct a sale or mortgage of the real property of infants." As far as our examination of the English authorities has gone, we think that the weight of them denies to a court of chancery such inherent jurisdiction. But even here we are met with conflict, for, in some of the cases holding this view, references are made to other decisions by the judiciary of England entertaining contrary views. We deem it unimportant, however, to enter into a review or a discussion of these English authorities; but it is well enough to bear in mind a fact that is recognized in many text-books on the subject, also in supreme court decisions of several states, and 10 Enc. Pl. & Pr. p. 737, that "the principal reason for denying this jurisdiction in England appears to have been that by changing the nature of the minor's estate from real to personal, or from personal to real, the rights of third persons, who would be entitled in case of the minor's death,

would be materially affected, as in that country real and personal property descend in different channels, and also because it would formerly have changed the infant's power to make testamentary disposition of his property." For those and other reasons the doctrine has not been followed in many of the states of this Union. It has, however, been followed in others, and, though there appears considerable conflict, we think the weight of adjudications on this subject is against the English rule. In the case of *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247, authorities upon this subject in Illinois and elsewhere were reviewed, and the court reached the following conclusion: "The power of courts of chancery, by virtue of their general jurisdiction over the estates of infants, to authorize the conversion of their real estate into personalty when it is clearly for their interest that such conversion should be made, is not only supported by the general current of authority in this country, but is so thoroughly settled by the former decisions of this court as to be no longer open to question in this state." In the case of *Goodman v. Winter*, 64 Ala. 411, 38 Am. Rep. 13, is the following ruling: "In this state the chancery court, by virtue of its general jurisdiction over infants and their estates, has power to decree the sale of an infant's lands, whether held under a deed or will, having regard to the necessities and interest of the infant; and this jurisdiction extends to contingent estates, or estates held in remainder, though it may be more sparingly exercised." It will be seen from the able opinion rendered in that case by Brickell, Ch. J., that the doctrine announced was based upon the inherent jurisdiction of a court of equity, upon which rested the power and duty of the court to protect infants, to take care of and preserve their estates while under disability debarring them from the administration of the property; and a discussion is likewise entered into why a different rule prevails in England. The same doctrine is announced in *Thorington v. Thorington*, 82 Ala. 489; *Gassenheimer v. Gassenheimer*, 108 Ala. 651. This inherent jurisdiction of a court of chancery is recognized and affirmed by Chancellor Kent in *Re Salisbury*, 3 Johns. Ch. 348, and *Hedges v. Riker*, 5 Johns. Ch. 163, and in *Snowhill v. Snowhill*, 2 N. J. Eq. 30. In the case of *Bulow v. Witte*, 3 S. C. N. S. 321, it is declared that it is not disputed that the court of chancery has the power to sell and convey the estate of an infant, and that, however doubtful it may at one time have been considered, it is now too firmly established to be shaken, and that the exercise of this jurisdiction, through the process of petition, however originating, has been sanctioned and confirmed by long-established practice, and that the right of the court in this respect is no more to be disputed than its right to order the sale of property for investment under the more expensive procedure by bill. See also *Bulow v. Buckner*, Rich. Eq. Cas. 401. Such general jurisdiction was also recognized by the supreme court of

North Carolina in the case of *Sutton v. Schonwald*, 86 N. C. 198, 41 Am. Rep. 455; also in the cases of *Rowland v. Thompson*, 73 N. C. 504; *Myrick v. Jacks*, 33 Ark. 425. We call attention to the above authorities as a few of those in this country that do not recognize the general doctrine in England, and while there is considerable conflict, as above indicated, between those and the decisions of other courts, we think the decisions recognizing this general inherent power in a court of equity rest upon the sounder reason and the wiser policy.

It is true that in many states the question is of no importance, from the fact that the subject is regulated by statute. Prior to the passage of the act of November 11, 1889 (see Civil Code, § 2545), the ordinary, in this state, had the authority to grant to the guardian of a minor child an order authorizing the guardian to sell unproductive real estate belonging to the ward, for the purpose of reinvesting the proceeds of the sale in other and productive property. See *Crawford v. Broomhead*, 97 Ga. 614. It follows, therefore, when the orders for the sale of this trust property, in 1869 and 1871, were passed, the act of December 21, 1827 (Cobb, Dig. pp. 325, 326), authorizing a sale of realty belonging to orphans, was in force, though we believe the same was not embodied in the Code. We do not mean to say, therefore, that there was in equity, or in the judge of the superior court of this state, any inherent jurisdiction simply to sell the legal estate of a minor for the purpose of reinvestment, prior to the act of 1889, provided the application urged no equitable reason for the sale, and attempted to accomplish no more than what the court of ordinary clearly had jurisdiction over. But that is not the case we are now considering. It should be borne in mind that this was not an application simply to sell the real estate of minors. There was involved in the matter an equitable estate, to wit, a trust estate, over which no court had any jurisdiction except the superior courts of this state. The object of the application (and, indeed, it was the prime object for the appointment of a trustee) was to bring about a sale of the entire fee in this property, including, not only the legal estate of the minors, but also the equitable estate, in which they likewise had a beneficial interest. Manifestly, the court of ordinary had no jurisdiction whatever in regard to the equitable estate. To have applied simply to the court of ordinary for direction to sell the fee in remainder in the property could not have accomplished the purpose of the petition. On the other hand, to have applied alone to the judge of the superior court for an order to sell the trust estate, only, would equally have failed in bringing about results that were manifestly for the interest of the beneficiaries; for it would simply have been an absurdity to have asked permission to sell a life estate in property which was bringing no income, with the view of raising proceeds sufficient to invest in property that would be sufficiently productive to support

the beneficiaries. Besides, the ordinary had no authority to direct a private sale, which was desired to be accomplished in this particular case. Here was a case, then, involving a matter over which equity clearly had jurisdiction; and this fact would give jurisdiction over other things connected with the equitable relief sought, although the court would not consider such other matters, taken singly and alone, and not accompanied with any element in the case looking to equitable relief. Even the strongest authorities denying chancery jurisdiction to order the sale of the legal estate of minors recognize the fact that under such circumstances, especially where the rights of third parties are involved, such sales could be legally had. For instance, where the minors are tenants in common with other parties, the legal estate of the minors in such property may be sold, and thus converted into money, upon the application of the other tenants in common desiring partition. In this case there was another tenant in common with the minors, to wit, their mother. The very purpose of the conveyance of the land to them was that they might be provided with maintenance and support, and yet the property was in such condition that neither the mother nor the children could enjoy any benefits even of the life estate without a sale of the entire fee. The case might have been different, had the minors no interest whatever in the life estate; but where they not only own the legal estate in remainder, but are likewise beneficiaries of the life estate, and it is shown to be absolutely to their interest, and even necessary to provide for them support, maintenance, and a home, to sell the entire fee, including both their legal and equitable estates, we can see no reason why a chancellor (in this state, the judge of the superior court) would not have the power, under the general inherent jurisdiction of courts of equity over the estates of minors, and the interests of the wards of chancery, when before them, to entertain jurisdiction and grant the relief prayed. This is not, therefore, a case in which the abstract doctrine above referred to, that no such inherent power exists in reference to a sale of the legal estates of minors, obtains; but we think, under its peculiar facts, it is to be clearly distinguished from all those cases in which this doctrine is recognized and enforced. For, if the superior court had not the jurisdiction in this case, then these plaintiffs in error were absolutely without any remedy whatever in any court of the state to obtain the relief which the petition of the trustees showed their distressed condition at the time demanded. We think it clearly a case where, under the broad and comprehensive powers of a court of equity over the estates of orphans and minors, the granting of the relief sought was within this inherent jurisdiction of the court.

6. We will now consider the question as to whether, under the facts of this case, the order of May 12, 1871, authorizing a sale of the property in question, was granted in

term or at chambers. The petition of the trustee and life tenant for the sale of the property had entered upon its back, "January Adjourned Term, 1871." The order of sale granted by the judge was signed by him as "Judge of the Superior Courts of the Rome Circuit, January Adjourned Term, May 12th, 1871." It was evidently the intention of the petitioners that their suit should be considered a term proceeding, and when the judge signed the order he manifestly regarded it as a proceeding in term. It further appears that on the date of this order the court was actually in session, and did not finally adjourn until the 7th day of June following. Before its final adjournment the entire proceedings were recorded upon the minutes of the court. These facts, in the absence of any proof to the contrary, are certainly sufficient to authorize the conclusion that this order was granted during a regular term of the court, in open court, while it was actually in session. It is this open proceeding during a regular session of the court that distinguishes actions at term from such as are had in vacation and at chambers. It is insisted, however, that as the petition was never filed, the case not regularly docketed, no process attached, and the order directed a record of the proceedings as is usually done in matters decided at chambers, these facts conclusively demonstrate that this was a chambers proceeding. It was decided in the case of *McGowan v. Lufburrow*, 82 Ga. 524, that the decree in that case, under the facts reported, was passed in term time, and not at chambers. The original record in that case, which we have just examined, shows that there was no prayer for process in the petition; no process attached to it; the petition was not filed until the very day the order was granted; there was no verdict of a jury; the petition itself was backed, "In Chatham superior court, in chambers;" and the order of the judge had the following caption: "*Ex parte* Mary G. Lufburrow, Executrix, et al. In Chatham superior court, in chambers." It is true, it further appeared in that case, by oral testimony, that this order was actually granted in open court during the term; but that oral testimony is not stronger than the record in this case, which, in effect, declares the order now in question was actually granted in term. There may be some question as to whether one would be allowed by parol testimony to contradict the record of the court, but it will certainly be presumed that the record speaks the truth, until the evidence is clear and positive to the contrary. It is insisted, however, that this case of *McGowan v. Lufburrow* is based upon special statutory provisions, as embodied in § 4855 of the present Civil Code, which relates to proceedings by executors when it becomes impossible to carry out any last will and testament. It will be seen, however, both from the facts in the *McGowan Case*, and from the opinion and reasoning of the court, that the proceeding was not based upon this section of the Code. It is true, the petition was by an ex-

ecutor, but it was for the purpose of selling the portion of the legal estate of minors devised to them under the will, in order to pay off debts created by the life tenant. It is true, it appeared in the testimony that some small portion of those debts was chargeable against the estate. The bulk of them, however, were debts of the life tenant. There was no pretense that for any reason it was impossible to execute the will; for that will directed, in the first place, that the debts should be paid. On page 532, Justice Simmons expressly bases the authority of the court to act in granting its order of sale upon §§ 4221 and 4222 of the old Code (§§ 4863 and 4864 of the present Civil Code). The court doubtless went upon the idea, as intimated by Chief Justice Bleckley in *Blake v. Black*, 84 Ga. 399, and by Chief Justice Jackson in *Sharp v. Findley*, 71 Ga. 665, that executors are trustees, and that in one sense that was a trust estate, because the will is a great trust conveyed to the executor, and hence the court had jurisdiction of that matter, not by virtue of § 4855, but under §§ 4863 and 4864 of the Code; and, bearing in mind that this court had previously decided a legal estate in remainder of minors could not be ordered sold at chambers, it was a material question in the *Lufburrow Case* as to whether the order of sale was granted at chambers or in term. However that may be, the question was directly made and directly decided, that, under the facts of that case, the final action of the judge was had during term; and not in vacation. In the *McGowan Case* (see 82 Ga. 534, it was decided that, under the provisions of § 4221 (§ 4863 of the present Civil Code), it was not necessary to file an *ex parte* petition any number of days before the term, as that section prescribes no time wherein a petition of this character should be filed. The court further held in that case that, even if the omission to file the petition had been irregular, it would not have made the decree entered thereon void. See also *Dean v. Central Cotton Press Co.* 64 Ga. 670; *Southern Marble Co. v. Stegall*, 90 Ga. 237. In the last case cited, it is true, the suit was by an executor, and based upon an impossibility to carry out the will; but it is clearly indicated in that case that it was a term proceeding, and the fact that there was a failure to attach process to the petition, and the failure to file the same, did not vitiate the proceeding, or make it one at chambers. Considerable stress is laid in this case on the fact that the judge, in his order authorizing a sale of this property, also directed a record of the proceedings, thus indicating an intention to comply strictly with the act of February 20, 1854, authorizing a sale of trust estates at chambers. In the case of *Southern Marble Co. v. Stegall*, 90 Ga. 241, a similar order was granted with reference to a record of the proceedings in that case; so it seems to be not an unusual thing for such orders to be given in cases decided at term. In the case at bar there appears a special reason for granting this order. The peti-

tion had reference to a suit in equity had in Clarke superior court, which fixed the title to this property in Mrs. Ralls and her children. It was desired, not only that the pleadings should be recorded, but also that the bill and decree in Clarke superior court should likewise be entered of record; and hence a special order was prayed for and granted for this purpose. Counsel for plaintiffs in error rely upon a *dictum* by Chief Justice Jackson in *Sharp v. Findley*, 71 Ga. 663, in which it is stated that there was no regular bill in equity filed and served according to law, and that the case may be considered as one at chambers. In that very connection, however, the chief justice stated that the order was actually passed in term. On page 668 (4) the proceeding is clearly regarded as one in term, and the court simply decided that this fact would not render the decree less effectual than if passed at chambers. Even if the facts of this case, with reference to the granting of this order, are open to two constructions,—one, that it was granted in term, and the other, at chambers,—“it is our duty, in favor of jurisdiction to pass the order and the proper exercise of the same, to adopt that construction which treats the order as completely legal, rather than that which would hold it partially illegal, and, to that extent, void or voidable.” *Lamar v. Pearre*, 82 Ga. 360.

7. The more especially should such a construction be adopted and enforced when we consider the fact that the rights of innocent purchasers are involved. Equity is always loath to interfere with such rights, and courts “have gone far to protect such purchasers, even when they held under doubtful or irregular sales, or defective or incorrect judgments of courts having jurisdiction of the subject-matter.” *Sharp v. Findley*, 71 Ga. 667, 668; *Schley v. Brocn*, 70 Ga. 64; *McGowan v. Lufburrow*, 82 Ga. 534. There is no question, from this record, that the parties under whom these defendants claim are innocent purchasers, for value, of the property in dispute. There was some testimony that some of these plaintiffs, while minors, knocked down a portion of a wall that the original purchaser was undertaking to erect upon the property; but this was evidently after the purchase, and after the vendee commenced to improve the property he had innocently and in good faith bought. The petition for the sale of this property was brought, not only by the trustee, but by the mother of these plaintiffs. It presented a case of absolute necessity for the sale of the entire property in order to provide for them the necessities of life, and to procure for them a home or farm from which they could make a support. While equity regards a minor as a privileged person, and should vigilantly protect and guard his rights in every proceeding that involves his interests, yet, when the minor is properly represented in court, and it has jurisdiction over his person and the subject-matter, the law will always presume that the chancellor acted wisely and in the full discharge of his duty 45 L. R. A.

with reference to the estate of his ward. Neither principles of law, equity, nor justice would, in such a case, tolerate setting aside the judgment for any mere irregularity, especially when the effect of such a course would be to deprive the innocent not only of the property they purchased, but of improvements placed thereon enhancing it perhaps tenfold in value. We do not think there was really any defect attending the granting of this order by the judge on May 12, 1871, and, even if there was, that it was a mere irregularity, which did not render void the judgment of the court. We therefore conclude that whatever title the plaintiffs had to the property sold under this order was divested by virtue of this sale, and that, therefore, there can be no recovery. under the facts of this case, of this portion of the premises in dispute.

8. The title to the Wadsworth triangle, however, stands upon an entirely different footing. This property was sold under an order of court granted on July 20, 1869, upon a petition filed by Mrs. Sarah Ann C. Ralls. In that petition she alleged that her father, J. C. Branch, had held the property in trust for her separate use. No allusion whatever was made in it to her children. The father having died, she prayed the appointment of a trustee as his successor, and that he be clothed with the legal title to the property. She asked that the same be sold, a cheaper residence bought, and so much of the surplus as was needed applied to buy necessities for herself and children. A trustee was accordingly appointed, and an order for the sale granted. The purchaser at the sale under this order acquired all title, rights, and equities in the land which were owned by Mrs. Ralls. After this sale, Mrs. Ralls, for herself and children, brought her bill in Clarke superior court. She states in her bill that her father, J. C. Branch, had repeatedly, in the presence of witnesses, expressed his intention and purpose to convey in trust to complainant, for the benefit of herself and children, said property, according to the terms of a trust deed executed by him to one George S. Black on November 24, 1860. It further appears from her petition that a portion of the purchase money paid by Branch for the property was her individual money, previously advanced by her father as part of her share of his estate. The verdict of the jury rendered at the February term, 1879, was that Branch did purchase of A. Shorter, and give to the said Sarah Ann C. Ralls, the land in question, that Mrs. Ralls had since been in possession thereof, and that the land had been paid for by Branch in part with her money which he had before given her. The verdict further specified that Branch had intended to convey said land to her and her children under the same terms and limitations in the trust deed to Black, and had frequently so expressed himself. The jury thereupon found the title vested in the said Sarah Ann C. Ralls and her children, and that the executor execute to Jones, in trust for them, a deed of conveyance under the same

terms and limitations as were contained in the Black deed. Here, then, are two petitions filed by Mrs. Ralls, in one of which she alleged, in effect, the property belonged to her by virtue of a gift from her father. In the other she alleged, and the jury so found, that it was given to her, but that it was the intention of the father to convey it to her and her children in accordance with the terms of the Black deed. This Black deed, however, was not executed until 1860,—about ten years after the parol gift to Mrs. Ralls. There is but one way in which the two petitions can be reconciled, and it seems to us a legitimate construction to place upon them, and the only one that can be placed without imputing falsehood to the petitioner: The property was given to her, and she was put in possession thereof, about the year 1849 or 1850. No mention was then made of the children. He afterwards said that he intended to convey the land to her and her children, just like he had conveyed the property in the Black deed; but a declaration of that intention was not made until after the execution of the Black deed, and which was some ten years after the parol gift to Mrs. Ralls. Either Mrs. Ralls or her husband, by virtue of his marital rights, clearly had an equity in this land, and a right supported by something else besides a mere parol gift for love and affection. A portion of the premises was bought with her own money, and, upon the strength of the gift, either she or her husband made valuable improvements upon the land, and remained in possession thereof for nearly twenty years. But what equity did the children have in the land? Upon what claim of right or title could they have based a proceeding at any time prior to the decree of Clarke superior court, had in 1870, to recover from Mrs. Ralls the premises in dispute? All that their claim could have been founded upon was a parol understanding or declaration made by their grandfather ingrafting a trust upon the land in their favor after he had parted with all equity to it by a gift to their mother. Outside of the pleadings, to which we have referred, instituted by their mother, there is absolutely nothing in this record to support even such a claim. The will executed by Branch mentions advances that he had made to his children, and, among them, property to the amount of several thousand dollars made to Mrs. Ralls; but nowhere in that will does he refer to the premises in dispute, or to any property which he intended to convey to Mrs. Ralls and her children. The parol testimony introduced on the trial of this case fails to disclose even such a purpose on his part, and the testimony of the witnesses with reference to improvements is to the effect that these improvements were placed upon the premises by the husband of Mrs. Ralls. It is true, by virtue of the record of Clarke superior court, the children acquired an interest in this land, including a legal estate to the fee in remainder thereto; but the purchaser of the Wadsworth triangle

was not a party to this proceeding, nor does he claim under any sale based upon that decree. We must therefore determine the rights of those parties by the condition of things that existed when the Wadsworth triangle was sold, in 1869. When this sale took place, it is not pretended that there was anything whatever to put the purchaser on notice of any claim which these children had to the land. All rights they acquired thereto were by virtue of a decree of court granted subsequently upon the petition of their mother, and based, at that, not upon any real equity they had in the land, but purely and simply upon a declaration made by the original owner after he had given the land to their mother. Even if this declaration had been made in writing, it could not have operated to have conferred a valid legal title upon these plaintiffs. See *Lemon v. Wright*, 31 Ga. 317. Much less could a trust in land be thus set up by parol. Under the facts in this case, therefore, we think that when the sale of this Wadsworth triangle was had, in 1869, Mrs. Ralls had an equity in the land at least superior to that of her children, and she could have then successfully defended any action which might have been instituted by them against her for the recovery of any interest in the premises. If this be true, then it necessarily follows, *a fortiori*, that an innocent purchaser of her interest, without any knowledge whatever of the children's equity or claim, acquired by that purchase a title superior to any claim of these plaintiffs. It appears further from the record in this case that the possession by the mother of the property in dispute covered a period of about twenty years prior to the decree of court creating the trust estate in favor of herself, with fee in remainder to the children. Under § 3571 of the Civil Code, exclusive possession by a child of land belonging originally to the father, without payment of rent, for the space of seven years, creates conclusive presumption of a gift. Between January 22, 1852, and the adoption of the Code of January 1, 1863, there seems to have existed no law in this state allowing an adverse possession on occupancy alone to ripen into a title; and the section cited, as well as sections on the subject of twenty years' prescriptive title and seven years' under color of title, as they now exist in our law, became of force by adoption of the first Code. While this is true, however, it does not follow that these provisions of the Code do not relate back to a prior possession. In the case of *Shiels v. Roberts*, 64 Ga. 372, 373, this court applied the rule of twenty years' possession to a case where such possession commenced prior to the adoption of the Code; and it was ruled that it was competent for the legislature to take into account the past possession, and to tack that to the future possession to make the twenty years. We do not see why a like rule would not apply to a presumption of gift arising out of the possession by a child for seven years. But, however this may be, as above indicated, apart from this question of prescrip-

tion, there was a complete equity outstanding against the claim of title set up by the plaintiffs in error. It is true that by virtue of his marital rights the husband of Mrs. Ralls may have acquired this title, but, as to the particular piece of land in question, the defendant, not claiming under the same original grantor with the plaintiff, had a right, as a defense against plaintiffs' action, to show an outstanding title or equity superior to that set up by plaintiffs. The weight of authority is to the effect that such outstanding title cannot be shown where the plaintiff and defendant claim under the same original grantor, and where the defendant fails to connect himself with such outstanding title; and there is no conflict in authority on the proposition that this defense is allowed in an ejectment case when the parties do not claim title from the same original source. It is further insisted that the decree of Clarke superior court rendered in 1871 related back to the parol gift by Branch in 1849 or 1850, and that, therefore, these plaintiffs had a title paramount to that of the defendant, even as to this particular part of the property now under consideration. It is true that their title does thus relate back, in so far as are concerned the rights of all who were parties to the proceeding in which said decree was rendered; but it would certainly be a dangerous precedent to hold that such a decree was binding upon innocent purchasers who were not parties to the case, and to apply to them a judgment of the court, which they could have successfully resisted, under the facts in this record, had they been parties to the proceedings. The conclusion, therefore, is that, before the plaintiffs' rights were established by the decree of Clarke superior court, a sale by their mother, or her trustee, of the Wadsworth triangle, precluded them from any recovery of this property, or from asserting any rights thereto, against those who had innocently purchased it without knowledge of their equity, if any they ever had.

The above views render it entirely unnecessary for us to consider the other important and interesting questions made by this record, touching mesne profits, and the outstanding title in the husband of Mrs. Ralls, which defendant claims to be superior to any title set up by the plaintiffs, and the doctrine of estoppel and ratification, which was also set up by way of defense to this action. The views above expressed dispose of the entire case, for, under the facts, we hold that no recovery can be legally had by plaintiffs.

Judgment affirmed.

All the Justices concur except **Simmons**, Ch. J., dissenting.

Simmons, Ch. J., dissenting:

1. The deed executed under the decree of the superior court of Clarke county on February 14, 1871, by the executrix of the estate of James C. Branch, in specific performance of a parol gift made by the latter many years before, conveyed the land in dispute to

B. F. Jones, with words of inheritance, as trustee for Sarah Ann C. Ralls, and her present children, and any future child or children of hers, free from the debts, contracts, and control of her present husband, as well as any future husband she may have, and, after the death of the said Sarah Ann C. Ralls, to her children, free and relieved of the trust. Under this deed, the children, who are the plaintiffs in this case, took an equitable estate as joint usees with their mother during her life, and a legal estate in remainder in fee, to take effect in possession at her death. *Frank v. Berkner*, 67 Ga. 264, 265, 267; *East Rome Town Co. v. Cothran*, 81 Ga. 359-365 (syl., point 1); *De Vaughn v. McLeroy*, 82 Ga. 706, 707; *Holcombe v. Tufts*, 7 Ga. 538, 544-546. This legal remainder vested in the children living at the date of the deed, subject only to open and take in any other child or children who might thereafter be born. *Olmstead v. Dunn*, 72 Ga. 850, 851.

2. The trust estate, therefore, so far as the children are concerned, was confined to the estate in common which they held as joint usees with their mother during her life. It is so expressly limited by the deed itself. Consequently the estate of the trustee was less than the fee, because it did not and could not include the legal remainder. *Frank v. Berkner*, 67 Ga. 264, 265, 267, and *East Rome Town Co. v. Cothran*, 81 Ga. 359-365. The extent of a trustee's estate is measured by the purposes of the trust, and not by words of inheritance affixed to his name. *Ibid.*; *Fleming v. Hughes*, 99 Ga. 446. In the case at bar the purposes of the trust were wholly disassociated from the estate in remainder, and the deed did not invest the trustee with any power of sale. Hence a sale of the fee by the said trustee only conveyed to the purchaser an estate for the life of the life tenant, unless the fee was authorized to be sold by the trustee under a lawful judicial order or decree.

3. The petition for the sale of the property to the Rome Hollow-Ware & Stove Company was presented by the trustee, as trustee for the mother and children, and by the mother in her individual right. A copy of the aforesaid deed was attached to the petition. The only property which the trustee held in trust for the children was, as above stated, the estate in common which they possessed as joint usees with their mother during her life. The other estate in the property possessed by them, to wit, the remainder, was shown by the deed itself to be a legal estate. The order of court appointing a guardian *ad litem* expressly named such guardian to represent the children in the "application for the sale of the trust property." By using the definite article, "the," the judge more clearly indicated that he must have recognized that the title set forth in the petition and deed showed a trust estate and a legal estate, and that his jurisdiction was over the trust estate alone. The order to sell recognized the trustee in that character only, and authorized the trustee,

as such, to sell the portion of "said property" mentioned in the application for the sale. These words, "said property," might bear two interpretations: First, the trust property in the designated portion of the land; or, secondly, the entire estate therein, equitable and legal. The first construction would impute a legal intent to the judge, and make the order completely legal, because he only had jurisdiction to order the sale of trust property, as will be hereinafter shown. The second construction would impute an illegal intent to the judge, and make his order legal in part and void in part, for the reason just mentioned. "Where two constructions are open to our choice, it is our duty, in favor of jurisdiction to pass the order, and the proper exercise of the same, to adopt that construction which treats the order as completely legal, rather than that which would hold it partially illegal, and to that extent void or voidable." *Lamar v. Pearre*, 82 Ga. 360. Therefore, to hold that the order only authorized a sale of the trust property will be to treat the order as completely legal, granting that the children had notice of the petition for the sale. Admitting, however, that both the applicants and the judge intended a sale of the fee in the property, still their intentions, unlike that of a donor or grantor, would amount to nothing, because the applicants did not have the fee to sell, and the judge had no power to give them authority to sell it. Hence the case of *Headen v. Quillian*, 92 Ga. 223, defining the words "the trust estate," as used and intended by the donor in the deed in that case, where, as Judge Bleckley says, "he evidently thought there was more than one trust," by using the words "subject to the above-described trusts" in giving the trustee a power of sale for reinvestment, as well as § 3083 of the Civil Code, in reference to the presumption and effect of a sale where parties have the fee to sell, and offer the property for sale, have absolutely no application to the question now under consideration. But the question of imputing a legal intent to the judge or chancellor, which is fully recognized in the case of *Lamar v. Pearre*, 82 Ga. 360, where the change of trustees and the subsequent order to sell the trust property for payment of trust debts and for reinvestment, were restricted to the life estate, may be classed as subsidiary to the vital question presented,—whether the superior courts of this state, as courts of equity, or the judges thereof, were invested in 1871 with either the inherent or statutory power to decree or order the sale of infants' legal estates in real property for reinvestment.

4. The origin of the inherent jurisdiction of equity over the persons and estates of infants, which was for a long period involved in doubt and dispute, was finally rested upon the principle that the King was the protector, as *parens patriæ*, of all infants in his Kingdom, and that he delegated this right to his court in chancery. Story, Eq. Jur. §§ 1326-1334; Pom. Eq. Jur. § 1304. But the court, like the King, exercised only the care

of infants and their property, and did not assume to itself the actual guardianship of them, though often characterized as their general guardian. Dan. Ch. Pr. 6th Am. ed. p. 1347; 1 Madd. Ch. Pr. p. 331; Macpherson, Infants, p. 103; 9 Enc. Pl. & Pr. p. 890, and the cases cited in the notes thereto. The extent of this jurisdiction, in addition to appointing guardians for infants having no testamentary guardians, and afterwards governing their custody, maintenance, and marriage, related to the management of their property, which, as hereinafter shown, has always been well defined and limited,—the protection and preservation of their property against their parents, guardians, and other persons. *Butler v. Freeman*, 1 Ambl. 301; Adams, Eq. 7th Am. ed. p. 281; Pom. Eq. Jur. § 78; Dan. Ch. Pr. 6th Am. ed. p. 1362. The enforcement and protection of trusts in their favor. *Lozey v. Stanley*, 147 N. Y. 570. The granting of authority to their guardians to make leases of their lands until their majority. Dan. Ch. Pr. 6th Am. ed. p. 1364; Macpherson, Infants, *311. The sale of their equitable estates (10 Enc. Pl. & Pr. p. 737, and cases cited in note 3; Woerner, Guardianship, p. 247), upon the reason, probably, that trusts are within the exclusive jurisdiction of equity, and, in a court of equity, "are invariably applied to property (and especially to real property), and not to persons" (Story, Eq. Jur. § 1330). And the sale of their legal estates, over which the court has acquired jurisdiction by litigation or proceedings under some one of its many heads of ordinary jurisdiction, such as in cases for receiverships (*Walker v. Morris*, 14 Ga. 325-327); partition (Adams, Eq. 7th Am. ed. *235; 10 Enc. Pl. & Pr. p. 734, note); injunctions against actions of ejectment, and other cases where the title and right of property come before a court of equity for adjudication (*Groce v. Field*, 13 Ga. 24; *Lozey v. Stanley*, 147 N. Y. 570, 571); relief when it is impossible to carry out the provisions of a will (*Sharp v. Findley*, 59 Ga. 730; *Southern Marble Ob. v. Stegall*, 90 Ga. 237); payment of mortgages or other debts of their testators or intestates (Dan. Ch. Pr. 6th Am. ed. p. 1345; Macpherson, Infants, *412, 413; 10 Enc. Pl. & Pr. p. 734, note; Woerner, Guardianship, p. 227); payment of legacies charged on lands devised to them (*Powell v. Powell*, 6 Madd. *53; *Dean v. Central Cotton Press Co.* 64 Ga. 671, 672); payment of estate debts, upon the application of the executor and devisees, to protect the rest of the estate from imminent sale by clamorous creditors (*McGowan v. Lufburrow*, 82 Ga. 523; *Blake v. Black*, 84 Ga. 399, 400); and the adjustment of the rights of vendor and infant vendee, where the latter buys and acquires possession of the property, and afterwards disaffirms the contract, by a plea of infancy, when sued for the balance of the purchase money (*Strain v. Wright*, 7 Ga. 568; *Thomason v. Phillips*, 73 Ga. 140). For these purposes the jurisdiction of equity is plenary and unquestioned; and when petitions or suits by bills thus in-

volving the persons and estates of infants are brought, to which the infants are parties, either plaintiffs or defendants, they become wards of court or in chancery. *Butler v. Freeman*, 1 Ambl. 302, 303; *Williamson v. Berry*, 8 How. 555, 12 L. ed. 1195; *Sharp v. Findley*, 71 Ga. 654; *McGowan v. Lufburrow*, 82 Ga. 523; Pom. Eq. Jur. § 1305. In this character they are entitled to the special protection of the court, and with which duty the court is thenceforth charged, on the principle, as stated by Lord Eldon in the case of *Wellesley v. Beaufort*, 2 Russ. Ch. 20, "that the law should place somewhere the care of individuals who cannot take care of themselves." This is no more than is enjoined upon the courts of ordinary in this state, which are also called the protectors and guardians of infants within their jurisdiction. *Deyton v. Bell*, 81 Ga. 370. The court does not thereby acquire jurisdiction over their wards for all purposes (*Butler v. Freeman*, 1 Ambl. 302, and the authorities cited *infra* on the inherent jurisdiction of equity to decree the sale of infants' legal estates in real property); and it would be idle to say that the mere naming of infants as sole defendants in a bill, or respondents in a petition, would give the court jurisdiction to authorize a sale even of their trust property, for in such cases they are put upon the same footing as adults as to service or notice before a decree or order can be made, affecting them or their estates (Dan. Ch. Pr. pp. 444, 1606, 1607; *Hill v. Printup*, 48 Ga. 453, 454). Indeed, as early as 1696 it was the boast of Lord Chancellor King that in "chancery, where the interests of infants are so far regarded and taken care of, that no decree shall be made against an infant, without having a day given him to show cause after he comes of age." *Falkland v. Bertie*, 2 Vern. 342. And the rule thus announced by this learned chancellor was adhered to by the chancery courts of England even in granting decrees for the sale of infants' estates acquired by descent and devise, when suit was pending in equity to sell the property for payment of their testator's or intestate's debts (*Blatch v. Wilder*, 1 Atk. 420; *Uvedale v. Uvedale*, 3 Atk. 117; Dan. Ch. Pr. 6th Am. ed. pp. 164, 168), until it was changed as to such decrees by the statute of 1 Wm. IV. chap. 47, § 11 (Macpherson, *Infants*, *412, 413, 423, 427).

The inherent jurisdiction of equity to decree a sale of the legal estates of infants in real property, for reinvestment, by bill or petition for that purpose, has been questioned and denied from the earliest times to now. In England, where the chancery jurisdiction for the protection of infants and their estates originated and is continued, the courts of chancery have uniformly denied this first-mentioned and greater power, without the aid of an act of Parliament. Adams, Eq. 7th Am. ed. pp. 284, 285; 1 Spence, Eq. Jur. 613; Dan. Ch. Pr. 6th Am. ed. pp. 168, 169; 9 Am. & Eng. Enc. Law, p. 126; 10 Enc. Pl. & Pr. pp. 734, 736, and notes; Schouler, Dom. Rel. §§ 356, 357; Woerner, 45 L. R. A.

Guardianship, pp. 225, 226. In *Taylor v. Philips*, 2 Ves. Sr. 23, decided in the year 1750, Lord Chancellor Hardwicke said: "There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as in the composition of debts, it has been done; but never as to the inheritance, for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill." And in *Russel v. Russel*, 1 Molloy, 525, decided in the year 1827, Lord Chancellor Hart said: "I have no authority to bind an infant's legal real estate. That was decided long ago by Lord Hardwicke, in *Taylor v. Philips*. . . . The chancellor has never since attempted to deal with the legal inheritance of infants without the aid of an act of Parliament." These two cases, which are most frequently cited, are but an exemplification of the rule maintained in many other English chancery cases, among which are *Simson v. Jones*, 2 Russ. & M. 374, 377, and *Calvert v. Godfrey*, 6 Beav. 97, 109. In *Simson v. Jones*, 2 Russ. & M. 374, the master of the rolls says: "This court has no authority to give an infant a power of alienation, even for her own benefit." And on page 377: "By the rule of law, she has no power of disposition during her minority; and this court has, I think, no jurisdiction to give her such power, and I am not aware that any case is to be found in which the court has attempted to exercise such a jurisdiction." And in *Calvert v. Godfrey*, Lord Langdale, M. R., distinctly denied the inherent jurisdiction of equity to order the sale of an infant's legal estate merely because it was beneficial to the infant, when no suit was pending by any person who had a right to call on the court to sell the estate for the payment of a debt.

The English rule as above announced has been adopted and followed by a decided weight of authority, both judicial and elementary, in this country. In addition to the many American cases cited in 10 Enc. Pl. & Pr. p. 736, see *Price v. Winter*, 15 Fla. 101; *Onderdonk v. Mott*, 34 Barb. 106; *Dodge v. Stevens*, 105 N. Y. 585; *Bent v. Maxwell Land Grant & R. Co.* 3 N. M. 227; *Hoback v. Miller*, 44 W. Va. 635 (syl., point 2); *Perin v. Megibben*, 6 U. S. App. 348, 53 Fed. Rep. 86, 96 (syl., point 6), 3 C. C. A. 443; *Stansbury v. Inglehart*, 9 Mackey, 134, 152, 154; and the following additional American text-books: Barton, Ch. Pr. § 170; Bispham, Eq. § 549; Pom. Eq. Jur. § 1309; Perry, Tr. 610; Tyler, Infancy, p. 296, § 193; 3 Wait, Act. & Def. p. 555. The case of *Anderson v. Mather*, 44 N. Y. 260, which was an application for the sale of an infant's equitable estate, shows the distinction which exists in the jurisdiction of a court of equity to decree a sale of the equitable and legal estates of infants. The court says: "The power exercised by the court of chancery as to the sale of the estates of infants of an equitable nature is inherent, and not derived from statutory authority. The power conferred by statute relates to lands

of which an infant is seised, and not to his equitable estates." And in the case of *Losey v. Stanley*, 147 N. Y. 569-571, the trustee's estate, as the court held, only extended over the estate of the life *cestuis que trust*, and the remainder, which belonged to infants, was a vested legal estate. Upon the application of the trustee, the lower court, which possessed equity powers, appointed a guardian *ad litem* for the infant remaindermen, and afterwards authorized the trustee to sell or mortgage the entire property,—equitable and legal. Chief Justice Andrews rendered the opinion of the court of appeals, which was unanimous, reversing the action of the court below so far as it affected the legal estate of the infant remaindermen. After showing the origin and extent of the inherent jurisdiction of equity over the legal estates of infants, he said: "The doctrine has been frequently declared in this state that a court of equity has no inherent power to direct the sale or mortgage of the real property of infants, and that its power in this respect is purely statutory. *Rogers v. Dill*, 6 Hill, 415; *Baker v. Lorillard*, 4 N. Y. 257; *Forman v. Marsh*, 11 N. Y. 544; *Horton v. McCoy*, 47 N. Y. 26; *Jenkins v. Fahey*, 73 N. Y. 355, 361. The obiter remarks of Chancellor Kent on the subject in *Re Salisbury*, 3 Johns. Ch. 348, and in *Hedges v. Riker*, 5 Johns. Ch. 163, are contrary to the general current of authority. The text-books are explicit in stating the modern doctrine on the subject. Pom. Eq. Jur. § 1309; Bispham, Eq. § 549. The question of the inherent power of a court of equity to order a sale of an infant's real property, upon the theory of a supposed benefit to him, is quite distinct from its acknowledged power in the enforcement and protection of trusts, and from the power of courts, in the exercise of their ordinary jurisdiction, to establish or enforce rights of property between parties to a litigation, whether infants or adults." A comparison of page 281 with pages 284 and 285 of Adams' Equity, of §§ 541-548 with § 549 of Bispham's Equity, and of §§ 1303 and 1307 with §§ 1308 and 1309 of Pomeroy's Equity Jurisprudence, will alone show that the protective powers and inherent jurisdiction of chancery over the persons and estates of infants, and making them wards of court for these purposes, is one thing, and entirely distinct from the alleged inherent jurisdiction of equity to decree a sale of an infant's legal estate in real property for reinvestment. And it may be added that the rule thus announced as to infants' legal estates in realty is also applicable as to their legal estates in personalty in this state. Any case that might be cited showing that a court of equity, either in England or in this country, has upheld the private sale alone of personal property made by a guardian, upon a supposed benefit to the infant ward, would not be applicable in this state, because, apart from other reasons, the primary reason upon which it would have to be grounded is that in England, and in many of the states in 45 L. R. A.

this country, guardians, by virtue of their office, have a power of sale, when fairly and reasonably made, over the personal estate of their wards (9 Enc. Pl. & Pr. 921; Woerner, Guardianship, p. 179), whereas in this state this common-law power is restrained, and the mode of sale pointed out, by statute. Therefore, in this state, personalty of wards, as to sales, is placed upon the same footing as realty, and guardians here have no power, by virtue of their office, to sell either class of property for reinvestment, or a court of equity, in this state, by its inherent jurisdiction, to uphold such a sale; and, if it cannot sustain such sales in the end, it cannot authorize them in the beginning. There is nothing in 6 Am. & Eng. Enc. Law, p. 723, § 12, 10 Enc. Pl. & Pr. p. 588, and 10 Am. & Eng. Enc. Law, pp. 692, 693, which are cited in behalf of the defendant in error, that can be said to conflict with the above ruling or stand against the mass of authorities sustaining it. The first citation merely refers to the origin of the jurisdiction of equity for the protection of infants, which is now admitted by all courts and text writers, and not to the sales of their property. The second citation deals with the ordinary jurisdiction of equity in protecting infants and their estates, while the inherent jurisdiction of equity to sell an infant's legal estate for reinvestment is treated in the same work on pages 733 to 737, inclusive. And the text of the third citation is based on the case of *Pace v. Pace*, 19 Fla. 438, which is a case brought by an infant ward to have his property protected and preserved from the illegal acts of the guardian, and has no connection with the inherent jurisdiction of equity to decree a sale of an infant's legal estate in real property for reinvestment, which jurisdiction the supreme court of Florida denied in the case of *Price v. Winter*, 15 Fla. 101.

All the conflict and confusion on this subject have been caused by a few text writers and courts in this country. Some have erroneously ascribed to the English courts of chancery the exercise of a principle which never existed, as that said courts would convert the nature of an infant's estate from personalty into realty, and from realty into personalty, whenever such change was for the infant's benefit, and applying this alleged principle of absolute conversion to sales of infants' lands. Chancellor Kent so stated and applied this doctrine in his Commentaries (pp. 242, 243), and by *dictum* in *Re Salisbury*, 3 Johns. Ch. 348, and *Hedges v. Riker*, 5 Johns. Ch. 163, on the authority of the cases of *Winchelsea v. Norcliffe*, 1 Vern. 435, and *Inwood v. Twyne*, 1 Amb. 417. The case in Vernon merely relates to the investment of money in land by the trustee of an infant, subject to the latter ratifying the investment when he became of legal age; and the lord chancellor stated, on pages 436 and 437, that, if the trustee had applied to the court for a decree to invest this equitable fund, it would have been allowed *sub modo*. And the case in Ambler, which cites the one in Vernon, was confined to allowing the

money of an infant, who was entitled in remainder to a jointure in land under marriage articles, to be invested in the life estate of such jointure; and the purchase was regarded as land, aside from the purchase being merged with the infant's existing remainder interest in the land, (1) because it was bought upon the application of the infant who was of years of discretion, and (2) because the infant ratified the purchase after reaching the age of twenty-one. Macpherson, in his excellent treatise on Infants (*283), speaking of this last-mentioned case, says: "His lordship [Lord Northington] used expressions which seem to claim for the court the power of making an absolute and unqualified conversion of an infant's property, but it has been already seen that the best authorities do not sanction this view." In the case of *Falkland v. Bertie*, 2 Vern. 342, Lord Chancellor King said, this "court never pretended to change the nature of infants' estates," which is also declared in *Fonblanque*, Eq. p. 38. Moreover, this principle of conversion was never applied in England to cases of sales, which I will explain in the next paragraph, and especially of infants' lands, which I have already discussed *in extenso*. And in the recent case of *Lossey v. Stanley*, 147 N. Y. 570, hereinbefore cited, the court of appeals of that state unanimously disapproved the doctrine thus announced by Chancellor Kent, as being against the general current of authority. Others repudiate the above alleged principle, and assert (though also in error) that the English rule against the sale of an infant's real estate for reinvestment is based on decisions of the English chancery courts prohibiting the conversion of personalty into realty, and realty into personalty, on the grounds (1) that the conversion of personalty, if permitted, would deprive the infant of his testamentary power of disposition over such property, as the law existed prior to the new wills act of 1 Vict. chap. 26; and (2) that personalty and realty in England, are distributed and descend, respectively, in different channels. 10 Enc. Pl. & Pr. p. 737; Woerner, Guardianship, p. 225. The principle of conversion, in the sense here used, as shown by the English authorities, is confined, in connection with personalty, to the investments of money by guardians and trustees in lands, or in paying off encumbrances and debts for repairs on infants' lands; and, in connection with realty, when the guardian or trustee has felled timber on, or taken minerals from, the lands of infants. See Macpherson, Infants, *280-303, 306-308, where the whole subject is clearly stated, with ample citations; also note in 10 Enc. Pl. & Pr. p. 734. And, when the conversions were thus made, they were allowed only to the extent mentioned, with the proviso that the land purchased shall be considered, during the infants' minority, as constructively personal (Adams, Eq. p. 285), and the felled timber, or its proceeds, as real property (Story, Eq. Jur. § 1357), in order to fall within the two reasons above mentioned as to testamentary disposition

and distribution and descent. And there is nothing to the contrary in this section of Story, Eq. Jur., just cited, when the text is read in connection with the authorities cited in the notes thereto, in not one of which is anything said or intimated about a sale of either the personal or real property (*viz.* lands) of infants. This principle of conversion, according to the authorities cited, was not applied in England to sales of property by guardians. If we so apply it, we will see that the two reasons specified above against the conversion of infants' personal property exerted no influence whatever upon the English chancery courts in the denial of their inherent jurisdiction to decree a sale of infants' legal estates in real property merely for the infants' benefit as for reinvestment. The first reason stated against the conversion of infants' personalty into realty—strictly speaking, of money into land—that the infant would be deprived of his testamentary power of disposition over the former before the statute of 1 Vict. chap. 26, could not have influenced the court in preventing the conversion of realty into personalty. And the second reason—the difference in the distribution and descent of personal and real property—would seem applicable; but that even this reason exerted no influence is shown by the fact that the chancery courts of England never allowed the sale of an infant's legal estate in land for reinvestment in land. On the contrary, as hereinbefore shown, they uniformly denied this power, without the aid of a statute, and statutes conferring this jurisdiction in particular cases were not enacted in England until late in the present century. See Macpherson, Infants, p. 318; Dan. Ch. Pr. 6th Am. ed. p. 169, note and pages 1873, 1874. Again, as in Woerner, Guardianship, p. 227, cases upholding the sale of equitable estates of infants, where the legal title was in trustees, are cited together with some cases maintaining the court's inherent jurisdiction to decree a sale of the legal estates of infants in real property, without drawing any distinction between them. Furthermore, in some cases which involve only the question of the court's power to decree a sale for reinvestment of trust estates, in which infants are among the beneficiaries, and the legal title is in trustees, the judges, not content with the citation of apposite cases, enter into unnecessary arguments, based on false reasons, if not inapplicable authority, to show that the jurisdiction extends also over the legal estates of infants. This is notably true of the opinion of Chief Justice Bailey in the case of *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247, where he states a wrong reason for the rulings of the English chancery courts, cites the case of *Huger v. Huger*, 3 Desauss. Eq. 18, 21, which permitted a sale of a portion of an infant's land to pay off a charge against him under his father's will to equalize in value his father's real estate between him and his brother, and gives prominence to the overruled dictum of Chancellor Kent in *Re Salisbury*, 3 Johns. Ch.

347. And still others (as, for instance, 10 Enc. Pl. & Pr. 735) even cite cases from states which have conferred this jurisdiction upon courts of equity by statute, to support the inherent jurisdiction of equity to sell the legal estates of infants in real property for reinvestment. Cases from Maryland are cited in this respect, whereas this inherent jurisdiction of equity was early denied in that state, in *Williams' Case*, 3 Bland, Ch. 186; and the case of *Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646, cites the case of *Dorsey v. Gilbert*, 11 Gill & J. 87, to support the constitutionality of the special acts passed by the legislature of that state for the sale of infants' realty, and shows that the "increasing necessity of these special acts caused the legislature to enact the statutes of 1816, chap. 139, and 1818, chap. 133," which "conferred general powers on the courts to decree sales of the real estates of infants, provided they were satisfied it would be for the interest and benefit of the minors."

4a. But, whatever may be regarded as the true rule in equity on this subject, it has become of little practical use in this country, since statutes have been enacted in nearly all the states regulating the sale of infants' legal estates. 10 Enc. Pl. & Pr. p. 737; Pom. Eq. Jur. §§ 78, 1309; Perry, Tr. § 610; Tyler, Infancy, p. 296; Woerner, Guardianship, p. 227. In this country the states, through their legislatures, possess the same power that the King in England possessed as the protector, as *parens patriæ*, of infants, consistent with their constitutional limitations (10 Enc. Pl. & Pr. p. 738; *Losey v. Stanley*, 147 N. Y. 571; *Davis v. Helbig*, 27 Md. 452, 92 Am. Dec. 646, or that Parliament had in providing by public or private acts for the conversion and sales of infants' legal estates in real property. At first, many of the states passed special statutes or private bills for the sale of such estates of infants, which of itself negatives the inherent jurisdiction of equity in this respect. 10 Enc. Pl. & Pr. p. 738; Woerner, Guardianship, p. 228; Perry, Tr. p. 202, § 610, and note 1. These were soon followed by general statutes which conferred the jurisdiction either upon courts of equity, law courts of general jurisdiction, or courts of ordinary or probate. 10 Enc. Pl. & Pr. p. 739; Woerner, Guardianship, pp. 232, 233; Perry, Tr. p. 201, § 610. In a few states different courts have concurrent or divided jurisdiction to order a sale. *Ibid.* In most of the states the jurisdiction by statute is conferred upon the courts of ordinary or probate. *Ibid.* Georgia is one of these states; and the court of ordinary in this state is a constitutional court of record, whose jurisdiction is original and exclusive (except by appeal) in many matters, including the appointment of guardians, the maintenance of infants, and the sales of their estates, and is much broader than the jurisdiction conferred on similar courts in other states. *Tucker v. Harris*, 13 Ga. 8, 58 Am. Dec. 488; Civ. Code, §§ 2541, 2542, 2547, 4232. By acts passed in 1704, 1792, and 1799, the care of orphans, which term includes minor children whose parents are alive (*Ragland v.* 45 L. R. A.

Justices of Inferior Ct. 10 Ga. 65, 70-73), was committed to the court of ordinary (Cobb, Dig. pp. 301, 306, 311). And by the act of December 22, 1823, all infants who have acquired property by descent, devise, gift, or purchase, whose parents are in life, are considered orphans, so as to authorize the courts of ordinary to withhold the property from their parent or natural guardian until ample bond is given, or, in lieu thereof, to appoint a general guardian for such infants. Cobb, Dig. p. 322; *Ragland v. Justices of Inferior Ct.* 10 Ga. 72. The sale of infants' legal estates in real property acquired by descent or devise is ordinarily effected through sales under orders of the court of ordinary, in pursuance of the acts of December 18, 1816, and December 23, 1826 (Cobb, Dig. pp. 319, 323); *Knapp v. Harris*, 60 Ga. 403. And the sale of infants' legal estates in real property acquired otherwise than by descent or devise was regulated by the act of December 21, 1827 (Cobb, Dig. p. 325). This statute, so far as is material, reads as follows: "Whereas, . . . no power is given to said courts [the inferior courts of the several counties of this state when sitting for ordinary purposes, being the courts of ordinary] to order the sale of any real estate belonging to orphans other than such as is acquired by them from their testator or intestate, by reason of which frequent and manifest injury is sustained by orphans . . . holding real estate other than such as is acquired by descent; for remedy whereof be it enacted, that from and after the passing of this act, the justices of the inferior courts of the several counties in this state, when sitting for ordinary purposes, shall be authorized to order a sale of any part, or the whole of the real estate of any orphan or orphans, . . . upon application of the . . . guardian or guardians, where it is fully and plainly made to appear that the same will be for the benefit of such orphan or orphans . . . under the same rules and restrictions as are by law pointed out for the sale of real estate of testators and intestates." This act was construed in the case of *Crainford v. Broomhead*, 97 Ga. 614, in a unanimous opinion, which was delivered by the writer, wherein it was held that "this act, construed with those of which it is amendatory, clearly gave to the courts of ordinary the power to order the sale of the real estate of orphans, whenever it should be made to appear to the court that the sale would be for the benefit of the orphan," and that this jurisdiction to sell such estates for reinvestment was exclusive in the courts of ordinary until it was taken from them, and conferred upon the judges of the superior courts in term or vacation, by the act of November 11, 1889 (Civil Code 1895, §§ 2545, 2546). In a word, prior to the act of 1889, the legal estates of infants could be sold for reinvestment only through a guardian, and by order of the courts of ordinary. And see the case of *Wells v. Chaffin* (decided in 1878) 60 Ga. 677, which holds that "a sale of realty belonging to minors by their guardian, without an order from the court of ordinary, is

not binding on them." Therefore in the case at bar it was only necessary, in 1871, for the natural guardian of the plaintiffs in error to have filed a bond, and applied for an order from the court of ordinary to sell their legal vested estate in remainder under the restrictions governing the mode of sale of intestate's real estate (Code 1873, §§ 1803, 1811, 1828, 2559; *Crawford v. Broomhead*, 97 Ga. 614), which was less strict than the provisions of the above act of 1889, which now governs the sale of infants' legal estates for reinvestment upon application of their guardians to the judges of the superior courts in term or at chambers.

5. Having reached the conclusion that the order of sale granted in this case in 1871 was not within the inherent jurisdiction of a court of equity over the estate in remainder of the plaintiffs in error, but that, as between the two courts, the proper court to make the order was the court of ordinary, upon the application of a guardian for the remaindermen, the question now arises whether such power was at that time conferred, either expressly or impliedly, by any statutory or Code authority, upon the judges of the superior courts, acting in term or vacation. This is especially pertinent, as the order of sale in this case was applied for by a summary petition under the statutory jurisdiction of equity. Sections 4863 and 4864 of the Civil Code (or §§ 4221 and 4222 of the Codes of 1873 and 1882), upon which the defendant in error lays stress in support of the order, read as follows: "All proceedings *ex parte*, or in the execution of the protective powers of chancery over trust estates, or estates of the wards of chancery, may be presented to the court by petition only, and such other proceedings be had therein as the necessity of each cause shall demand." Section 4863. "A court of equity is always open, and hence the judge in vacation and at chambers may receive and act on such petitions." Section 4864. To clearly ascertain the meaning of the "protective powers of chancery over trust estates, or estates of the wards of chancery," as used in section 4863, it is necessary, in the first place to refer to the inherent jurisdiction of equity in this respect. From what has already been said as to the extent of the inherent jurisdiction of equity for the protection of infants and their estates, and making them wards of court for these purposes, and the inherent jurisdiction of equity to decree a sale of infants' legal estates in real property for reinvestment, which are two entirely distinct subjects, one of which exists, and the other does not, there can be but one logical answer; and that is that there is nothing in these sections of the Code which authorizes a judge of the superior court, in term or at chambers, on a substantive petition, to order the sale of infants' legal estates in real property for reinvestment. The cases of *Sharp v. Findley*, 71 Ga. 654, and *McGowan v. Lufburrow*, 82 Ga. 523, which are relied on by the defendant in error to support the order of sale in this case, under § 4863 of the Civil Code, are not in conflict with the views

we entertain, and do not apply to the facts in the case at bar. The case of *Sharp v. Findley*, in which the executor and all the devisees joined in the petition, was grounded upon the impossibility of carrying out the provisions of a will. In such cases equity would entertain inherent jurisdiction by will, and decree a sale of the property to protect the beneficiaries, under its ordinary jurisdiction over trusts (*Sharp v. Findley*, 59 Ga. 730; *Southern Marble Co. v. Stegall*, 90 Ga. 237); and the judge of the superior court is expressly given the same jurisdiction by statute (Codes 1873, 1882, § 4214; Civil Code 1895, § 4855). Hence it was held that this statute, in connection with section 4221 of the Codes of 1873 and 1882 (Civil Code 1895, § 4863), would authorize the judge at chambers to pass the order of sale in that case. The case of *McGowan v. Lufburrow*, in which the petition was also presented by the executrix and all the devisees, was for the sale of a part of the testator's estate for the immediate payment of trust debts, in order to protect the rest of the estate from clamorous creditors. As this was to protect an estate to which the executrix held the legal title in trust for such purposes, equity would have entertained jurisdiction for this purpose under its ordinary jurisdiction over trusts; and hence, too, while the sale in that case was also held to be legal under the section of the Code last cited; it was absolutely immaterial, so far as the jurisdiction was concerned, whether the order was signed by the judge in term or at chambers, because his power in either case was the same. In *Blake v. Black*, 84 Ga. 399, 400, Chief Justice Bleckley classes the cases of *Sharp v. Findley* and *McGowan v. Lufburrow* as cases involving the protection of equity over trusts; and the writer, who delivered the opinion in the case of *McGowan v. Lufburrow*, so designates that case, and distinguishes it from the right to sell the legal estates of infants for reinvestment in the case of *Taylor v. Kemp*, 86 Ga. 185. And the further contention in behalf of the defendant in error, that when Justice Tripp remarked in his opinion in the case of *Milledge v. Bryan*, 49 Ga. 397, that the order in that case was passed by the judge below several years before the Code went into operation, he doubtless had in mind the change made by the above section of the Code, is also error. The subject-matter of the case of *Milledge v. Bryan* was whether a passive trust for infants, before the Code, conveyed to them the legal estate, under the operation of the statute of uses; there being no dispute, if it did, that the judge had no power to order a sale of such estate. He decided in the affirmative, in accordance with all authority. Consequently his remark; no doubt, had reference to the Code making a passive trust for minors an executory trust during their minority, which was not the law before the Code, and hence that, if the order of sale in *Milledge v. Bryan* had been made since the Code, it would have been legal, because in the exercise of a jurisdiction over the trust estate of minors. See *Askew v. Patterson*,

53 Ga. 213, 214, where *Milledge v. Bryan* is distinguished on this point.

The sections of the Code now being considered have been frequently construed by this court, but the court has never gone to the extent assumed in behalf of the defendant in error. In *Iverson v. Saulsbury*, 65 Ga. 729, Justice Jackson, delivering the opinion of the court, said that they, with the two succeeding sections, forming one chapter, stand together. To quote his words: "These four sections are embodied in chapter 6, title 25, pt. 3, of the Code [1873], and stand together. They appear to vest in the chancellor, at chambers, full power over trust estates in respect to the removal of trustees, the sale of trust property, and the investment of trust money. In the exercise of these great powers, chancellors should be cautious, and see that the case is clearly made out, and that their wards are protected, and their estates are preserved, and their rights protected, just as, in open court, and before a jury, it would be their duty to see that the same rights are protected." Chief Justice Bleckley's opinion in *Blake v. Black*, 84 Ga. 392, 399, 400, also shows that they have relation to trusts. And in *Harvey v. Cubbage*, 75 Ga. 794, Justice Blandford, delivering the opinion of the court, said they were codified from the act of February 20, 1854, which authorizes judges of the superior courts, in term or at chambers, to pass upon matters of trust by petition. Of course, it does not necessarily follow from this that the judge in term, or at chambers, is restrained from passing on proper petitions to authorize a sale of the legal estates of infants, when a court of equity has obtained control of the property in a pending cause within its jurisdiction, or when they can exercise the power in the manner hereinbefore mentioned, under some one of the ordinary heads of the court's inherent jurisdiction. But the case at bar does not fall within this class of cases. Among the subjects covering the "protective powers of chancery over trust estates or the estates of wards of chancery," as used in § 4863 of the Civil Code, and determined by this court, is the power, upon petition, to appoint trustees to fill a vacancy (*White v. McKeon*, 92 Ga. 344; to order the sale of a part of the trust property to relieve the rest from an indebtedness on all (*Iverson v. Saulsbury*, 65 Ga. 724, 725, 728, 729); to order the mortgage of trust property to protect and preserve the corpus (*Iverson v. Saulsbury*, 68 Ga. 801, per Jackson, J., followed in *Weems v. Coker*, 70 Ga. 746; *Bolles v. Munnerlyn*, 83 Ga. 727; *Pease v. Wagon*, 93 Ga. 363; and *Wagon v. Pease*, 104 Ga. 417); to order the sale, in whole or in part, of property of adults and minors acquired by devise, where the legal title remains in the executors, when it is impossible to carry out the trust provisions of a will (*Sharp v. Findley*, 71 Ga. 654; *Blake v. Black*, 84 Ga. 392, 399, 400, and *Southern Marble Co. v. Stegall*, 90 Ga. 237), or when it is necessary for the payment of estate debts and legacies (*McGowan v. Lufburrow*, 82 Ga. 523; and *Blake v. Black*, 84 Ga. 392, 399, 45 L. R. A.

400); and to protect a ward of chancery by compelling a trustee to comply with a prior order of court to pay over money for the support of the ward, arising out of the latter's trust property (*Obear v. Little*, 79 Ga. 386). And among other powers, by proceedings *ex parte* and upon petition, as shown by the cross references to other parts of the Code made by the codifiers in the margin to § 4863, are the appointment and removal of trustees, (§ 3168), the sale of trust property (§ 3172), the investment of trust funds in stocks in which a trustee is not authorized by statute to invest in his own discretion (§ 3180), and the passing of interlocutory orders in equitable suits (§ 4847), which may include the setting aside of a sum of money out of a fund involved in the litigation for the support of the minor parties. So that there is no reason or authority upon which to base the claim of the defendant in error that §§ 4863 and 4864 of the Civil Code authorize the judges of the superior courts, in term or at chambers, to order a sale of the legal estates of infants in real property for reinvestment. And, when this power of sale is given by statute, it has been held to be beyond the jurisdiction of the court to authorize an exchange of the property for other property (*Moran v. James*, 21 App. Div. 183), and especially, as was asked for in the petition, and granted in the order, in the case at bar, for stock in a corporation (*Perin v. Macgibben*, 6 U. S. App. 348, 53 Fed. Rep. 96, 97, 3 C. C. A. 443). And any authority conferred to sell the property for the maintenance of the infant would not be applicable, because that would be an extinguishment, and not the protection, of the corpus of the estate.

The only remaining sections of the Code conferring power upon the judges of the superior courts, in term or at chambers, to order the sale of property in which infants may be interested, aside from the sale of homestead property, under § 2847 of the Civil Code, and the sale of infants' property, upon application of their guardian, under the act of November 11, 1889, are §§ 3172 and 4865 of the Civil Code, or §§ 2327 and 4223 of the Codes of 1873 and 1882. These sections relate to the sale of trust property, and to none other; and as it was doubtless under these sections that the petition to sell the property in dispute was made, because the trustee applied for the order as trustee for the mother and children, it is unnecessary to confound the unambiguous statutory jurisdictions upon summary petition under these sections with the inherent jurisdiction by suit in a court of equity. In such cases the court or judge exercising jurisdiction by statute is restricted by the power conferred by the statute. *Williamson v. Berry*, 8 How. 537, 12 L. ed. 1188; *Woerner*, Guardianship, pp. 232, 233. Under these sections whatever the judge could do in term he could do at chambers, and whatever he could not do at chambers he could not do in term. In the case of *Losey v. Stanley*, 147 N. Y. 571, 572, it was unanimously decided that the lower court, which exercised general

equity powers, and which was authorized by statute to order the sale of trust property upon summary petition, had no jurisdiction whatever upon such a petition to sell the legal estate in remainder belonging to infants, or to appoint a guardian *ad litem* to effect such a sale. And to the same effect is the case of *Walker v. Pope*, 101 Ga. 665, in which Justice Fish, who delivered the opinion of the court, said: "The principles of law governing this case are well settled and familiar, and will be readily gathered from the headnotes, read in connection with the reporter's statement of the facts." On pages 667 and 668 the reporter's statement shows that the executor and alleged trustee brought his petition to the superior court (which was joined and concurred in by the life tenant, an adult male), praying for a sale of the property for reinvestment in a farm, upon substantially the same allegations as set forth in the petition in the case at bar; that a guardian *ad litem* was appointed for the named children, who were entitled to a legal estate in remainder in the property; that the judge of the superior court granted the order to sell; and that a sale was made under the order. The headnotes show that the only reasons the plaintiffs (the children) failed to recover in that case were—First, that those who were capable of understanding their rights ratified in writing the said sale of the property and the disposition of the purchase money, without moving to disaffirm the same within a reasonable time after reaching their majority; and, secondly, that the youngest child, who also signed the ratification paper, but who was too young to comprehend its purport, although held entitled to recover within seven years from the death of the life tenant in a several action, could not recover in a joint action with the others, whose title had been tolled before the commencement of the suit. In this court, as the judges have almost invariably passed the orders at chambers, the question has often arisen as to the power of a judge of the superior court at chambers to order a sale of the legal estates of infants for reinvestment under the sections now being considered, or by statute generally before the act of November 11, 1889, and has as often been decided in the negative. See *Pughsley v. Pughsley*, 75 Ga. 95; *Rogers v. Pace*, 75 Ga. 436; *Taylor v. Kemp*, 86 Ga. 185; *McDonald v. McCall*, 91 Ga. 305; and *Fleming v. Hughes*, 99 Ga. 450. These cases are directly in point, and are unquestionably sound in their conclusions. They establish a principle as firmly as any principle can be established. There is not one decision of this court adverse to them, and they therefore form a rule of property in this state which has existed for many years. When these decisions thus denied this power to the judges of the superior courts at chambers, they also, in legal effect, denied the same power to the said judges in term, when acting under the statutory jurisdiction by summary petition, because each possesses the same power,—one no more nor

less than the other. It would therefore be anomalous to hold that this statutory jurisdiction gives the judge in term the power to sell the legal estates of infants for reinvestment, and confines the judge at chambers to a sale of trust estates, especially when a court of equity is without the inherent jurisdiction, as we have declared, to order the sale of an infant's legal estate in real property for reinvestment, except in the instances we have specified; and there can be no doubt that in making these decisions this court had in mind the provisions of § 4863 of the Civil Code, as well as of § 4865, which have stood together in the Code for the last thirty-six years. That such is true is shown by the case of *Taylor v. Kemp*, 86 Ga. 185, where the decision in the case of *McGowan v. Lufburrow*, which was made under the provisions of § 4863, principally, was upheld for the purposes of that case, but was denied and distinguished as to the facts in *Taylor v. Kemp*, and also by the case of *Fleming v. Hughes*, which cites the case of *Taylor v. Kemp*, with others, and denies the jurisdiction without relying upon any special section of the Code. There is nothing in the case of *East Rome Town Co. v. Cothran*, 81 Ga. 366, 367, when properly read and considered, that can conflict with the cases above cited, which exist in an unbroken line. On page 366, Chief Justice Bleckley held that the original order to sell in that case could not bind the infant remaindermen, because, according to *Hill v. Printup*, 48 Ga. 452, infant beneficiaries in a trust estate must be made parties. On page 367, in connection with the attempted confirmation proceedings, in which the infant remaindermen were made parties, he said: "It is urged that this order of confirmation cured all defects in the title to Freeman, and this might be so, perhaps, had the judge not been disqualified;" and he no doubt had in his mind at the time what the rule would have been, in accordance with *Hill v. Printup*, if the infant beneficiaries in the trust estate in that case had been made parties to a confirmatory proceeding. The minors in the case of *East Rome Town Co. v. Cothran* were not infant beneficiaries in a trust estate, as Chief Justice Bleckley himself held on pages 361-366, 81 Ga., and hence, if he had decided that they would have been bound by the order of confirmation, had such order been passed by a qualified judge, the ruling would have been contrary to all the cases cited above on the subject of ordering the sale of infants' legal estates by petition under the statutory jurisdiction, and could not have stood against them.

I think the opinion of the majority of the court virtually concedes that a court of equity has no inherent power to order the sale of the legal estates of infants, upon a summary petition; but it is claimed that, while this may be true, still, if the court has jurisdiction to order a sale of the trust property, and the trustee applies also for an order for the sale of the legal estate, the court, having acquired jurisdiction for one purpose,

will retain it for all, and will grant such relief as it may deem proper in the premises. In other words, it holds that a court of equity has jurisdiction, even upon summary petition, to decree and order the sale of infants' estates for reinvestment, upon the application of the trustee, when the infants have an equitable interest with others in the life estate, and are the sole owners of a legal estate in the remainder, on the ground that, equity having acquired jurisdiction over the equitable life estate for the purpose of a sale, that, *per se*, invests the court with the power to retain the jurisdiction to order a sale of the legal estate in remainder also. With great deference to the opinion of my associates, I think that this principle has no application to a proceeding such as this. It applies to cases of litigation, where the complainant has an equitable remedy for one purpose, and also a legal remedy touching the subject-matter of the litigation against the defendant, and the complainant seeks to enforce his equitable remedy, in which cases the jurisdiction of equity may be retained to grant full relief, and avoid a multiplicity of suits between the litigant parties. In a word, there must be a controversy between litigant parties before the court, to bring this principle into action or life. See Pom. Eq. Jur. §§ 181, 223-242, where the whole subject is discussed, with citation to numerous authorities, including some in this state. An examination of the Georgia cases in which the principle has been applied will show that in all of them there was a controversy between the parties, and that equitable and legal rights were involved therein. And the same appears to be true of the decisions of the other courts. The court of appeals of New York, in an unbroken line of decisions, has applied the principle that, where equity has acquired jurisdiction for one purpose, it will retain it to grant full relief to the parties litigant; yet the principle is not applied in proceedings where a trustee applies to a court of equity to sell or mortgage the life estate, and the legal estate in remainder of infants. In fact, the denial to a court of equity of the inherent jurisdiction to order a sale of infants' legal estates arises in many cases where such estates are in remainder after an executory trust extending over and terminating with the life estate. The above principle, then, arises in cases of litigation under the ordinary heads

of equity jurisdiction; and as Chief Justice Andrews pertinently said in the case of *Loosey v. Stanley*, 147 N. Y. 570, in delivering the opinion of the court, where the trustee, whose estate extended over the life estate, only applied to equity to include in a sale the legal estate of infant remaindermen: "The question of the inherent power of a court of equity to order a sale of an infant's real property, upon the theory of a supposed benefit to him, is quite distinct from . . . the power of courts, in the exercise of their ordinary jurisdiction, to establish or enforce rights of property between parties to a litigation, whether infants or adults." The supposed difficulty of making a sale of the trust estate for life by one court or jurisdiction, and the sale of the legal estate in remainder by another, is not sound, as is shown by the case of *Loosey v. Stanley*, 147 N. Y. 570, and many others. The same difficulty arises when a petition is presented to a judge of the superior court at chambers, in this state, to order a sale of a trust estate for life, and a legal estate in remainder. In such cases he can only order a sale of the trust estate. *Rogers v. Pace*, 75 Ga. 436; *Fleming v. Hughes*, 99 Ga. 444. What greater efficacy or sanctity or jurisdiction should be given to the act of the same man when he merely walks from his private chambers into the courtroom with the order, and immediately signs it there? None that I can see, in a case like this.

As to the distinction between the exercise, by a court of chancery, of original and inherent jurisdiction, and the exercise, by the same court, of jurisdiction conferred by statute, see *Williamson v. Berry*, 8 How. 536, 537, 12 L. ed. 1187, 1188, and *Boswell v. Otis*, 9 How. 336, 13 L. ed. 164. These cases rule that where jurisdiction is given a court of equity by statute and a proceeding is filed thereunder, the court cannot combine its original inherent jurisdiction with the statutory jurisdiction. The statutes of Georgia giving courts of equity at chambers jurisdiction to sell trust estates, those courts cannot combine their original and inherent jurisdiction with that conferred by statute, so as to enable them, in chambers or on a summary petition in term time, to order the sale of legal estates.

For these reasons, I cannot agree to the opinion of the majority of the court on the questions above discussed.

KENTUCKY COURT OF APPEALS.

Ed. N. CALDWELL, *Appt.*,

v.

W. L. STORY.

(.....Ky.....)

1. A communication made in good faith upon any subject in which the person has an interest, or with reference to which he has a duty, public or private, either

NOTE.—As to liability for defamatory words used in course of duty, see also *Hemmens v. Nelson* (N. Y.) 20 L. R. A. 440. 45 L. R. A.

legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged.

2. An indorsement on a note to the effect that it was never signed, but is a fraud and forgery, made by a cashier of a collecting bank to show the reason for non-payment, in accordance with a custom of bankers in that state, when returning it to the party who sent it for collection, is privileged.
3. A person who declares that a note presented to him for payment is

forged, and thereby induces the cashier of a collecting bank, who presents it to him, to return it with an indorsement that it is a forgery, which constitutes a privileged communication by the cashier, is not guilty of libel, though he may be of slander, if the note is not forged.

(September 26, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Barren County in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Affirmed*.

The facts are stated in the opinion.

Messrs. John Sandidge and W. L. Porter, for appellant:

A communication made in good faith upon any subject in which the person has an interest, or in reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged.

Marks v. Baker, 28 Minn. 162.

Such a communication as W. G. Simpson placed upon the back of this note was not privileged.

If the communication be held privileged as to Simpson, yet the court erred in dismissing appellant's action against Story.

Starkie, Slander & Libel, 341; *Malone v. Carrico*, 16 Ky. L. Rep. 155; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Hart v. Baxter*, 47 Mich. 198; *Hoar v. Wood*, 3 Met. 193.

Messrs. I. A. Brents and Baird & Sturgeon for appellee.

Paynter, J., delivered the opinion of the court:

To collect a note of appellee, Story, which Caldwell held, he gave it to Trigg & Co., bankers, at Glasgow, Kentucky, who sent it through the Bank of Cumberland to the Bank of Albany, Clinton county, Kentucky. Simpson, as cashier of the Bank of Albany, presented it to Story for payment. Story refused payment, and, as alleged by the appellant, directed, induced, and procured Simpson to return the note to Trigg & Co., through the Bank of Cumberland, with an indorsement on it as follows, to wit: "Never signed a note; fraud, forgery," etc. It is alleged in the petition that the words were false, libelous, and defamatory, and that they were so published in Barren county, to the appellant's damage in feelings, reputation, etc. Story and Simpson reside in Clinton county, Kentucky, and they were summoned there to answer this action in the Barren circuit court. By a special demurrer and plea, Story questioned the jurisdiction of the court, and also answered that he did not direct Simpson to make the indorsement on the note of which complaint was made. Simpson answered, and alleged that Story had directed him to make the report which he made; that the Bank of Cumberland was the corresponding agent of Trigg & Co., and that the Bank of Albany, of which he was cashier, was the corresponding agent of the Bank of Cumberland; that he received the note as cashier of the bank;

45 L. R. A.

that he presented the note to Story for payment, and he refused to pay it; that it was the custom of bankers in this state, when bills and notes were received by them for collection, and payment refused, to indorse on such paper or slip attached thereto the reasons given for nonpayment, and to forward the same to the bank from which the paper originally started; that he in good faith, and without malice towards the appellant or purpose to injure him, and without any intention or purpose of charging him with the crime of forgery or fraud, made the indorsement on the note; that he in good faith made the indorsement on the note for the sole purpose of informing the appellant and his agents, Trigg & Co., the defense that Story claimed to have to the note; that the note was returned by mail from the Bank of Cumberland to Trigg & Co.; that the indorsement on the back of the note was a privileged and confidential communication to plaintiff's agent, Trigg & Co.; that he, in discharge of his duty as cashier of the Bank of Albany, made the indorsement, that the appellant might know the reasons which Story gave for refusing to pay the note. No reply was filed to this answer, and, upon the trial of the case, the court gave a peremptory instruction to the jury to find for Simpson, which was accordingly done. No objection was made or exception taken to the giving of the instruction, and no appeal is prosecuted as to Simpson.

It is insisted that the communication which Simpson made was privileged. The communication which he had made was as corresponding agent. The method of collections usually employed by banks is the same as was employed in this case, and as contemplated by Caldwell when he gave Trigg & Co. the note for collection. The general rule may be stated to be that a communication made in good faith upon any subject in which the person has an interest, or with reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. Under the custom of bankers in this state, it was the duty of Simpson, as cashier of the Bank of Albany, to report the reasons for nonpayment, and he made the report to the parties to whom he was under obligation to make it. The corresponding duty was upon Trigg & Co. to inform their customer the reasons which the payor of the note gave for its nonpayment. In our opinion, it was a privileged communication. If this be correct, then it cannot be adjudged that Story has been guilty of libel. He may have been guilty of slander in the statement which he made to Simpson, but it necessarily follows, if the communication which Simpson made was privileged, the offense of libel was not committed.

So, if Story was guilty of slander, it took place in Clinton, not in Barren, county; and, under § 74, Civ. Code Prac., the venue of the action was in Clinton, not in Barren, county, and the court properly dismissed the action as to Story.

The judgment is affirmed.

CALIFORNIA SUPREME COURT.

O. MCHENRY *et al.*, Appts.,
v.

W. A. DOWNER, Tax Collector.

(118 Cal. 20.)

1. The taxation of shares of stock in national banks is permitted by the act of Congress of June 3, 1864, as amended February 10, 1868 (U. S. Rev. Stat. § 5219), provided they are taxed in the city or town where the bank is located, and at no greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state.
2. The provision that all property not exempt shall be "taxed in proportion to its value, to be ascertained as provided by law," which appears in Const. art. 13, § 1, is not self-executing.
3. To assess shares of stock in a national bank as other personal property, without any deduction for debts of the owner or for investments of the stock of the

bank in nonassessable government bonds, would work an illegal discrimination in favor of state banks and against shares of national banks, when state banks are taxed under Pol. Code, § 3608, providing for the taxation of the property of corporations, but that no assessment shall be made of shares of stock or any holder thereof be taxed therefor, and § 3629 provides for the deduction of the debts of the owner from the assessment of credits.

(February 3, 1897.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Stanislaus County in favor of defendant in a proceeding submitted upon an agreed statement of facts to determine the legality of a tax imposed upon plaintiffs. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Lloyd & Wood for appellants.

Messrs. L. W. Fulkert and *P. H. Griffin* for respondent.

NOTE.—State taxation of national banks.

- I. Decisions prior to establishment of national banks.
- II. Acts establishing national banks.
- III. Taxation of property franchises or processes of banking.
- IV. Taxation of shares of stock.
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- c. Method of fixing value of shares.
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- d. Method of assessing the tax.
- e. Period for which tax payable.
- f. Where tax is to be assessed.
- g. Territories may exact tax.
- V. Bank officers to assist.
- VI. Provisions of state Constitutions.
- VII. Remedies.
- VIII. Contracts for special rates.
- IX. Tax on bank officers.

I. Decisions prior to establishment of national banks.

After the creation of the old United States Bank the states attempted to place a tax upon it or its branches, and the question of the right to do so soon came before the Supreme Court of the United States.

That court held that all subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are upon the soundest principles exempt from taxation. The sovereignty of a state does not extend to those means employed

by Congress to carry into execution powers conferred on that body by the people of the United States. The question is one of supremacy, and if the rights of the states to tax the means employed by the general government be conceded, the declaration that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land is empty and unmeaning declamation. The result is that the state has no power to tax a bank chartered by the United States government to assist in carrying on its operations. But this rule does not extend to deprive the state of the power to tax the real property of the bank in common with other real property within the state, nor to impose a tax on the interest which the citizens of the state hold in the institution in common with the other property of the same description throughout the state. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

In *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, the court was asked to revise the opinion in *McCulloch v. Maryland*, and did so, but again arrived at the conclusion that a state cannot tax the bank of the United States. The court says that if the bank was a mere private corporation engaged in its own business it would be subject to the taxing power of the state, and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would not exempt its private business from taxation. But that since the bank existing at that time was created for public and national purposes it was not subject to the power of the state. So to tax its facilities, its trade and occupation, is to tax the bank itself.

And the court further held, in *Osborn v. Bank of United States*, that the fact that the act of Congress establishing the bank of the United States did not expressly declare that it was to be exempt from state taxation will not prevent the court from implying such exemption, if necessary to the operations of the bank.

In accordance with the intimation found in the decision in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, the South Carolina court held that United States bank stock in the hands of an individual is a legitimate subject of taxation. The fact that this may result in driving the stock out of the state is im-

Searls, C., filed the following opinion:

This is a controversy without action, submitted upon an agreed statement to the superior court in and for the county of Stanislaus, under the provisions of § 1138 of the Code of Civil Procedure, to determine the legality of a tax imposed upon the plaintiffs, and the right of the defendant as tax collector to enforce payment thereof. By the judgment in the case, the validity of the tax, and the right of the defendant to collect the same, were upheld. Plaintiffs appeal from the judgment, and the cause comes up on the judgment roll.

It appears from the agreed statement: (1) The First National Bank of Modesto is a banking corporation, created under and pursuant to the laws of the United States in relation to the creation and organization of national banks, with a paid-up capital stock of \$100,000, divided into 1,000 shares of \$100 each, and located and having its place of business at Modesto, in the county of Stanislaus, state of California. (2) The plaintiffs, and each of them, were at the several dates herein mentioned the holders and owners of certain of the shares of stock in said national bank. The number of shares owned and held by each of the plaintiffs is stated

in the agreed statement, but is unimportant here. (3) For the years 1894 and 1895, or for either of said years, said plaintiffs, or any of them, or the corporation or its officers, did not furnish to the assessor of the county a statement showing the respective interests or property of said plaintiffs, or any of them, in or to the paid-up capital stock of said First National Bank, or in or to any of its personal property or the shares of the capital stock owned by them in said corporation, and did not furnish any statement showing the amount of any debt or debts due from them, or any of them, or from the corporation to bona fide residents of this state, or to firms or corporations doing business in this state. (4) For the years 1894 and 1895 the assessors of said Stanislaus county assessed the said First National Bank, upon its real estate and mortgage interests in real estate, and upon the furniture and fixtures of its banking office only, at the full cash value of such real estate, mortgage interests, furniture, and fixtures, said bank claiming that its other property was not subject to taxation under state authority. For the years 1894 and 1895 all the several banking corporations and other corporations located in said county, other

material, since if Congress thinks proper to establish a bank on other funds than its own it does not possess the power to compel any individual to purchase the stock, but must send it into the market, to where individuals find it to their interest to participate. So that the case does not present the question as to the exercise of inconsistent powers between the state authorities and the United States, but between the state and its citizens, or, in other words, what the state authority has a right to draw on, the sources of the wealth of its citizens to support and defray the expenses of government. *Bulow v. Charleston*, 1 Nott & M'C. 527.

So, it was held that the state may impose a tax on the dividends arising from stock in the bank of the United States owned by its citizens. *State ex rel. Berney v. Tax Collector*, 2 Rail. L. 654. *Harper, J.*, said in his opinion the question was whether the imposition in question was in good faith a tax, or whether under the guise of a tax a penalty was intended to be inflicted with a view to suppress the bank.

The fact that the United States Bank went out of existence so soon probably accounts for the fact that the decisions upon the right to tax stockholders are so few. But the above decisions represent the state of the law at the time the act was passed for the establishment of the national banks.

II. Acts establishing national banks.

Congress did not in the act which first established the national banks, that of 1863, make any provision about taxation. But that act was amended the next year, and the act of 1864 provided that nothing in the act should be construed to prevent all the shares in any of said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under the state authority at the place where such bank is located and not elsewhere, but not at a greater rate than is assessed on

other moneyed capital in the hands of individual citizens of such state. Provided that the tax so imposed shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located. And provided that the act shall not exempt the real estate of associations from either state, county, or municipal taxation to the same extent according to value as other real estate is taxed.

The act of 1868 provides that the legislature of each state may determine and direct the manner and place of taxing all the shares of national banks located within the state subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state.

These statutes were carried into the Revised Statutes, § 5219, so as to provide that nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxation of the shares of national banking associations located within the state subject only to the two restrictions,—that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent according to its value as other real property is taxed.

The decisions are not entirely in accord as to the proper construction of these statutes. Many cases have come before the courts in which the question has arisen, and upon most branches of the subject a settled rule has been

than national banking corporations, were assessed upon all their real and personal property at its full cash value; but the shareholders in state banks and state corporations were not assessed upon their shares of stock therein, such shares of stock being treated as exempt from assessment under the provisions of § 3608 of the Political Code of the state of California. (5) J. F. Campbell, county assessor for said Stanislaus county for the year 1895, assessed to each of the plaintiffs herein the shares of stock by them severally held in said First National Bank of Modesto. He ascertained that said shares were of the cash value of \$100 per share over and above the real estate, etc., assessed to the bank. The assessor pursued the following course in arriving at the value of the stock, viz.: He ascertained that the paid-up capital stock was \$100,000; undivided profits, \$4,140; surplus, \$20,000,—total value \$124,140. He deducted therefrom, value real estate assessed to bank, \$6,305; value mortgage interest to bank, \$5,596; value office furniture, etc., to bank, \$800,—thus leaving a balance of \$111,439. From this sum he deducted 10 per cent for bad debts. He further ascertained that the capital stock was divided into 1,000 shares of \$100 each, and

thus determined that they were of the value of \$100 each. He also found that said shares had not been assessed for the purposes of taxation for the year 1894, and thereupon doubled the assessment of 1895, and assessed said shares at \$200 each. The state board of equalization reduced the value of all property assessed for taxation in said county for the year 1895 10 per cent, and upon the property as so reduced taxes were levied. Plaintiffs have tendered to the tax collector all sums due from them for taxes for the year 1895, save and except the tax imposed upon said shares of stock so by them held and owned, which said last-mentioned tax they claim is contrary to law, and therefore illegal and void; and said tax collector, the defendant herein, claims that the same is lawful, and therefore a good and valid claim. As before stated, the superior court adjudged that the taxes imposed upon the shares of stock are legal and valid, and that defendant has a right to collect the same. The plaintiffs appeal.

The points made by appellants for reversal are: (1) The taxes in question were not assessed in pursuance of the provisions of § 1 of article 13 of the Constitution of this state. (2) The taxes in question are ille-

evolved, but in a few instances disagreement still exists.

III. Taxation of property franchises or processes of banking.

So far as the property of the bank is concerned there is little conflict of opinion. The statute permits the taxation of real estate, and the only question can be as to whether or not the taxation is to the same extent according to value as other real estate is taxed.

It is not necessary that state banks should exist to authorize the taxation of national banks. *Smith v. Webb*, 11 Minn. 500.

Real estate of a national bank may, under state statutes, be assessed as real estate in the town where situated, and need not be assessed as part of the capital of the bank. *Loftin v. Citizens' Nat. Bank*, 85 Ind. 341.

But a municipal corporation cannot impose an ad valorem tax on the banking house and lot of a national bank when such tax is not imposed upon the state banks. *City Nat. Bank v. Paducah*, 10 Ky. L. Rep. 221, 9 S. W. 218.

Where a bank obtains a lease of real estate with promise of purchase or renewal, and upon it erects a banking house, it is subject to taxation thereon as real estate to the extent of the value of the building. *People ex rel. Van Nest v. New York City & County Tax & A. Comrs.* 80 N. Y. 573.

Where the laws provide for the taxation of shares of stock in the bank without any deduction on account of real estate the real estate cannot be taxed *eo nomine* against the bank unless the statute expressly requires it. *Rice County Comrs. v. Citizens' Nat. Bank*, 23 Minn. 280; *State v. Citizens' Nat. Bank* (Minn.) 15 Alb. L. J. 145.

Personal property.

There is no permission in the act of Congress to tax personal property of the bank, and the general rule is as stated in *People v. National Bank of D. O. Mills & Co.* that such property cannot be taxed.

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The personal property of a national bank is exempt from direct taxation by a state. *San Francisco v. Crocker Woolworth Nat. Bank*, 92 Fed. Rep. 273; *First Nat. Bank v. Province*, 20 Mont. 374.

A municipal corporation cannot tax the personal property of a national bank located therein. *National Bank v. Long* (Ariz.) 57 Pac. 639.

The furniture of a national bank is not subject to taxation by the state, especially where the furniture of state banks is by the laws of the state exempt from taxation. *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 489.

The personal property of a national bank consisting of safe, office furniture, cash, bills discounted, etc., is not subject to state taxation. *National State Bank v. Young*, 25 Iowa, 311.

The state cannot tax the notes, bills, bonds, etc., of national banks since it would be a tax on the business of the bank. *State v. First Nat. Bank*, 4 Nev. 348. The court says that Congress having permitted the states to collect a certain character and amount of taxes on the shares and real estate of the bank would seem by strong inference to have intended to reserve to itself exclusive power over the taxation of banks and bank property of other descriptions.

Mortgages held by national banks are not subject to state taxation. *First Nat. Bank v. Kreig*, 21 Nev. 404.

There has been some difference of opinion as to the right to tax bank notes. In one case it was held that national bank notes are obligations of the United States government, and exempt from taxation. *Horne v. Green*, 52 Miss. 452.

But in *Lilly v. Cumberland County Comrs.* 69 N. C. 300, it is stated by way of argument that the state until forbidden by Congress has power to tax national bank bills.

And it was held by the same court that until Congress forbids, the states have a right to tax the circulation of national banks. *Buffum v. Orange County Comrs.* 69 N. C. 498.

gal, because the property assessed is not subject to assessment for the purposes of taxation, and is exempt therefrom by the provisions of § 3608 of the Political Code. (3) The taxes in question are illegal, because they were levied in violation of the provisions of the national bank act. For the sake of greater brevity we shall consider the propositions involved in the several contentions of appellants not in the order of their sequence, but together.

Section 1 of article 13 of the Constitution of this state is as follows: "All property in the state, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; provided, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this state, or to any county or municipal corporation within this state, shall be exempt from taxation. The legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from cred-

its or debts due to bona fide residents of this state." It will appear at a glance that the foregoing constitutional provision is not, and does not pretend to be, self-executing. All property not exempt shall be taxed in proportion to its value, but that value is to be "ascertained as provided by law." The Constitution fixes the liability of property to taxation, and the standard upon which it is based, *viz.*, in proportion to its value; but the duty of prescribing the machinery by which to ascertain such value is confided to the legislature. "Taxes . . . are the enforced proportional contribution of persons and property, levied by the authority of the state, for the support of the government, and for all public needs." Cooley, *Taxn.* p. 1. The power of taxation is lodged with the legislative branch of our government. "The legislature must therefore determine all questions of state necessity, discretion, or policy involved in ordering a tax, and in apportioning it; must make all the necessary rules and regulations which are to be observed in order to produce the desired returns; and must decide upon the agencies by means of which collections shall be made." Cooley, *Taxn.* 2d ed. p. 43. The question presented seems to divide itself un-

So, the Indiana court held that the notes of national banks known as national currency are not exempted from state taxation, notwithstanding § 130 of the act of 1864 provides that the word "obligation" or other security in the United States, used in the act, should be held to include and mean all bonds, coupons, national currency, United States notes, treasury notes, fractional currency, checks for money of authorized officers of the United States, certificates of indebtedness, etc., which have been, or may be, issued under the act of Congress, since the word "obligation" as there used refers to the obligations and securities for the counterfeiting of which § 11 provides a punishment, and not to the bonds, treasury notes, and other obligations which by § 1 are exempt from taxation, and the national currency is in no proper sense of the term obligations of the United States, since they do not rest properly on the promise of the government to pay them as her own debt but simply in her promise that she will indemnify herself in her own bonds and only after failure of the bank and forfeiture of the bonds will she regard herself as finally liable. *Montgomery County Comrs. v. Elston*, 32 Ind. 21, 2 Am. Rep. 327.

Capital.

The capital of a national bank cannot be assessed by state authority. *Collins v. Chicago*, 4 Biss. 472; *National Bank v. Elmira*, 53 N. Y. 40; *Smith v. First Nat. Bank*, 17 Mich. 479; *First Nat. Bank v. Watkins*, 21 Mich. 483.

The taxation by state authority of the capital stock of a national bank invested in United States securities may be restrained. *First Nat. Bank v. Douglas County*, 3 Dill. 298.

So, one court has held that the surplus fund and undivided profits of a national bank are not taxable by the state. *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 489.

But in New Hampshire it is said that the state may tax the surplus capital of national banks beyond the amount which they are required to carry to their surplus fund semi-annually. *First Nat. Bank v. Peterborough*, 56 N. H. 38, 32 Am. Rep. 416.

At least where the shares of stock are taxed only at the par value.

As to inclusion of surplus capital in estimating the value of shares, see *infra*, IV. c. 1. And such fund is subject to taxation, although invested in government bonds. *First Nat. Bank v. Concord*, 59 N. H. 75.

So, in New Jersey it is held that the state may tax the undivided surplus of the bank and its other investments of capital if they are not made in securities of the Federal government. *State, North Ward Nat. Bank, Prosecutor, v. Newark*, 39 N. J. L. 380.

The fact that the statute requires persons owning any shares of stock in any banking association to return the same for taxation does not by the use of the word "stock" illegally impose a tax upon the capital stock of the bank. *Harrison v. Vines*, 46 Tex. 15.

A provision that the assessor shall list and assess all property to the person, firm, corporation, association, or company owning or having the possession, charge, or control thereof does not require the assessing of taxes on the stock of national banks against the banks. *People v. National Gold Bank*, 51 Cal. 508.

A national bank which returns its capital for taxation is not thereby estopped from setting up that the same was not subject to taxation and refusing to pay the tax. *Brown v. French*, 80 Fed. Rep. 168.

Requiring bank to pay tax on shares.

Since the shares of stock are assessable in the hands of individuals, an attempt has been made with some success to require the bank to pay the tax on the whole number of shares, and reimburse itself from the shareholders.

If it was possible for a bank to own its own shares they probably could be assessed to it, although in one case it was held that in case certain of the shares of the bank are owned by it they should not be assessed to the bank, but the value of all the capital stock should be divided among holders of the remaining shares

der two heads: (1) May the legislature of the state tax the stock of national banks? And, if yea, (2) has it provided adequate means for so doing?

The first query is of easy solution. National banks are agencies of the Federal government, selected as a necessary or convenient means to the exercise of its functions, and are not, except by its consent, subject to the taxing power of the states. Were it otherwise, it is said a state dissatisfied therewith could tax them out of existence, and thus indirectly hamper and thwart the operations of the general government. *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Van Allen v. The Assessors*, 3 Wall. 573, sub nom. *Churchill v. Utica*, 18 L. ed. 229; *Austin v. Boston*, 14 Allen, 359; *Flint v. Boston*, 99 Mass. 141; *State, North Ward Nat. Bank, Prosecutor, v. Newark*, 39 N. J. L. 380. The general government has, however, consented that, subject to certain restrictions, the states may tax the stock or shares of national banks. By the act of Congress of June 3, 1864, as amended February 10, 1868 (U. S. Rev. Stat. § 5219), it is provided as follows: "Nothing herein shall prevent all the shares in any associ-

ation from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed." It will thus be seen that, subject to the two restrictions enumerated in the act of Congress, shares of stock in national banks are proper subjects of state taxation. In the present instance the shares were taxed in the county and city or town where the bank is located, and, as none of the shareholders appear to be nonresidents

who should be assessed with the value thereof. *Dutton v. Citizens' Nat. Bank*, 53 Kan. 440.

So, where a bank, when applied to for a statement of the shares subject to taxation as required by the laws of the state, hands the assessor a statement of its condition from which a tax is assessed against it on its capital stock, the tax will be illegal, since its capital is not subject to taxation by the state, and it will not be presumed that the bank owned all of its own stock. *Brown v. French*, 80 Fed. Rep. 166.

But shares owned by a national bank in other national banks may be taxed by the states. *Bank of Redemption v. Boston*, 125 U. S. 60, 31 L. ed. 689.

Under a statute requiring persons to give in for taxation all shares or stocks in moneyed or banking associations or institutions, stock of a national bank cannot be assessed against it in its corporate capacity unless owned and held by it. *Waco Nat. Bank v. Rogers*, 51 Tex. 608.

However, if the bank lists its shares as its property for the purpose of taxation, and the taxing officers, in pursuance thereof, tax the same in the name of the bank, equity will not relieve the bank from payment of the tax, although it could not have been properly taxed upon the shares either primarily or as agent for the owners. *Albuquerque Nat. Bank v. Perea*, 5 N. M. 664.

In a Washington case it was held that the method of assessing the entire stock of each bank to the holders thereof at the place where the bank is located, and to collect the amount levied from the bank which is then at liberty to charge up the taxes paid to the account of the stockholders *pro rata* either as an item of expense or otherwise, met strenuous opposition from the banks, but has been sustained by the courts, and is quite general. *Paul v. McGraw*, 3 Wash. 296.

And in a subsequent case it was held that the assessment of the capital stock of a national bank made to the bank *in solidum* is valid. *First Nat. Bank v. Chehalis County*, 6 Wash. 64.

The latter decision seems to have carried the 45 L. R. A.

doctrine rather beyond what is sanctioned by other courts, although in practice the same result is reached, the general rule being that the shares in a national bank cannot be assessed in the aggregate and placed on the tax list in the name of the bank. *Miller v. First Nat. Bank*, 46 Ohio St. 424; *First Nat. Bank v. Fisher*, 45 Kan. 726.

So, an assessment upon the shares of a national bank in gross is illegal. *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15; *Sumter County v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30.

The tax upon the stock of a national bank cannot be made *in solidum* against the bank itself. Although the bank may be required to collect and pay the tax it cannot be required to ascertain its amount, and each stockholder is entitled to the rate of taxation existing in the locality where he lives, and not to the rate in the place where the bank is located. *National Bank v. Richmond*, 42 Fed. Rep. 877.

The stock of a national bank cannot be assessed *in solidum*, but the shares of only the stockholders residing in the city where the bank is located can be assessed, and this must be assessed separately in order to permit them to deduct their indebtedness where the laws permit such deduction. *First Nat. Bank v. Richmond*, 39 Fed. Rep. 309.

Although the tax cannot be assessed *in solidum* against the bank, the tax may be assessed against the shares, and the bank required to pay the aggregate amount. *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15; *Maguire v. Board of Revenue & Road Comrs.* 71 Ala. 401; *Whitney Nat. Bank v. Parker*, 41 Fed. Rep. 402.

That the officers of the bank are required to pay the tax does not prevent its being a tax on the shares if it is expressly placed upon the shares at a certain amount per share. *First Nat. Bank v. Kentucky*, 9 Wall. 253, 19 L. ed. 701.

The fact that the national bank is made the agent of the state to collect the tax on its shares while the state banks are not made such agents

of the state, no violation of the restriction as to the place of taxation appears.

This brings us to a consideration of the second question, viz.: Has the legislature of this state provided the means for the taxation of the stock in harmony with the requirement of the act of Congress, which requires that the rate of taxation shall not be in excess of that imposed upon other moneyed capital in the hands of citizens of the state? Prior to 1881, §3640 of our Political Code read as follows: "Each person, firm, or corporation owning or having in his or its possession any of the shares of the capital stock of any corporation, association, or joint-stock company shall be assessed therefor. If the corporation, association, or joint-stock company has its principal place of business in this state, the assessable value of each share of its stock shall be ascertained by taking from the market value of its entire capital stock the value of all property assessed to it, and dividing the remainder by the entire number of shares into which its capital stock is divided. The owner or holder of capital stock in corporations, associations, and joint-stock companies whose principal place of business is not within the state must be individually assessed for such stock," etc. The section provided, fur-

ther, that shareholders, in their statements to the assessor, should designate the number of shares held by them, and the name of the corporation, and that they should present a certificate as to the amount or value of property assessed to the corporation in order to secure a deduction on account thereof. Under the law as it then stood, the shares of stock held by Nancy Miller in the National Gold Bank of D. O. Mills & Co. were assessed to her for the purposes of taxation, in the same manner substantially as in the case at bar. An agreed statement was made, involving the same facts substantially as here. The case came before this court in *Miller v. Heilbron*, 58 Cal. 133, whereupon it was held that the attempted taxation of the shares in the national bank was in violation of the permission and limitations contained in § 5219 of the Revised Statutes of the United States, and therefore void. It was held in that case that the fact that shares in the national bank were assessed the same as shares in state banks was not sufficient; that the clause in the United States statute that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., "means something more than that there should be no discrimination with respect to the percentage or any valuation which

does not render the tax void. *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236.

In New Jersey while the law was in force requiring the bank to pay the tax the universal custom was for convenience to assess the tax in form against the bank instead of against individual stockholders, and require the bank to pay the tax out of the general funds of the bank. *State, North Ward Nat. Bank, Prosecutor, v. Newark*, 39 N. J. L. 380.

In one case, however, it was held that the state cannot require the cashier of national banks to collect annually from every shareholder the tax against his shares, and pay the same into the state treasury. *Markoe v. Hartmanff* (Pa.) 6 Am. L. Reg. N. S. 487.

There has been some conflict in determining the proper method of compelling the bank to pay the tax.

In regard to the enforcement of payment, it is held that taxes against the capital stock of a national bank cannot be enforced against the bank, or be made payable out of the assets of such bank in the hands of a receiver. *Gray v. Logan County*, 7 Okla. 321.

The tax against the holders of the bank shares cannot be collected by selling property of the bank. *First Nat. Bank v. Meredith*, 44 Mo. 500; *First Nat. Bank v. Fancher*, 48 N. Y. 524; *First Nat. Bank v. Hershire*, 31 Iowa, 18.

Although in one case it was held that the bank may be required to pay the taxes assessed against the shareholders, and such requirement be enforced by distraint of its property. *First Nat. Bank v. Douglas County*, 3 Dill. 330.

Under the Iowa statute, to render the bank liable for the tax due by the shareholders it must be shown to have or have had in its possession dividends or other property or money belonging to the taxpayer, since they are only liable as other agents are liable, for taxes upon property under their control for investing, and other agents are only liable for the taxes upon money under their control. *Hershire v. First Nat. Bank*, 35 Iowa, 272. 45 L. R. A.

Tax on business.

The business of a national bank is not subject to a tax by the municipal authorities of the city where it is located. *Macon v. First Nat. Bank*, 59 Ga. 648.

The state cannot authorize its municipal corporations to levy for their use an annual business tax on the quarterly business of national banks. *Pittsburg v. First Nat. Bank*, 55 Pa. 45.

National banks are not liable to a privilege tax imposed by a city ordinance. *National Bank v. Chattanooga*, 8 Helsk. 824.

The state cannot permit its municipal corporations to require license taxes from national banks doing business within their limits. *Carthage v. First Nat. Bank*, 71 Mo. 509, 36 Am. Rep. 494.

The states cannot impose a license tax upon national banks. *Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 429; *Scranton v. Bank* (Pa.) 4 Law Times N. S. 2.

The state cannot assess a gross tax upon the annual net income or earnings of the bank. *Com. v. Girard Nat. Bank*, 6 Phila. 431.

The state cannot place a tax on the franchises and property of a national bank. *Third Nat. Bank v. Stone*, 174 U. S. 432, 43 L. ed. 1035; *Louisville v. Third Nat. Bank*, 174 U. S. 435, 43 L. ed. 1037; *Louisville v. Citizens' Nat. Bank*, 174 U. S. 436, 43 L. ed. 1037; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850.

That the statute provides that the bank shall be assessed on its real and personal property, and also upon the value of its franchises to be ascertained by subtracting the value of its tangible property from the value of its capital stock, does not show that the tax is located upon the franchise proper so as to be beyond the power of the state if the tax does not exceed the value of the shares of capital stock on which the tax may be laid. *First Nat. Bank v. Stone*, 88 Fed. Rep. 409.

might be made; but that, taking the assessment, rate of assessment, and valuation together, the taxation on shares of national banks should not be greater than on other moneyed capital." Then, as now, under our Constitution and laws, "other moneyed capital" invested in credits entitled the holder thereof to deduct therefrom all debts due by the party assessed to bona fide residents of the state. As national bank shares are property, and not credits, the assessor is not authorized to deduct from the value thereof debts due by the owner to others; hence it was held that there was a clear discrimination in favor of other moneyed capital, and against the holders of such bank shares. *New York v. Weaver*, 100 U. S. 543, 25 L. ed. 706, is referred to and relied upon in support of the conclusion reached, and, we think, supports such conclusion. So in *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229, where a statute of the state of New York provided for the taxation of national bank shares at the same rate as was imposed upon other moneyed capital in the hands of the other individuals of the state, but did not impose a tax upon the shares of state banks, although a tax was levied upon the capital of such

state banks, it was held under the act of Congress of 1864, which contained a provision, in addition to the present restrictions, that the rate of taxation imposed upon such shares should not exceed that imposed upon state banks; that a tax upon the capital of state banks was not the equivalent of a tax upon the shares of national banks, not exceeding their par value, for the reason that the capital of state banks may consist of the bonds of the United States which are exempt from state taxation, etc.; and that the tax was hence invalid.

After the transaction arose out of which *Miller v. Heibron*, 58 Cal. 133, grew, and in 1881, § 3608 of the Political Code was amended so as to read as follows: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." The constitutionality of this section was drawn in question in the case of *People*

Insolvent bank.

The personal property of an insolvent national bank in the hands of a receiver is exempt from taxation under state laws. *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 832. The court says such property and assets still belong to the bank, and the property in the receiver's hands is exempt to the same extent it was before the receiver's appointment.

Under the provisions of the United States Revised Statutes, that in case of the insolvency of a national bank the United States shall have a first and paramount lien upon all its assets, the state authorities cannot levy upon the assets of the bank to collect a tax assessed after it becomes insolvent. *Woodward v. Ellsworth*, 4 Colo. 580.

But in an Oklahoma case it was held that the assets of a national bank in the hands of a receiver are liable to the claim of the state for taxes on the real estate of the bank, and for the penalties which have accrued for its nonpayment in priority of all other claims against such assets. *Gray v. Logan County*, 7 Okla. 321.

IV. Taxation of shares of stock.

a. Shares may be taxed.

While there seems to have been no question as to the right to tax the shares of stock in the hands of individuals, many cases have come before the courts in which the question has arisen as to the validity of the particular tax because of the method of assessing it or some other alleged inequality or discrimination.

The shares of a national bank may be taxed. *State ex rel. Lathrop v. Dowling*, 50 Mo. 134; *Mintzer v. Montgomery County*, 54 Pa. 139.

As far as shares of stock in a national bank represent the value of its capital uninvested in national securities such shares are not protected by constitutional barriers against taxation by the local government, and such taxation is to be entirely regulated by the state imposing it. *State, Fox, Prosecutor, v. Haight*, 31 N. J. L. 399. The court says whether the 45 L. R. A.

state in its own right can tax that portion of the property of one of those banks which in its own nature has no claim to immunity from taxation, must depend altogether on the solution of the question whether the taxation of such property tends to embarrass or impede the operation of the bank considered as an instrument of the government. And it is held that a tax upon the shares of the capital stock of the bank as the property of private individuals will not obstruct the movements of the public machine. And the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, is stated as being that a state tax imposed upon the operations of a national bank is invalid, but that the taxation of such shares in the bank in the hands of individuals is not invalid.

That the states may impose upon the stockholders such prescriptive taxation as to compel the winding up of the banks is not a sufficient reason for holding that the power to tax the shares does not exist. *Utica v. Churchill*, 43 Barb. 550.

It has been held that the state may tax shares in national banks without authority of Congress. *Stetson v. Bangor*, 56 Me. 274; *Parker v. Siebern* (Ohio) 5 Am. L. Reg. N. S. 526.

So, the fact that the bank was organized under the original act of 1863 which did not authorize state taxation of it, will not prevent its stock being taxed after the passage of the act of 1864. *Strader v. Manville*, 33 Ind. 111.

And the fact that the state tax law was passed prior to the passage of the act of Congress authorizing the taxation of national bank shares will not prevent the act from being effective, and no subsequent act need be passed with direct reference to the law of Congress. *Lionberger v. Rowse*, 43 Mo. 67.

Although in one case it was held that Congress has power to prohibit the taxation of shares of stock in national banks, and may therefore modify such taxation and provide under what circumstances it may be exacted. *People ex rel. Lincoln v. Barton Assessors*, 44 Barb. 148.

Shares of stock in national banks are subject

ex rel. Burke v. Badlam, 57 Cal. 594, which was an application for a writ of mandate to compel Badlam, as assessor, to assess to various holders certificates of stock by them held in corporations, etc. The court upheld the section of the Code, placing its opinion upon the ground that, where all of the property of a corporation was assessed to the corporation, to again assess the shares of stock to the shareholders would be double taxation, which is inhibited by our Constitution. Assuming then, as we must, that § 3608 of the Political Code is constitutional, this difference is presented in the method of valuation for the purposes of taxation between state banks and the shareholders of national banks: The shares of stock in the former are not assessed. In lieu thereof, all the property of the corporation is assessed. But this does not include government bonds or other nonassessable property, and all solvent credits unsecured by deed of trust, mortgage, or other lien on real or personal property due or owing are to be assessed subject to a deduction for all debts (not secured as above) due and owing by the corporation to bona fide residents of the state. Pol. Code, § 3629. In the latter—that is to say, in the case of shares of national banks—the stock

is assessed at its value after deducting only the property actually assessed to the corporation; that is to say, its real estate and debts secured by mortgage, trust deed, etc. As before stated, the assessor is not authorized to deduct debts owing by the owner of the shares, for the reason that shares of stock are property, and not credits, from which, under the law, debts can be deducted. The disparity in the mode of valuation becomes more apparent when we consider that one third of the paid-up capital stock of every national bank must be invested in nonassessable property, viz., in the registered bonds of the government of the United States, which are required to be deposited with the Treasurer of the United States as security for its notes, before it can be authorized to do business. No method is provided in our statute for deducting from the value of the shares anything on this account, and in the case at bar it was not done.

Waiving, then, the fact that shares in state banks are not assessed at all, and assuming that the assessment of all the property of a state bank may be the equivalent of the assessment of the shares of stock in a national bank, and the stubborn fact still remains that under our law it is not such

to state, county, and municipal taxation. *McLaughlin v. Chadwell*, 7 Helsk. 389.

And in one case it was added without permission of Congress. *Utica v. Churchill*, 33 N. Y. 161.

But in *First Nat. Bank v. Richmond*, 39 Fed. Rep. 309, the court intimates that Congress has not given municipal corporations power to tax shares of national banks, though it states that such question need not be decided in the case.

Increased shares of stock in a national bank are not subject to taxation until the increase has been approved by the comptroller of the currency, although the subscriptions have been paid and a dividend declared and paid on the shares before such approval takes place. *Charleston v. People's Nat. Bank*, 5 S. C. N. S. 103, 22 Am. Rep. 1.

Investment in government bonds.

That the capital of the bank is invested in government bonds does not prevent state taxation of the shares of stock. *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom.* *Churchill v. Utica*, 18 L. ed. 229; *Utica v. Churchill*, 33 N. Y. 161; *People ex rel. Kennedy v. Commissioners of Taxes*, 35 N. Y. 423; *First Nat. Bank v. Board of Reviewers of Assessments*, 41 La. Ann. 181; *Wright v. Stitz*, 27 Ind. 338; *People v. Bradley*, 35 Ill. 130.

That the surplus of the bank is invested in government bonds does not prevent its being considered in establishing the value of the shares for the purpose of taxation. *State, Stratton, Prosecutor, v. Collins*, 43 N. J. L. 563.

The question whether or not the value of the bonds is to be deducted in ascertaining the value of the stock is considered *infra*, IV. c. 2.

Construction of statutes.

Although the Minnesota Constitution authorized the passage of laws taxing the shares of stock of national banks, no such laws were in force in 1865, since such shares must be taxed *eo nomine*, and cannot be taxed under provisions relating to banks and bankers and 45 L. R. A.

brokers and joint-stock companies, or to individuals. *Smith v. Webb*, 11 Minn. 500.

There is no provision in the Massachusetts statutes authorizing the taxation of national bank shares for fire-district purposes. *Rich v. Packard Nat. Bank*, 138 Mass. 527. The court says in view of the fact that provision is made by our present statute in terms only for the taxation of bank shares for state, county, and town purposes that the machinery provided therefor is adapted only for taxation of all those shares, and of the apparent intention that the shares shall bear the same burden, the shares are not taxable for the benefit of the fire district.

A statute providing for the taxation of all shares in a bank now or hereafter incorporated by or in pursuance of any law of this commonwealth, or of any other state or government, will apply to national banks subsequently provided for by act of Congress. *Mintzer v. Montgomery County*, 54 Pa. 139.

Under the New York laws in force in 1865 corporations were taxable upon their capital, and holders of stock in corporations so taxed were not taxable on the shares, so there was no provision for the taxation of shares in national banks. *People ex rel. Lincoln v. Barton Assessors*, 44 Barb. 148.

Until December 8, 1880, no attempt was made in Alabama to tax the shares of national banks. *Pollard v. State*, 65 Ala. 628, *Overruling McIver v. Robinson*, 53 Ala. 456, and *Sumter County v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30.

A statute prohibiting a tax on the stock of a national bank for municipal purposes does not apply to a tax for school purposes or for a donation by a township to aid in building a railroad. *Root v. Erdelmeyer*, 37 Ind. 225.

b. Requirement as to equality.

1. Form of legislation.

Congress expressly yielded to the states the right to tax the shares subject to the proviso that the taxation shall not be at a greater rate

equivalent, but militates most grievously against the owners of stock in the national banks. Exact equality, from a mathematical standpoint, may not be attainable in the matter of taxation; but a system which of necessity, and not from accident or error of judgment, discriminates against the owners in national banks to a large extent, is in violation of the restriction imposed by Congress upon the privilege granted to the states to tax shares in national banks. In other words, as was said in *Boyer v. Boyer*, 113 U. S. 689, 28 L. ed. 1089, the expression used in the United States statute, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., refers not simply to the rate of taxation, but to the whole process of assessment and valuation, and that a state law which "establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital," etc., is in violation of the restriction contained in the act of Congress. The paramount object of the restriction by the act of Congress upon the taxation of shares in the national banks by the several states is aptly stated by Mr. Justice Matthews in *Mercantile Nat. Bank v. New York*, 121 U.

S. 138, 30 L. ed. 895, in which case, after stating the doctrine of previous cases, he added: "The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

Keeping steadily in view this policy and purpose, many of the cases which at first blush seem irreconcilable become plain, and are referable to patent sources of distinction. It is contended by counsel for respondent that the cases of *Miller v. Heilbron*, 58 Cal. 133, and *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229, have been virtually overruled by the later cases in the Supreme Court of the United States. We have examined such later cases with some care, and while it must be conceded that some of them restrict the broad reasoning of those cases, and point out numerous exceptions to the general rules therein enunciated, we see no expression of

than is assessed upon other moneyed capital in the hands of individuals. The question then arose whether the state legislation must expressly require equality, or whether equality in practice was sufficient.

The United States Supreme Court held that a state statute providing for the taxation of shares of a national bank as authorized by the act of Congress will be invalid if it does not require the tax to be imposed upon such shares not to exceed the rate imposed upon the shares of any of the banks organized under authority of the state where the national bank is located. *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229.

But other courts have not regarded such provision as necessary.

If the law provides that stockholders in all banks shall be taxed on the value of their shares it is not necessary that the law shall expressly state that the tax imposed on the shares of national banks shall not exceed that imposed on shares in state banks. *First Nat. Bank v. Douglas County*, 3 Dill. 330.

That the state law does not expressly prohibit the imposition of a greater tax than is levied upon shares of state banks is not fatal if no discrimination is in fact made in favor of the state banks. *Lionberger v. Rowse*, 43 Mo. 67.

The state statute need not expressly provide that the tax on the national-bank stock shall not be greater than that levied upon capital in the hands of individual citizens, but it is sufficient if the law in fact does not violate the provisions of the national banking act. *Harrison v. Vines*, 46 Tex. 15.

A provision that stockholders in all banks, state and national, shall be assessed and taxed on the value of their shares therein, is equivalent to a provision that there shall be no discrimination in favor of the state banks, and it is not necessary that there shall be added a clause that the tax imposed upon the shares of national banks shall not exceed that imposed on the shares of state banks. *First Nat. Bank v. Douglas County*, 3 Dill. 330.
45 L. R. A.

That debts are allowed to be deducted from the credits of taxpayers generally, but are not allowed to be deducted from the value of bank shares, does not make the statute void, since in practice the allowance of a deduction of debts from credits merely requires a deduction from the value of bank shares, because Federal and state statutes must be construed together and the assessors must allow deductions if the holder of the bank shares is shown to be entitled to them. *First Nat. Bank v. St. Joseph*, 46 Mich. 526.

The mere repeal of a clause in a state statute making the state banks taxable upon their capital is sufficient to authorize a provision providing for the taxation of shares of national banks, since the presumption will be that the shares of state bank stock will then be taxed. *Morseman v. Younkin*, 27 Iowa, 350.

If it is not clear from the statute that stock in state banks is exempt from taxation, and the question is before the state courts, the Federal courts will assume that they are taxed for the purpose of upholding a tax on the shares of national banks until the question is decided the other way by the state courts. *Davenport Nat. Bank v. Mittelbuscher*, 15 Fed. Rep. 225.

2. What is moneyed capital.

The term "moneyed capital" in the act of Congress does not include capital that does not come into competition with that invested in national bank shares. *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. ed. 660.

The term "moneyed capital" as used in the act requiring the taxation of shares of national banks at no greater rate than other moneyed capital is taxed does not include capital in the hands of corporations. It does not include shares in a corporation which is not engaged in a business which will come in competition with the national banks. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895; *National Newark Bkg. Co. v. Newark*, 121 U. S. 163, 30 L. ed. 904; *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772.

Money invested in corporations that carry

dissent from the principles decided. It has been held that savings banks and trust associations are not within the reason of the rule provided by Congress, and hence that the restriction does not apply to them (*Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895); also, that "it could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt" (*Hepburn v. Carlisle School Directors*, 23 Wall. 480, 23 L. ed. 112; *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. ed. 573;) also, that "the act of Congress was not intended to curtail the state power on the subject of taxation." It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property if the legislature chose so to do. *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 369. We think the spirit breathed in all the later cases is this: The several states may exempt certain personal property from taxation; may provide a different mode of taxation for property, the use of which produces no competition with capital invested in national banks. These exceptions, however, must not operate as an

unfriendly discrimination against investments in national bank shares. In view of this doctrine and of the condition of our law, we are of opinion: (1) That, under § 3608 of our Political Code, shares of stock in national banks are not subject to assessment for the purposes of taxation. (2) If it be conceded that this section has no application to the shares of stock in national banks, and that they may be assessed as other personal property, then the machinery provided therefor works such a discrimination in favor of state banks, and against shares of national banks, that it is violative of the restrictions of the act of Congress, and that the assessment and tax in the case at bar are null and void. We recommend that the judgment of the court below be reversed, and the court directed to enter judgment in favor of the plaintiffs.

We concur: **Haynes, C.; Belcher, C.**

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment of the court below is reversed*, and the court directed to enter judgment in favor of the plaintiffs.

on railroads and mining and manufacturing enterprises is not within the meaning of the United States statute forbidding taxation by a state of the shares of national banks at a greater rate than is assessed upon other moneyed capital in the hands of citizens of the state. *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, *sub nom.* *First Nat. Bank v. Chehalis County*, 41 L. ed. 1069; *National Bank of Commerce v. Seattle*, 166 U. S. 463, 41 L. ed. 1079.

Moneyed capital means money employed in a business whose object is to make profit by investing such money in credits by way of loans, discounts, or otherwise which from time to time in the course of business are reduced again to money and reinvested. *Mercantile Nat. Bank v. Shields*, 59 Fed. Rep. 952.

It is only moneyed capital employed by the persons to whom it belongs in the business of discounting commercial paper, making loans on collateral securities, buying and selling bills of exchange, negotiating loans, dealing in securities and like operations of the business of banking, which comes in competition with the capital invested in national banks, discriminatory taxation in favor of which is forbidden by U. S. Rev. Stat. § 5219. *National Bank v. Baltimore*, 92 Fed. Rep. 239.

Under the construction placed upon the law by the Supreme Court of the United States all credits of whatever nature, whether interest-bearing or not, are moneyed capital in the sense in which that term is used in the act. *Wasson v. First Nat. Bank*, 107 Ind. 206.

The moneyed capital with which the taxation of the shares in national banks is to be compared is not limited to the amounts invested in state banks, but extends to all moneyed capital in the hands of individuals in whatever invested. *First Nat. Bank v. Lucas County*, 25 Fed. Rep. 749.

When by local legislation different rates are prescribed for different classes of moneyed capital the rate imposed upon shares of national banks should approximate as closely as possible to the rate imposed upon other moneyed capital of the same or a similar class, namely 45 L. R. A.

ly, shares of state banks. *City Nat. Bank v. Paducah*, 2 Filpp. 61.

A mere allegation that all the moneyed capital owned by resident individual citizens and invested in interest-bearing loans, discounts, and securities, except that owned by and invested in incorporated banks, is exempted from taxation, without setting out the classes of unassessed moneyed capital with sufficient clearness to enable the court to say that any material quantity of it coming into competition with that of national banks had been left unassessed, is not sufficient to show the illegality of an assessment against national bank stock. *Puget Sound Nat. Bank v. Seattle*, 9 Wash. 608.

3. Effect of exemption of property in state.

The prohibition to tax shares in national banks at a higher rate than other moneyed capital has no reference to capital which is exempted from all taxation. *Everitt's Appeal*, 71 Pa. 216.

That some moneyed capital in the state is exempt from taxation will not prevent the state from imposing a tax upon the shares of national banks. *Hepburn v. Carlisle School Directors*, 23 Wall. 480, 23 L. ed. 112; *Adams v. Nashville*, 95 U. S. 19, 24 L. ed. 369.

The exemption of shares in life insurance companies of deposits in savings banks, and of the amount invested in municipal bonds, does not require the exemption of stock in national banks. *Mercantile Nat. Bank v. New York*, 28 Fed. Rep. 776.

The fact that the shares of stock in building and loan associations are not taxed does not prevent the taxation of the shares of stock in national banks. *Consolidated Nat. Bank v. Pima County (Ariz.)* 48 Pac. 291.

That the property of mining companies is exempt from taxation does not prevent the taxation of national bank shares. *Talbott v. Silver Bow County*, 139 U. S. 438, 35 L. ed. 210.

The exemption from taxation of the amount invested in state bonds does not make an un-

PEOPLE of the State of California, *Appt.*,
v.
NATIONAL BANK OF D. O. MILLS &
COMPANY, *Respt.*

(123 Cal. 53.)

1. Property not on the verified list returned to an assessor may be added by him to the assessment without first issuing a subpoena and without an examination, under Pol. Code, § 3632, if he knows of the property, and its possession and ownership are admitted by the taxpayer.
2. Personal assets of a national bank cannot be taxed by a state under U. S. Rev. Stat. § 5219, which permits and regulates the taxation of the shares of stock in such corporations.

(December 19, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for Sacramento County in favor of defendant in an action brought to compel payment of taxes. *Affirmed.*

The facts are stated in the opinion.

lawful discrimination against shares of national banks. The intimation to the contrary in *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705, was a mere *dictum*, and the tendency of the decisions is strongly to the contrary of it. *Pollard v. State*, 65 Ala. 628.

That certain forms of moneyed capital such as interest paying, state, county, and corporation bonds, are exempt from taxation, does not prevent the taxation of national bank shares. *McLaughlin v. Chadwell*, 7 Helsk. 389.

The mere fact that other species of moneyed capital in the hands of individual citizens are exempted from local taxation to an amount greater than that of the capital stock of the national banks located in the state will not exempt such shares from taxation unless the exemptions are carried so far as to indicate a decided legislative preference on the part of the state in favor of the exemption of other kinds of moneyed capital. *Boyer's Appeal*, 103 Pa. 387. The court says so long as the state restricts the taxation of national banks to the same kind and degree of taxation that it imposes upon similar capital belonging to its citizens or its own institutions it does not discriminate against those banks.

The requirement that taxation on national bank shares shall not be at a greater rate than on other moneyed capital applies only to the rate, and does not prevent the state from exempting any of its subjects from taxation so that mortgages, judgments, and other moneyed capital in the hands of individual citizens of the state could not be subjected to the tax which is imposed on bank shares. *Gor-gas's Appeal*, 79 Pa. 149.

That a tax is imposed upon the capital stock of corporations generally which shall be in lieu of all other taxation does not exempt the shares of the stockholders from taxation so as to require the exemption of the shares of national banks within the state. *Albany City Nat. Bank v. Maher*, 19 Blatchf. 175, 6 Fed. Rep. 417.

The exemption of credits from taxation is not an unlawful discrimination against shares of stock in a national bank if the moneyed capital in the state generally, which is employed by

Messrs. W. F. Fitzgerald, Attorney General, and *Henry E. Carter*, for appellant:

The property owner cannot put in any statement he sees fit, and thereby preclude the assessor from making an assessment of property not given in by him, and leave to the assessor the unpleasant and unsatisfactory alternative of prosecuting him for perjury.

The taxpayer is required to furnish the assessor with a statement under oath, setting forth specifically all the real and personal property owned by such person, etc.

If the taxpayer gives a statement of his real property only, without any personal property on it, when in fact he owns personal property, it is a neglect or refusal to give the statement required by § 3629, Pol. Code, and a failure to comply with other requirements of the title of the Code, as a foundation for an arbitrary assessment.

The assessor may thereupon, if he has knowledge of the property owned or in the possession of the taxpayer, assess the same, and if he has no knowledge of such property, he may then avail himself of the remedy provided by § 3632, Pol. Code, to subpoena the

individuals in the business of making profit, is not permitted to escape taxation. *First Nat. Bank v. Chehalis County*, 6 Wash. 64. The purpose of Congress being that the moneyed capital invested in national banks should not be placed at a disadvantage as compared with moneyed capital in the hands of individual citizens of the state, and which is used for practically an identical purpose with that invested in the shares of national banks.

Exemption from taxation of the shares of all corporations which are required to list their property for taxation in the state does not create a discrimination against the shares of national banks which are not entitled to exemption. *McIver v. Robinson*, 53 Ala. 456.

But the exemption from county taxation of railroad securities, shares of stock in corporations liable to pay a state tax, mortgages, judgments, recognizances, moneys due on contract for sale of real estate, loans by corporations which are taxable for state purposes, will constitute such a discrimination against national banks that a tax on the shares of such banks will be invalid. *Boyer v. Boyer*, 113 U. S. 689, 28 L. ed. 1089.

The state may tax the bank shares held by its corporations or citizens as an investment subject to the restriction that the tax shall not exceed the burden upon similar property in the state. So a tax on shares in a national bank which is no higher than that on shares in the state bank is not invalid, although the only other subjects of taxation in the state are real estate and live stock. *First Nat. Bank v. Herbert*, 44 Fed. Rep. 158.

The mere fact that a few banks have been by contract with the state relieved from all but a nominal rate of taxation will not prevent the taxation of shares in national banks at a higher valuation if such higher valuation was placed upon the state banks generally. *Deposit Bank v. Davless County (Ky.)*, 44 L. R. A. 825.

The mere fact that at the time a tax is attempted to be placed on the shares of a national bank there are in existence several branches of a state bank whose charter exempts it from taxation on its capital stock will not make

taxpayer or any other person before him and examine them in reference to the statement; and thereby disclose the property.

It is incumbent on the defendant to show that the action of the assessor is unauthorized by law.

San Francisco v. Flood, 64 Cal. 508.

Section 3681 is simply the grant of an additional power and duty of the assessor, and takes nothing away from nor restricts the power given him under §§ 3629-3633, Pol. Code.

Farmers' & M. Bank v. Los Angeles Bd. of Equalization, 97 Cal. 323.

As this is a case where no title to real property is involved and no vested interests at stake, the strict rule of *stare decisis* should not prevail.

People v. Lynoh, 51 Cal. 15, 21 Am. Rep. 677.

Respondent makes plaint that an arbitrary assessment in such case would be too severe punishment for a person returning a false statement, and that the assessor should

not be clothed with such power. The taxpayer has it in his own hands to avoid such results by a very simple and just remedy—the return of a true statement of his property. If it is exempt from taxation the law protects him.

San Francisco v. Flood, 64 Cal. 509.

The inherent right rests in a state to tax the property of a Federal corporation unless prohibited by Congress.

Lane County v. Oregon, 7 Wall. 77, 19 L. ed. 104; *First Nat. Bank v. Kentucky*, 9 Wall. 361, 19 L. ed. 703; *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *Farrington v. Tennessee*, 95 U. S. 686, 24 L. ed. 560; *United States v. Union P. R. Co.* 98 U. S. 569, 25 L. ed. 143; *Western U. Teleg. Co. v. Atty. Gen. of Massachusetts*, 125 U. S. 531, 31 L. ed. 790; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153.

Congress has not exempted personal property of national banks from taxation.

the tax on the national bank stock invalid if the tax is not greater than that imposed upon other moneyed capital in the hands of individual citizens of the state generally. *Richmond v. Scott*, 48 Ind. 568; *Stilz v. Tutewiller*, 48 Ind. 600.

Where in a particular case the only state bank in the city, the capital of which is equal to the combined capital of all the national banks, is exempt from taxation beyond 50 cents per share, which same exemption extends to all state banks in the state, the shares of the national banks cannot be taxed beyond that rate, although a higher rate is placed upon other moneyed capital within the city. *City Nat. Bank v. Paducah*, 2 Filipp. 61.

The exemption from taxation of deposits in savings banks does not require the exemption of national bank shares. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895; *Richards v. Rock Rapids*, 31 Fed. Rep. 505.

And the fact that the savings banks are permitted to do a regular banking business is immaterial. *Bank of Redemption v. Boston*, 125 U. S. 60, 31 L. ed. 689.

That the state has disabled itself by contract from placing a tax upon the shares of certain of its banks which are its only banks of issue because it has agreed to accept in lieu thereof a percentage on the capital of the bank will not prevent it from taxing the shares of national banks at a higher rate if the shares in state banks in general having an aggregate capital much higher than the exempted banks are taxed at the same rate as that in the national banks. *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721.

But where the holders of shares in state banks are not subject to taxation no tax can be laid on the shares of national banks. *People ex rel. Lincoln v. Barton Assessors*, 20 How. Pr. 371.

Where by the laws of the state the shares of state banks cannot be taxed for municipal purposes no tax for such purposes can be levied on shares of a national bank. *Craft v. Tuttle*, 27 Ind. 332.

4. Discrimination.

In general.

The fact that some corporations, or some 45 L. R. A.

personal property, is subject to a less rate of taxation than that employed in banking corporations will not alone vitiate the law imposing taxes upon the bank shares, unless a clear legislative intent thereby appears to effect a discrimination against such shares. *McMahon v. Palmer*, 102 N. Y. 176.

National bank capital need not be favored equally with the most favored moneyed capital in the state. *Davenport Nat. Bank v. Board of Equalization*, 64 Iowa, 140.

That the shares in national banks are taxed at a higher rate than shares in other than moneyed corporations does not render the tax void. *First Nat. Bank v. Waters*, 19 Blatchf. 242, 7 Fed. Rep. 152.

That stock of corporations whose property is taxed is not subject to taxation, and that property of moneyed corporations is taxed at a nominal sum while the shares of national banks are taxed at full value, is not sufficient to show unlawful discrimination against the shares of the national banks. *Silver Bow County Comrs. v. Davis*, 6 Mont. 306. The court says the statute is not invalid because it subjects bank shares to taxation and exempts the shares of other corporations. In order to affect its validity it will be necessary to show that there is an unjust discrimination in the amount of the tax upon the money invested in the bank shares and money invested in the shares of other corporations, and this cannot be shown while it appears the money is taxed at equal rates.

That there is a discrimination between the rates imposed upon national bank shares and on bonds, certificates of indebtedness, and evidences of debt in whatever form, and upon shares of stock in foreign corporations, all of which may be held by private bankers who compete with the national banks for business, will not render the tax on the shares of the national banks invalid where the lower rate on such securities does not require the raising of a larger tax from the bank shares while it is not shown that sufficient capital is invested in such securities to result in a material discrimination, and such securities are in fact issued by persons or corporations who pay their full share of taxes so that all that class of property might be exempt from assessment on the ground of double taxation. *National Bank v. Baltimore*, 92 Fed. Rep. 239.

The question of the legality of a tax against

Messrs. Lloyd & Wood, for respondent: The assessment was invalid, and furnished no basis for the collection of the taxes in question.

Weyse v. Crawford, 85 Cal. 196; *Lake County v. Sulphur Bank Quicksilver Min. Co.* 66 Cal. 17; *San Luis Obispo v. Pettit*, 87 Cal. 499.

The true meaning to be given § 3633 is that an arbitrary assessment was to follow upon the neglect to furnish any statement, and was not to be the consequence of a defective statement in any case until at least there had been an examination by the assessor of the taxpayer or some other person under oath.

While the Constitution provides that all property shall be taxed, etc., still the *quo modo* is a matter of legislative control, and must be steadily followed.

De Witt v. Hays, 2 Cal. 469, 56 Am. Dec. 352.

In construing statutes and the Constitution, the rule is almost universal to adhere to the doctrine of *stare decisis*.

shares in national banks must turn on whether or not the tax or system of taxation complained of materially and injuriously discriminates against national bank shareholders in favor of other moneyed capital in a degree tending to discourage investments in the shares of national banks. *First Nat. Bank v. Richmond*, 39 Fed. Rep. 309.

If there is a discrimination in the tax against holders of national bank stock in the valuation thereof for assessment as compared with the assessment for the same year of other moneyed capital in the hands of individual citizens of the state and invested in the state so as to make a profit from the use thereof as money, the tax will be illegal. *Puget Sound Nat. Bank v. King County*, 57 Fed. Rep. 433.

The omission of the first proviso of the act of 1864 from U. S. Rev. Stat. § 5219, does not show an intention to permit the states to subject the shares of national banks to a greater rate of taxation than that imposed upon the state banks, but § 5219 should be construed precisely as if no prior legislation on the same subject had been had: *City Nat. Bank v. Paducah*, 2 Flipp. 61.

The principle in *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721, that the power of the state was subject only to the restriction that the taxation should not be at a greater rate than is assessed upon other moneyed capital was unnecessary to the decision of the case. *Ibid*.

By construction of statute.

A statute which made a discrimination against national bank shares would be void. But it is generally held that if no discrimination is provided by law the fact that the law is so administered as to effect discrimination will not make the tax void.

The discrimination against holders of shares in national banks must be statutory, and not merely that of the officials charged with the collection of the tax, to warrant an injunction to restrain the collection. *Wagoner v. Loomis*, 37 Ohio St. 571.

If a state statute creating a system of taxation does not on its face discriminate against national banks, and there is no evidence of a legislative intent to make such discrimination nor proof that the statute works an actual and material discrimination, there is no cause for 45 L. R. A.

Scale v. Mitchell, 5 Cal. 402; *Hickman v. O'Neal*, 10 Cal. 292; 1 Kent, Com. 476; *Jones*, Bailm. 46.

The assessment in question of the personal property, to wit, safe and fixtures and money on hand or on special deposit, "is void, because such property is not the subject of taxation by the state of California.

13 U. S. Stat. at L. 111; 15 U. S. Stat. at L. 34; U. S. Rev. Stat. §§ 5133, 5243.

Congress, by the enactments cited, provided that in lieu of all existing taxes a national bank should be taxed as follows:

First: By the United States. One half of 1 per centum each half year; that is to say, 1 per centum annually upon the average amount of its notes in circulation. One quarter of 1 per centum each half year; that is to say, one half of 1 per centum annually upon the average amount of its deposits. One quarter of 1 per centum each half year; that is to say, one half of 1 per centum annually upon the average amount of its capital stock beyond the amount invested in United States bonds.

holding it to be unconstitutional. So, the fact that savings banks are taxed on their paid-up capital, and not on their shares, does not make a discrimination against national banks. *Davenport Nat. Bank v. Davenport Bd. of Equalization*, 123 U. S. 83, 31 L. ed. 94.

If the state statute is designed to operate equally on all shares in banks, state and national, the fact that by reason of former decisions of the courts some of the state banks are not subject to the provisions of the statute does not make an illegal discrimination against the national bank shares. *First Nat. Bank v. Stone*, 88 Fed. Rep. 409.

The act of the assessors in illegally reducing the value of town lots subject to assessment is not an infringement of the act of Congress which prohibits legislative discrimination against shares in national banks and favoring any other kind of moneyed capital. *Lemly v. Forsyth Comrs.* 85 N. C. 379.

Where the statutes of the state provide for the assessment of the same percentage of taxation against every description of property except a few articles exempt from public policy, and furnish means for a just and fair assessment of all moneyed capital so as to obtain as near as practicable an equal rate of taxation upon all, they sufficiently comply with the requirements of the act of Congress, and a tax on the shares of national banks will not be illegal, although by the application of the statutes a higher tax is placed upon owners of bank shares than upon holders of some other classes of property. *Rosenberg v. Weekes*, 67 Tex. 578.

If a higher valuation of bank shares than other moneyed capital arises from error of judgment on the part of the assessors it is no ground for relieving the bank from paying the assessment. *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372.

No inequality of taxation which will entitle shareholders in a national bank to relief is shown by the fact that certain forms of capital which is more easily concealed escape taxation if there is no intention in the state laws that such shall be the rule. *Mercantile Nat. Bank v. New York*, 28 Fed. Rep. 776.

But the discrimination may become so general and marked that the courts will interfere on behalf of the shareholders, although it is

Second: By the states wherein the bank was located. The shares of the capital stock which are to be included in the valuation of the personal property of the owner or holder of such shares, including nonresident shareholders, who are to be taxed at the location of the bank. The realty owned by the bank, and which is to be taxed to it.

Congress is invested with power to fix the limits and determine the manner of taxation by the states of the property of national banks.

McHenry v. Downer, 116 Cal. 20; *Miller v. Heilbron*, 58 Cal. 140; *Van Allen v. The Assessors*, 3 Wall. 573, sub nom. *Churchill v. Utica*, 18 L. ed. 229; *Lane County v. Oregon*, 7 Wall. 77, 19 L. ed. 104; *Wilson v. Black Bird Creek Marsh Co.* 2 Pet. 250, 7 L. ed. 414; *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *First Nat. Bank v. Richmond*, 39 Fed. Rep. 309; *Talbott v. Silver Bow County Comrs.* 139 U. S. 438, 35 L. ed. 210.

Congress has fixed certain and well-defined

effects merely in the administration of the law.

If the state board of equalization attempts to equalize national banks in a class by themselves and state banks in a class by themselves, but adopts one standard of percentage for state banks and another for national banks upon the same basis of principal sums for calculation as to each class, so that the assessment upon the national banks is at a higher rate than upon the state banks, there will be an unlawful discrimination which will entitle the holders of the national bank stock to relief. *First Nat. Bank v. Lucas County*, 25 Fed. Rep. 749.

If after the assessment by the local board of bank shares and other moneyed capital at the same percentage of actual value the state board of equalization raises the assessment on the bank shares to make it correspond to that in force in other counties of the state without raising the value of other property the tax will be illegal. *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. ed. 118.

When the assessing officers omit substantially to subject the moneyed capital of individual citizens not exempt by state laws, so far as practicable to uniform taxation, or when, as matter of fact, they assess only a few taxpayers on such capital and those only for trifling amounts, the tax laws operate oppressively upon national bank shares which are taxable to their full amount, and under such circumstances the rate of taxation of the shares should be fixed only after deducting from the capital of the bank all assets which are exempt from taxation. *First Nat. Bank v. Lindsay*, 45 Fed. Rep. 619.

Where the local assessors by a mutual understanding fix the rate of assessment for moneyed capital at six tenths of its actual value, and by reason of the action of the state board of equalization a higher valuation is fixed upon shares in national banks, the holders of the shares in such banks are entitled to relief, although the Constitution requires all property to be assessed at its true value. *First Nat. Bank v. Lucas County*, 25 Fed. Rep. 749.

If the assessors had a fixed purpose generally known to all persons interested, that no deduction for debts would be allowed in the valuation of bank shares for taxation when they were allowed in case of other kinds of prop-

erty, an offer to perform the acts necessary to obtain the deduction is not necessary to give the taxpayer a right to resort to the courts for protection. *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 26 L. ed. 1052, 12 Fed. Rep. 93.

By assessing other property too low. If the shares of a national bank are not subject to statutory discrimination or to discrimination by rules of the assessing officers, the fact that other property is rated for taxation at a less proportionate value than are the shares of the bank does not make the assessment of the bank shares void so as to permit the bank to contest payment in the courts without tendering the amount of taxes which should rightfully be paid. *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469.

Miller v. Heilbron, 58 Cal. 141.

Congress in conceding to the states the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the national banks.

Lionberger v. Rouse, 9 Wall. 468, 19 L. ed. 721; *New York v. Commissioners*, 4 Wall. 244, sub nom. *New York ex rel. Duer v. New York City & County Tax & A. Comrs.* 18 L. ed. 344; *Bradley v. Illinois*, 4 Wall. 450, 18 L. ed. 433.

Banks organized under acts of Congress are regarded as fiscal agents and exempt from taxation, except as Congress may specially authorize it.

City Nat. Bank v. Paducah, 2 Flipp. 61;

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So, the fact that the shares of a national bank were taxed at par, which was 77 per cent of their value, while the shares of state banks also taxed at par were taxed at 100 per cent and 35 per cent of their value, does not show such an intentional discrimination against the shares of the national bank as to entitle the shareholder to a return of the tax after it has been paid. *Stanley v. Albany County Supers.* 21 Blatchf. 250, 15 Fed. Rep. 483.

The legality of an assessment of a tax upon the property of a national bank which does not exceed its true value cannot be affected by the custom of the assessor to assess other property at a uniform valuation less than its true value. *Engelke v. Schlenker*, 75 Tex. 559.

But a state statute which establishes a mode of assessing shares in national banks by which they are valued higher in proportion to their real value than other moneyed capital is invalid, although no greater percentage is levied on such valuation than on that of other moneyed capital. *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705, overruling *Williams v. Weaver*, 75 N. Y. 30, which held that the provision in the national banking act that no greater rate shall be assessed on shares of national banks than on other moneyed capital does not apply to over-valuation of the shares.

And the systematic and intentional valuation of all other moneyed capital by the tax officers of the state below its true value while shares in national banks are assessed at their

Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196; *Flint v. Boston*, 99 Mass. 141, 96 Am. Dec. 713; *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895; *National State Bank v. Young*, 25 Iowa, 311; *Frederick County Comrs. v. Farmers' & M. Nat. Bank*, 48 Md. 117; *First Nat. Bank v. Albia*, 86 Iowa, 28; *Bradley v. Illinois*, 4 Wall. 459, 18 L. ed. 433; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, *sub nom.* *First Nat. Bank v. Chehalis County*, 41 L. ed. 1069; *Rosenblatt v. Johnson*, 104 U. S. 462, 26 L. ed. 832; *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 489; *Talbott v. Silver Bow County Comrs.* 139 U. S. 438, 35 L. ed. 210; *Lane County v. Oregon*, 7 Wall. 77, 19 L. ed. 104; *New York ex rel. Bank of Commerce v. New York City & County Tax Comrs.* 2 Black, 632, 17 L. ed. 455; *Collins v. Chicago*, 4 Biss. 472; *First Nat. Bank v.*

Richmond, 39 Fed. Rep. 309; *National Bank v. Richmond*, 42 Fed. Rep. 877; *Brown v. French*, 80 Fed. Rep. 166; *Pittsburg v. First Nat. Bank*, 55 Pa. 45; *Smith v. First Nat. Bank*, 17 Mich. 479; *Carthage v. First Nat. Bank*, 71 Mo. 508, 36 Am. Rep. 494; *Sumter County v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30; *Providence Inst. for Savings v. Boston*, 101 Mass. 575, 3 Am. Rep. 407; *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15; *First Nat. Bank v. St. Joseph*, 46 Mich. 526; *Newport v. Mudgett*, 18 Wash. 271; *Pullman State Bank v. Mauring*, 18 Wash. 250; *Miller v. First Nat. Bank*, 46 Ohio St. 424; *First Nat. Bank v. Fisher*, 45 Kan. 726; *Consolidated Nat. Bank v. Pima County (Ariz.)* 48 Pac. 291; *First Nat. Bank v. Province*, 20 Mont. 374; *State v. Thomas Cruse Sav. Bank*, 21 Mont. 50, post, 760; *State, North Ward Nat. Bank, Prosecutors, v. Newark*, 39 N. J. L. 380; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *Osborn v. Bank of United States*,

true value will entitle the holders of shares to relief from the excess, although the statutes of the state provide for the valuation of all property at its true value. *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 25 L. ed. 901.

And the shares of stock in a national bank cannot be taxed at their full value if the other property in the state is taxed at only 30 or 40 per cent of its value. *Merchants' Nat. Bank v. Cumming*, *Thompson*, Nat. Bank Cas. 926.

Unequal valuation of the shares is as much prohibited as an unequal rate of percentage thereon. *Evansville Nat. Bank v. Britton*, 10 Biss. 503.

5. Deduction of indebtedness.

It has been authoritatively decided that the owner of shares in a national bank is entitled to deduct his debts from the value of the shares if such deduction is allowed in favor of the owners of personal property generally, although there are cases which have held to the contrary.

Deduction permitted.

A state cannot permit the deduction of just debts from the value of personal property subject to taxation, and refuse to extend the privilege to shares of national banks. *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 32 L. ed. 118.

Under a statute taxing money on hand or at interest more than the owner pays interest for, the owners of shares of national banks are entitled to a deduction of their indebtedness from the value of their shares. *Peavey v. Greenfield*, 64 N. H. 284.

Where the state statute permits persons having money invested in moneyed capital earning its profit as an investment of money coming back with its gain and being put out again for the purpose of returning to the individual owner and bringing with it its profit to deduct from the true value of such investments his bona fide debts, the same privilege must be allowed to holders of shares in national banks. *State Nat. Bank v. Shields*, 31 Ohio L. J. 321, *Refusing to Follow Niles v. Shaw*, 50 Ohio St. 370.

When a deduction of debts from the value of shares in state banks or from moneyed capital used in competition with national banks is allowed it must also be allowed in favor of

holders of national bank shares. *Newport v. Mudgett*, 18 Wash. 271.

The taxing laws of the state cannot be upheld as against the act of Congress so far as they may discriminate against national bank stock by directly exempting a portion of other moneyed capital from taxation or by doing the same thing in allowing a deduction of debts from the assessed value of a portion of other moneyed capital and denying the same deduction to the holders of national bank stock when such discrimination is so palpable as to show that it is material and serious. *Wasson v. First Nat. Bank*, 107 Ind. 206.

The holder of shares in national banks must be allowed to deduct his indebtedness from their value where he has no other property from which they may be deducted if the state law provides that in making up the amount which a person is required to list for taxation he will be entitled to deduct from gross amounts all debts in good faith owing by him. *First Nat. Bank v. Albia*, 85 Iowa, 736, *appx.*

If indebtedness is permitted to be deducted from all other moneyed capital it must be deducted from the value of bank shares. *City Nat. Bank v. Paducah*, 2 Flipp. 61; *Evansville Nat. Bank v. Britton*, 10 Biss. 503; *McAden v. Mecklenburg County Comrs.* 97 N. C. 355.

No tax can be assessed against a taxpayer where the money on which he pays interest is greater than his money on hand, money at interest, and national bank stock. *Weston v. Manchester*, 62 N. H. 574.

If shares in state banks are treated as credits from which debts are allowed to be deducted under the state laws, the shareholders in national banks are entitled to have their shares also treated as credits for the purpose of deducting indebtedness. *Newport v. Mudgett*, 18 Wash. 271.

Where the law provides for taxing money on hand and at interest more than the owner pays interest for, the valuation of his shares in a national bank is subject to a deduction of the amount of his interest-bearing indebtedness. *Peavey v. Greenfield*, 64 N. H. 284.

Shares of stock in a national bank are credits within the meaning of a statute permitting a taxpayer to deduct from the gross amount of his credits listed for taxation all debts owing by him in good faith. *First Nat. Bank v. Albia*, 86 Iowa, 28.

Where debts are allowed to be deducted from

9 Wheat. 701, 6 L. ed. 216; *People ex rel. Lincoln v. Barton Assessors*, 44 Barb. 148.

Shares of stock in a national bank stand for and represent the money on hand and other personal property of the bank, and in limiting the power to tax to the shares which represent the money and other personal property it must have been intended to provide that the money and other personal property should not be taxed.

Broom, *Legal Maxims*, 8th ed. 663; *Tynan v. Walker*, 35 Cal. 644, 95 Am. Dec. 152; *Patton v. Placer County*, 30 Cal. 179; *Harper v. Minor*, 27 Cal. 113; *Bourland v. Hildreth*, 26 Cal. 221; *Perry v. Ames*, 26 Cal. 378; *Boyce v. California Stage Co.* 25 Cal. 475; *People v. Jackson*, 24 Cal. 632.

Temple, J., delivered the opinion of the court:

The action was brought to recover taxes assessed to respondent, a national banking association organized under the acts of Con-

gress. On the first Monday in March, 1895, it had real property in Sacramento, and also personal property, consisting of safes and fixtures, and money on hand and money on special deposit. The blank form for a statement, with demand for a list, was served on it by the assessor; and it was returned, with a description of certain real estate, and safes and fixtures, valued at \$5,000. The assessor was dissatisfied with this, and returned it to the president of the bank, insisting that the personal assets of the bank were liable to taxation. After considerable conversation and discussion, during which the amount of the deposits as they were afterward assessed was stated by the president and cashier, the list was changed by erasing the item as to the safes and fixtures, and in that condition was verified and returned to the assessor by the cashier. The assessor then proceeded, without issuing any subpoena to any officer or employee of the bank, or to any other person, to assess to and

the value of the shares a debt upon a note for borrowed money which was invested in government bonds should be deducted, although the transaction was a mere device to escape taxation. *People ex rel. Thurman v. Ryan*, 88 N. Y. 142, 42 Am. Rep. 238.

The value of stock in a national bank must be considered as part of the taxpayer's "debts due or to become due" him from which he is entitled to deduct the amount of his bona fide indebtedness in listing his property for taxation under Wis. Rev. Stat. § 1038, subd. 10. *Ruggles v. Fond du Lac*, 53 Wis. 439.

The shareholders of national banks are entitled to a deduction of debts when the state statute provides that from the gross amount of money and credits of one liable to taxation may be deducted all debts due and owing. *Richards v. Rock Rapids*, 31 Fed. Rep. 505.

An illegal discrimination against shares of national banks exists when deductions are allowed to be made from solvent credits in the hands of taxpayers generally, but are not allowed to be made from the value of national bank shares, and the fact that in a particular instance the owner of the national bank shares owes no debts is immaterial upon the question of the validity of the statute. *Miller v. Heilbron*, 58 Cal. 133.

Where the provision for the taxation of shares of national banks is that they shall be taxed at the same rate as is levied on other moneyed capital, and the statute provides that indebtedness may be deducted from money loaned and solvent credits, the same deduction must be made in favor of shareholders in national banks. *Maguire v. Board of Revenue & Road Comrs.* 71 Ala. 401.

Permitting the deduction of debts from money loaned and solvent credits in fixing the amount of assessment against taxpayers generally, and denying such deduction to holders of shares in national banks, is an unlawful discrimination against them. *Pollard v. State*, 65 Ala. 623.

And it is immaterial that such deduction is denied to shareholders in other classes of corporations. *Mercantile Nat. Bank v. Shields*, 59 Fed. Rep. 952.

When a nonresident shareholder is taxed at the place where the bank is located he is entitled to the deduction of debts allowed by the law of that place in case of other moneyed capital. *Ibid.*

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If deduction of debts is allowed in favor of a material portion of the taxpayers, it must be allowed in favor of holders of national bank shares. *Wasson v. First Nat. Bank*, 107 Ind. 206; *Indianapolis v. Vajen*, 111 Ind. 240.

The court may take judicial notice that notes, mortgages, judgments, except for money loaned, amounts due for goods, wares, and merchandise of all kinds, railway material, farming implements, machinery, manufactured articles of all kinds, sold at wholesale or retail, amounts due for labor and professional services, amounts due for public improvements on account of sales of real estate, live stock, and farm products, and all other credits of every description due from any person, company, or corporation whatever, whether drawing interest or not, except money on hand, money loaned, bonds issued by bodies corporate and public corporations, and shares of stock in corporations, constitute such a large and material part of the whole moneyed capital of the state that if deduction of debts is allowed in favor of the holders of them, and not in favor of the owners of bank shares, there will be an unlawful discrimination against the latter. *Wasson v. First Nat. Bank*, 107 Ind. 206.

A statute which does not permit a deduction of indebtedness from an assessment upon bank shares, but which does allow such deduction from an assessment upon other credits, is void. *National Albany Exch. Bank v. Wells*, 18 Blatchf. 478, *sub nom.* *National Albany Exch. Bank v. Hills*, 5 Fed. Rep. 251. This decision was reversed in 105 U. S. 319, 26 L. ed. 1032, on the ground that as to a large number of shareholders whose taxes were enjoined there was no evidence that they owed any debts whatever at the time the assessment was made.

A statute permitting the deduction of debts from other kinds of personal property, but refusing to permit it in case of bank shares, is not wholly void, but only so far as the deduction is not permitted. *Albany County Supers. v. Stanley*, 105 U. S. 305, 26 L. ed. 1044, 12 Fed. Rep. 87; *Evansville Nat. Bank v. Britton*, 105 U. S. 322, 26 L. ed. 1053.

But the Alabama court held that a state statute which is invalid because not allowing deduction of indebtedness which is allowed in favor of other moneyed capital will be held invalid *in toto*, and not merely in favor of those who have indebtedness to deduct which

against the defendant the safes and fixtures, valued at \$5,000, and deposits to the amount of \$800,000. In due time the defendant tendered the amount of the tax upon the real estate, but it declines to pay the tax upon the personal property; claiming that it is exempt under the act of Congress creating national banks, as an instrumentality of the Federal government. All the findings, save one, were agreed upon by the parties. It is not found, and does not appear, that the assessor considered that defendant had, after demand, refused to make a statement as to its property, or that he made an entry to that effect on the assessment book, as authorized by § 3633 of the Political Code; but it does appear that the board of equalization refused to consider the objections made by the bank to the assessment on the ground that the "assessment had been arbitrarily made, and that the board of equalization had no power to review the same." It is admitted that the bank did have the

property which was assessed to it, and also that, if it is not exempt from taxation, it ought to have been given in by the bank and assessed to it. The refusal of the board to consider defendant's objections has not injured it, if the assessment was proper and would have been maintained. Judgment was for the defendant, and the people appeal from the judgment, and from an order denying a new trial.

It is contended that the assessment was illegal, for two reasons:

1. After the taxpayer has returned to the assessor his verified list, although the assessor knows of other property belonging to the taxpayer; although, in fact, the taxpayer has had his attention called to the matter, and admits the possession and ownership of other property, as was the fact in this case,—still the assessor cannot include such property in the assessment without first issuing a subpoena and holding an examination, as he is authorized to do under § 3632

they are not permitted to do. *Maguire v. Board of Revenue & Road Comrs.* 71 Ala. 401.

Money deposited in a national bank and bearing no interest is taxable to the depositor without any deduction for debts due from him under the Massachusetts statutes. *Gray v. Boston Street Comrs.* 138 Mass. 414.

Refusing deduction.

Some courts have refused to recognize the right of the holder of shares in a national bank to a deduction of debts merely because it was allowed in favor of other property owners.

That a deduction of debts is allowed in favor of other moneyed capital of the state while it is not allowed in favor of the owners of bank shares does not make the tax invalid. *People ex rel. Cagger v. N. Y.* 59; *Williams v. Weaver*, 75 N. Y. 30.

Where debts are allowed to be deducted from credits the deduction cannot be allowed in favor of holders of bank shares, since such shares are investments in stocks, and not credits. *Niles v. Shaw*, 50 Ohio St. 370; *Chapman v. First Nat. Bank*, 56 Ohio St. 310.

If the rate upon the bank shares is no higher than that upon other property the tax is not illegal because deductions for debts are not allowed from the value of the bank shares while they are allowed from the amount of other classes of property. *McVeagh v. Chicago*, 49 Ill. 318.

Where the statutes provide for the deduction of debts from credits the debts cannot be deducted from the value of the bank shares, since a bank share not being a debt of its owner is not within the term "credits." *Rosenberg v. Weekes*, 67 Tex. 578.

Debts may be allowed to be deducted from some of the moneyed capital in a state without permitting them to be deducted from the value of bank shares if the capital from which they are deducted is not so large or substantial when compared with the capital invested in national bank shares as to show an illegal discrimination. *First Nat. Bank v. Ayers*, 160 U. S. 660, 40 L. ed. 573.

The word "credit" in the Kansas statute authorizing the deduction of debts from credits does not include shares in national banks, and that statute is not contrary to the provisions of the United States Revised Statutes because the deduction is not allowed in favor of moneys secured by judgment, moneys on deposit in a 45 L. R. A.

bank and substantially all moneyed capital of every description invested for profit. *Dutton v. Citizens' Nat. Bank*, 53 Kan. 440.

In Nebraska the court at first held that the shareholders are entitled to deduct their debts. *Bressler v. Wayne County*, 25 Neb. 468.

But that case was overruled in *Bressler v. Wayne County*, 32 Neb. 834, 13 L. R. A. 614, on the ground that the statute allowed a deduction of debts merely from credits, and did not apply in favor of the owners of moneyed capital generally. The court says the rule is that where the rate fixed by the state for the taxation of capital in the hands of individual citizens situated similarly to that invested in national banks is not less than that invested in national bank shares the rule of uniformity is maintained even though some moneyed capital in the state which is invested by individuals in business or enterprises which do not come into competition with national bank shares is exempt from taxation, or is assessed at a less rate than is imposed on shares of stock in national banks.

A state may forbid the deduction of indebtedness from personal property taxable within its limits to an amount equal to the value of stock owned by the taxpayer in a national bank in another state, although the effect is to indirectly tax such stock, since the state is under no obligation to allow a deduction on account of indebtedness, and it may properly reduce such deduction by the amount of the taxpayer's property which is not taxed, whether the exemption arises from want of power or from considerations of justice or policy. *Small-ey v. Burlington*, 63 Vt. 443.

6. Other deductions.

If in assessing the shares of the stock of state banks the value of the real estate belonging to the bank is deducted the same deduction must be made in favor of shares of national bank stock. *Loflin v. Citizens' Nat. Bank*, 85 Ind. 341.

As between the individual shareholder of a national bank who is taxed upon his shares as other personal property, and the individual citizen who is taxed upon all personal property owned by him, there is no discrimination, although in ascertaining the value of the shares of stock the value of stock held by the bank in other corporations which are taxed within the state is not allowed to be deducted. *Pacific Nat. Bank v. Pierce County*, 20 Wash. 675.

of the Political Code. The proposition is that an addition to the list furnished by the taxpayer, without the examination, renders the assessment void,—at least, as to the property thus added to the list. Unless the statute has given such effect to the list, this position cannot be maintained. The general duty of the assessor is to list all taxable property in his county or district. The law compelling the taxpayer to furnish the list is undoubtedly designed to assist the assessor in the performance of his duties. The assessment is not judicial, and must necessarily be summary. All property should be assessed, or the burden of taxation is not imposed alike upon all. The assessor must not knowingly permit any to escape. Must he, then, when he not only is fully informed as to the property, but the taxpayer admits and states to him all the facts in regard to it, but simply contends that it is by law exempt, resort to this—in that case—useless proceeding before he can lawfully assess such

property? In many states the law does give the verified list some effect, but I think it has generally been held that unless the statute provides otherwise, it does not in any way limit the powers of the assessor. *Welty, Assessm. § 4; Cooley, Taxn. 357; 1 Desty, Taxn. p. 545.* In Massachusetts it is made conclusive upon the assessor, although it has been held there that the commissioners who revise and equalize may add other property. In New York the taxpayer may make an affidavit which may have the effect to reduce his assessment, and the different states, as was to have been expected, have various schemes upon the subject. In Nevada a similar law was construed, and it was held that the statement was merely in aid of the assessor, and had no binding effect upon him. *State v. Kruttschnitt, 4 Nev. 178.* See also *Wabash, St. L. & P. R. Co. v. Johnson, 109 Ill. 11; Felsenthal v. Johnson, 104 Ill. 21; Morris v. Jones, 150 Ill. 542; Thompson v. Tinkcom, 15 Minn. 295 (Gil.*

That in the taxation of the capital stock of domestic corporations deduction is allowed for the value of property owned by the corporation which is otherwise taxed, does not make an unlawful discrimination against the shares of national banks which are valued in view of the whole capital of the bank without making any deduction for property otherwise taxed. *Maguire v. Board of Revenue & Road Comrs. 71 Ala. 401.*

An unjust discrimination against national bank shares is made by a law which requires the value of bank shares to be ascertained by taking the market value of the entire capital stock and deducting therefrom the value of all property assessed to the corporation and dividing the remainder by the number of shares of stock, since none of the personal property of the national bank can be assessed under the state laws so that the holders of its shares do not obtain a deduction which is accorded to the owners of the shares in state banks. *Miller v. Hellbron, 58 Cal. 133.* The court says that the restriction of the United States statute is that the taxation of the individual owner of shares of a national bank shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. And it would be a strained construction of the statute to hold that a proportionate part in value of the personal property belonging to a state bank and assessed to it was in the hands of individual shareholders of such bank.

That shares of national bank stock owned by colored people are liable to taxation for the support of schools, which is not true of other moneyed capital, and that a deduction of \$100 may be made from the amounts listed by taxpayers for taxation generally, which is not accorded to such shares, does not make such a discrimination against the shares of national banks in favor of which the deduction is not allowed as to make the tax void. *City Nat. Bank v. Paducah, 2 Filipp. 61.*

A state tax system is inoperative against national bank shares where it provides that in the taxation of corporations created by state laws a deduction shall be made for such portion of the capital stock as may be invested in property, and permits immunity from municipal taxation upon payment of a fixed and limited percentage, which advantages are not allowed to national banks, and the fact that in

one case the assessment is on the capital stock and in the other on the shares is immaterial. *Pollard v. State, 65 Ala. 628.*

In a New York case it was held that the fact that state banks are taxed on their capital from which the amount invested in government bonds is deducted, while national bank shares are taxed in the hands of individuals without deduction on account of capital invested in government bonds, is not an illegal discrimination. *Utica v. Churchill, 33 N. Y. 161.* But this case was overruled by *Van Allen v. The Assessors, 3 Wall. 573, sub nom. Churchill v. Utica, 18 L. ed. 229.*

And the *Van Allen Case* was followed in *First Nat. Bank v. Fancher, 48 N. Y. 524.*

If deduction of investments in nontaxable securities may be made by taxpayers in general a tax will be void on the shares of a national bank based on the total value of the assets refusing to permit a deduction of the amount which the bank has invested in nontaxable securities, and it is immaterial that the discrimination is made against other corporations as well as against national banks in favor of individuals. Under the rulings of the Supreme Court of the United States government bonds can form the subject of indirect taxation in the hands of national banks only when they form the subject of such taxation in the hands of individuals. *Whitney Nat. Bank v. Parker, 41 Fed. Rep. 402.*

An unequal burden is not placed upon the shares of national banks by the fact that in ascertaining their value a portion of the capital of the bank which is invested in United States bonds is not deducted, while in the taxation of private bankers the amounts which they have invested in such securities is deducted. *Exchange Nat. Bank v. Miller, 19 Fed. Rep. 372.*

That the amount of capital of corporations generally which is invested in government bonds is deducted in assessing the tax against them, but is not deducted in fixing the value of shares of national banks when a portion of the capital is invested in such bonds, does not make an illegal discrimination which will avoid the tax. *State, Stratton, Prosecutor, v. Collins, 43 N. J. L. 563.*

The fact that private bankers are permitted to deduct the amount of legal tender notes and United States bonds held by them from their total capital in listing their property for taxa-

226). The last-named case is particularly interesting upon this point. The statute there considered was quite similar to ours, and it was held that the assessor was not only at liberty to add omitted property of which he had knowledge, but was bound by his oath so to do; and it was said that, when the statute "does not expressly or by implication make the oath of the party conclusive, it is merely a step in the proceedings to enable the assessor to make a complete return of all the property in his district." I believe this to be a correct statement of the general current of decisions upon the subject.

The question, then, is, Is there anything in our statute which will preclude the assessor from listing any property to the taxpayer, except such as he returns in his verified list, or shall admit on examination under oath after service of a subpoena upon him? The subpoena cannot be issued until after he has made his statement, and the statute does not expressly authorize the assessor to add to

the list after the issuance of the subpoena, and the examination of the taxpayer under oath, even if further property should be discovered upon such examination. Under the statute, and upon the *stricti juris* theory of construction, so much insisted upon by respondent, the assessor has no more power to add to the list after the issuance of the subpoena and after the examination than he had before, and although the existence of other taxable property may have been admitted by the taxpayer. It must be observed, also, that this construction makes the taxpayer the judge of what property is exempt from taxation, *quoad* the assessor. Counsel for respondent say it must be intended that upon the discovery of other property upon such examination the assessor should list it. To this I agree, but I know of no reason why property so discovered should be listed, and property discovered through the unsworn admissions of the taxpayers should not be. The provision as to the examination

tion does not require a deduction of such bonds and notes from the total capital of a national bank in arriving at the value of shares for taxation in the hands of individual owners. *Adair v. Robinson*, 6 Tex. Civ. App. 275.

7. Difference in manner of taxing state and national banks.

If the state banks are taxed on their capital the shares of the national banks cannot be taxed. *Bradley v. Illinois*, 4 Wall. 459, 18 L. ed. 433, Overruling *People v. Bradley*, 39 Ill. 130, which held that the provision of a state Constitution requiring equal and uniform taxation does not prevent the assessment of state banks on their capital stock and the shares of national banks in the hands of individual owners.

The Federal decision was followed in *People v. McCall*, 43 Ill. 286, the court holding the tax void.

If by the laws of the state no tax is placed on the shares of state banks, none can be placed on those of national banks. *Wright v. Stilz*, 27 Ind. 338; *Evansville v. Bayard*, 39 Ind. 450; *State, Matheson, Prosecutor, v. Boyd*, 32 N. J. L. 273.

If the state statutes provide merely for the taxation of the capital of the state banks, the fact that there are no state banks organized to which the law can apply will not make the tax on the shares of the national banks valid. *Hubbard v. Johnson County Supers.* 23 Iowa, 130; *Olmstead v. Henry County Supers.* 24 Iowa, 33; *Lauman v. Des Moines County*, 29 Iowa, 310.

But it has been held that a difference in the mode of taxing state and national banks will not render the tax on national bank shares void if there is no inequality in the burden. *Parker v. Siebern* (Ohio) 5 Am. L. Reg. N. S. 526.

The necessary equivalent tax upon shares of state banks need not be assessed directly upon the shares, but may be assessed upon the capital or property of the banks, provided only that it is a full equivalent for the tax on the shares of the national banks. *Frazer v. Siebern*, 16 Ohio St. 614.

The fact that in assessing the shares of stock of a national bank their value is reached by taking one fourth of the par value of the stock, while in assessing a state bank the value is reached by taking one fourth of the value of the assets after deducting liabilities and real estate, does not show a discrimination against 45 L. R. A.

the national bank, although the result is to reduce the amount on which the state bank is assessed to a much lower amount than that of the national bank while their nominal capital is the same. *Richards v. Rock Rapids*, 31 Fed. Rep. 505.

Where a tax of fifty cents on every share of \$100 is laid upon state banks, and the officers of the bank are required to pay the same on behalf of the shareholders, the same tax and method of proceeding is valid when applied to shares in national banks. *Com. v. First Nat. Bank*, 4 Rush, 98, 96 Am. Dec. 285.

A state may tax the shares of national banks although it does not tax shares of banks organized under its own authority as such, but only their capital providing the tax on capital is a full equivalent for that imposed on the shares of national banks. *Van Slyke v. State*, 23 Wis. 655; *Bagnall v. State*, 25 Wis. 112. Under the laws of Wisconsin every state bank in consideration of the privilege of doing business was required to pay the state treasurer a semi-annual tax of $\frac{3}{4}$ of 1 per cent on the amount of the capital stock of the bank regardless of the fact whether its capital was invested in United States securities or whether a portion of its capital had been lost in business. This tax was paid on the capital stock as a compensation for the special privileges granted by the state, and as a fair equivalent for the exemption from local taxation on their property. And the court says this constitutes the fundamental distinction between a case arising under our state banking law and one arising where the tax is upon the capital stock of the state bank and the bank is entitled to a deduction from its capital stock of the amount invested in United States securities. For, wherever a tax of a given percentage is imposed on the capital stock of a state bank, and that capital is liable to be diminished on account of investments in United States securities, and the same rate is imposed on the shares of national banks there, it is plain the taxation is not equal or equivalent.

Where the tax upon the state banks is upon capital, profits, and time deposits, subject to a deduction for United States bonds and for real estate owned by the bank, it is not an equivalent for a tax upon the full value of shares in national banks, in ascertaining which no deduction is made for investments in bonds or real estate. *Frazer v. Siebern*, 16 Ohio St. 614.

is but an aid to the assessor to enable him to perform the duty enjoined upon him, and which, upon making his return, he is compelled to state under oath that he has done. Pol. Code, § 3652. In respect to this, reliance is placed upon *Ways v. Crawford*, 85 Cal. 196, which, it is contended, holds that the assessor cannot add to a list returned by a taxpayer, unless he has been so subpoenaed and examined. I do not so understand that opinion. It holds that the assessor cannot make an assessment which shall not be revisable by the board of equalization, unless the taxpayer has refused to make out his list under oath, or has refused to comply with some other requirement of the law. Properly understood, I have no quarrel with that decision. Unless there has been some dereliction on the part of the taxpayer, unless he has failed to render the assistance to the assessor which the law requires him to render, he cannot be subjected to the penalty of a nonrevisable assessment.

That certain corporations in the state are taxed on their capital stock instead of on the shares of such stock does not make a discrimination against shareholders of national banks whose shares are taxed. *Mercantile Nat. Bank v. New York*, 28 Fed. Rep. 776.

The proviso in the national banking act that no burdens shall be imposed upon them by the states from which state banks are exempt was meant to apply to banks of issue. *Lionberger v. Rouse*, 9 Wall. 468, 19 L. ed. 721.

The fact that savings banks are taxed on the capital, and not on their shares, will not prevent a tax against the shares of national bank stock if the taxation of the national bank shares is no greater than that assessed upon moneyed capital generally,—especially where the result is the same as though the capital of the national banks had been directly taxed. *Davenport Nat. Bank v. Board of Equalization*, 64 Iowa, 140.

That the shares of trust companies are not taxed, but the tax is placed on the value of the capital stock with deductions to avoid double taxation and exemptions, and they are additionally taxed on their franchisees, does not show that there is a discrimination against national bank shares which are taxed as such. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. ed. 895.

8. Discount for prompt payment.

That all banks are given an opportunity to obtain a discount by paying the tax before a certain time does not render the law an imposition of an unequal burden upon the banks which do not accept the privilege within the protection of the United States Constitution. *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236.

9. Uniformity throughout state.

That the shares of a resident of one township are taxed at a higher rate than those of a resident in another township in the same state does not make the tax illegal. *State, Stratton, Prosecutor, v. Collins*, 43 N. J. L. 563.

Uniform taxation in all the different municipal corporations of the state is not required by the national banking act, but only that the same shall be uniform in the municipality or subdivision in which the bank is located or where the shareholder resides. *People v. Moore*, 1 Idaho, 504.
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This, I think, is all that was decided upon this matter in *Weyce v. Crawford*. It denominates such an assessment "an arbitrary assessment." The term is not found in the statute. As used in the opinion, it evidently has reference only to an assessment which cannot be revised by the board of equalization. This is not a ruling that the assessor cannot assess property not found in the verified lists made by a property owner.

2. As a second reason for claiming that the assessment is illegal, it is contended that the personal assets of the bank are exempt from taxation by the terms of the national banking act. It is provided in § 5219 of the Revised Statutes of the United States that nothing in that act shall prevent all shares in any association from being included in the individual assessment of the owner in assessments made for the purpose of state taxation, "but the legislature of each state may determine and direct the manner and place of taxing all the shares of national

The rate upon bank shares need not be as low as the lowest rate upon moneyed capital anywhere in the state, but it is sufficient if the rate on bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located. *Providence Inst. for Savings v. Boston*, 101 Mass. 575, 3 Am. Rep. 407.

c. Method of fixing value of shares.

1. Valuation above par.

Under the act of 1868 the shares of national banks may be valued for taxation at an amount above their par value. *Hepburn v. Carlsle School Directors*, 23 Wall. 480, 23 L. ed. 112.

And the same was true under the act of 1864. *People v. New York Tax & A. Comrs.* 94 U. S. 415, 24 L. ed. 164.

The surplus fund which a national bank is required to reserve from its net profits is not to be excluded in the valuation of its shares for taxation. *Stratford Nat. Bank v. Dover*, 58 N. H. 316; *State, North Ward Nat. Bank, Prosecutor, v. Newark*, 30 N. J. L. 380.

In ascertaining the value of the shares the taxing officers may include in their estimate all reserve funds, profits, earnings, and other values. *St. Louis Nat. Bank v. Papin*, 4 Dill. 29.

The undivided profits of a bank may be estimated in determining the value of the shares of stock for taxation, but if by the laws of the state the tax upon the shares in state banks is fixed at a certain amount per share of a certain value the tax upon shares in a national bank cannot be higher than that, because the shares are more valuable on account of undivided profits. *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 489.

The fact that state banks may divide up their surplus while national banks are required to retain a portion of theirs which may increase the value of the shares does not make a tax upon the full value of the shares illegal. *People ex rel. Gallatin Nat. Bank v. Commissioners of Taxes & Assessments*, 67 N. Y. 516.

The actual and not the par value of the stock should be assessed under the New York statute of 1866, chap. 761. *Ibid.*; *People ex rel. Williams v. Albany Bd. of Assessors*, 2 Hun, 583; *People ex rel. Gallatin Nat. Bank v. New York City Tax & A. Comrs.* 8 Hun. 536.

Although one early case held that national

banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," etc. It was also provided that shares owned by nonresidents should be taxed in the city or town where the bank is located, and not otherwise. The original act required a list of shareholders to be kept open at the bank during business hours for the inspection of state officers, and no other visitatorial power was allowed. The attorney general does not deny that a national bank is a fiscal agent of the United States, created by it as a means of exercising its powers. Nor does he apparently question the power of Congress to limit or deny the right of the state to tax its property; but he contends that, although the state cannot tax an agency of the United States, it may tax the property of its agents,—at least, where there is no express inhibition by Congress,—

and that taxation of the personal property of a bank, as other like property in the state is taxed, is not prohibited, either expressly or impliedly, by the act of Congress. Upon all these questions the decisions of the Supreme Court of the United States are final and accordingly counsel have most elaborately considered numerous cases decided by that tribunal. I think counsel really disagree, however, only on one point, *viz.*, whether taxation of such property is prohibited by the act of Congress. Appellant states his contention as follows: "An important question raised here is whether the inherent right rests in a state to tax the property of a Federal corporation, unless prohibited by Congress, or whether its right to tax the property of such corporation is derived from the Federal government?" The respondent submits two propositions: (1) Congress has the power; and (2) has limited the power of the state to tax the property of national banks, and, of course, that it has denied to

bank shares cannot be assessed by a state for taxation at more than their par value, and the assessment of taxes on national bank stock at more than its par value renders the whole tax void. *Union Nat. Bank v. Chicago*, 3 Biss. 82.

In determining the value of shares for assessment their fair cash value in the event that the bank continues its business is to be taken, and not what their value would be in case the bank was to be wound up, which is not in contemplation. *National Bank of Commerce v. New Bedford*, 135 Mass. 313.

A statute giving the bank an option to collect from the shareholder and pay to the state a tax of 6-10 of 1 per cent upon the par value of the shares of stock which shall be in lieu of all other taxes except upon the portion of the capital which is invested in real estate is not void for repugnance, although by reason of the exemption of other moneyed capital all the property of the bank was exempt from local taxation, since the exemption may operate upon the excess in value of the capital stock above its par value. *Second Nat. Bank v. Caldwell*, 13 Fed. Rep. 429.

2. Deduction for investment in bonds.

It is now settled that under the enabling clause in the national banking act the states may tax the shares of stock in such banks, although the capital is wholly invested in stocks and bonds of the United States. *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom.* *Churchill v. Utica*, 18 L. ed. 220. The power of Congress to impose the duty of paying the state tax upon the banks is placed upon the ground that it is a condition of exercising the necessary rights and privileges conferred upon the banks, so that the tax on the shares is not a tax on the capital of the bank.

If the rate of taxation by the state on shares in a national bank is not greater than upon the moneyed capital of the individual citizen which is subject to taxation,—that is if no greater proportion of tax on the valuation of the shares is levied than upon other moneyed taxable capital in the hands of citizens,—the tax is valid, and it is immaterial that in determining the value of the shares the amount of capital invested in United States bonds is included. *New York v. Commissioners*, 4 Wall. 244, *sub nom.* *New York ex rel. Duer v. New York City & County Tax & A. Comrs.* 18 L. ed. 344. The 45 L. R. A.

court says that the exemption clause in the national banking act says that the right of taxation of the shares of stockholders shall not be greater than upon the moneyed capital of the individual citizen which is subject to taxation excluding what he may have invested in government bonds.

And that rule was followed in *Adams v. Nashville*, 95 U. S. 10, 24 L. ed. 369.

Shareholders are not entitled to an allowance for the portion of the capital which is invested in government bonds. *First Nat. Bank v. Farwell*, 10 Biss. 270, 7 Fed. Rep. 518.

The value of bonds and legal tender notes held by a national bank on the 1st day of January of the year for which assessment of taxes is made cannot be deducted from the amount of capital stock of the bank in arriving at the value of the bank shares for assessment in the hands of shareholders. *Adair v. Robinson*, 6 Tex. Civ. App. 275.

If the equalities prescribed by U. S. Rev. Stat. § 5219, are substantially observed the holders of shares in national banks are not entitled to a reduction of their assessment because a large part of the capital of the bank is invested in government bonds which are not subject to state taxation. *First Nat. Bank v. Lindsay*, 45 Fed. Rep. 619.

Although some of the state courts had held that a stockholder in a national bank whose capital is invested partly in United States bonds may be taxed by the laws of the state only for such portion of the amount of his shares as is not made up of the value of said bonds. *State, Jewell, Prosecutor, v. Hart*, 31 N. J. L. 434.

The portion of the capital which is invested in government bonds cannot be taxed to the shareholders unless Congress expressly gives its consent. *State, Fox, Prosecutor, v. Haight*, 31 N. J. L. 399.

The value of government bonds held by the bank must be excluded in determining the value of shares for the purpose of taxation. *Com. v. Girard Nat. Bank*, 6 Phila. 431.

3. Deduction for investment in real estate and other property.

There has been some conflict of opinion as to whether or not a deduction from the amount of capital stock should be made of the value of property otherwise taxed in ascertaining the value of the shares.

the states the right to tax any property of national banks, except their real estate, although permitting the taxation of the shares to the shareholders. Since, therefore, respondent bases its claim to exemption upon the proposition that Congress has prohibited the tax, it is only important as a matter of argument to determine whether the state may tax such property, unless forbidden by Congress, or whether it derives its power to tax from the permission given by Congress. It is an important consideration in regard to this question that Congress has expressly provided for the taxation of the shares of the bank to the shareholders, and has directed the mode in which this shall be done. It has been repeatedly declared by the Supreme Court of the United States that by this provision Congress has not deprived the states of a resource from which it could properly derive a revenue. The shares of stock may be taxed, and it is hornbook law that the stock represents the value of all the assets of the bank. It has been so expressly adjudicated in this state. *People ex rel. Burke v.*

Badlam, 57 Cal. 594; *Spring Valley Water-works v. Schottler*, 62 Cal. 69; *San Francisco v. Fry*, 63 Cal. 470. It is assumed in *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229, also in *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705, where it is asserted that the limitation was intended only "to protect the banks from anything beyond their general share of the public burdens." In many other cases the proposition is taken for granted, and it is, I think, quite obvious. Under our decisions, we cannot deny that when the capital stock is assessed the assets of the corporation are subjected to the tax. In the case of national banks the value of the shares was in part made up of United States bonds, in which a portion of the capital must be invested. The bonds are not subject to state taxation, yet no deduction is required from the assessment for the investment in the bonds. So the real estate may be assessed, as well as the stock, but the value of the shares is made up in part by the real estate. The trouble is that we do not tax to the individual share-

One line of cases holds that the value of its real estate should be deducted from the total capital of the bank before the value of the shares is ascertained for the purpose of taxation. *City Nat. Bank v. Paducah*, 2 Filipp. 61.

Where a portion of the capital stock of a national bank is invested in real estate its value should be deducted from the entire value of the capital stock in ascertaining the value of the shares for the purpose of taxation. *First Nat. Bank v. Albia*, 86 Iowa, 28.

In assessing shares of national bank stock under the act of 1866, it is the duty of the assessor to deduct from the actual value of each share a sum bearing the same proportion thereto as the assessed value of the real estate of the bank bears to the actual value of the capital stock. *People ex rel. Trademen's Nat. Bank v. Tax & A. Comrs.* 69 N. Y. 91, *Overruling* 9 Hun, 650.

Where a portion of the capital of the bank is invested in real estate which is separately taxed its amount must be deducted from the capital in ascertaining the value of the shares for taxation to the full value of the real estate, although under the law real estate is only valued at 60 per cent of its true value for purposes of taxation. *First Nat. Bank v. Albia*, 85 Iowa, 736, Appx.

In the absence of proof it will be presumed that in assessing the shares of a national bank the value of the real estate was first deducted from the value of the capital stock where the real estate is separately taxed. *Re Farmers' Nat. Bank*, 1 Thomp. & C. 383.

As to separate taxation of real estate when shares are taxed to the full value of the capital stock, see *supra*, III.

Other cases have held that the shares in the hands of individual owners may be taxed at their full value without reduction for the franchises, for the real estate otherwise taxed, or for untaxable bonds held by the bank. *Frazer v. Slebern*, 16 Ohio St. 614.

A bank cannot complain that it is assessed both on its stock and its real estate without any deduction of the value of the real estate in ascertaining the value of the stock, where the aggregate assessed value of both is less than one half their real value, and the fact that other taxpayers are assessed too low is 45 L. R. A.

Immaterial. Nickerson v. Kimball, 1 Chicago L. J. 42, *Thompson, Nat. Bank Cas.* 419.

d. Method of assessing the tax.

The shares of national banks need not be placed in the list of other personal property upon which an assessment is based. *McVeagh v. Chicago*, 49 Ill. 318.

The fact that in making up the assessment the value of bank shares is placed in a separate column on the assessment book does not invalidate the assessment. *Williams v. Weaver*, 75 N. Y. 30.

Where the owner of the shares does not live in the ward where the bank is located, but does live in the city, the statute may provide that the assessment of the stock may be made upon a list specially prepared for that purpose, the owner having no real estate in the ward. *McMahon v. Palmer*, 102 N. Y. 176, 55 Am. Rep. 796.

That a shareholder in a national bank has no other personal property in the district in which the bank is located does not prevent his being assessed upon his shares of stock under the provisions of the act of Congress that nothing shall prevent all the shares of any of said associations from being included in the valuation in the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located. And the fact that shareholders are residents of other townships in the state, or of other states, will not prevent an assessment upon their shares at the place where the bank is located. *State, Farmers' Nat. Bank, Prosecutor, v. Cook*, 32 N. J. L. 347.

The fact that money has been taxed for municipal purposes on the 1st day of January in a particular year will not prevent the taxation for the same purposes of stock in a national bank subsequently purchased on the 1st day of April of the same year. *Richmond v. Scott*, 48 Ind. 568.

e. Period for which tax payable.

Under the Alabama Constitution in case no tax has been levied on the shares of national banks for a series of years the legislature cannot levy such tax for past years, although di-

holders the stock; but, on the other hand, we assess to the corporation all its assets, which, we have held, gives the value to the stock. Under our methods of classification, made for the purpose of equalizing the burdens of taxation, it has been held that we cannot assess the shares of stock in a national bank as other money capital is assessed. But, conceding that Congress could direct the extent and mode of taxing the property of the bank, if the mode provided would, if pursued, subject the property of the bank to taxation to the same extent that other like property is taxed, the conclusion is irresistible that it was intended that the tax expressly permitted should be the only tax to which the property is to be subjected. But it seems to me that the precise question was determined in *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. ed. 832. A state attempted to tax the personal assets of an insolvent national bank. It was quite naturally thought that it had then ceased to be a governmental instrumentality. In a short

opinion by the chief justice it was held that, as the assets still belonged to the corporation, they were exempt, under § 5234 of the Revised Statutes of the United States. In *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 489, Mr. Justice Matthews refers to the case. After asserting the power of Congress in the premises, he says: "It has in fact withdrawn them and their property from the domain of state taxation, except so far as it has expressly consented that they may be taxed. That consent, so far as it has been given, is contained in § 5219 of the Revised Statutes. It does not permit taxation of any property belonging to the bank, except only its real estate, as clearly appears from *Rosenblatt v. Johnston*, 104 U. S. 462," 26 L. ed. 832. General and special deposits are assessable to the depositors. *Yuba County v. Adams*, 7 Cal. 35.

The judgment and order are affirmed.

We concur: **McFarland, J.; Henshaw, J.**

recting that it is to be at the same rate as was assessed and collected upon other moneyed capital. *Maguire v. Board of Revenue & Road Comrs.* 71 Ala. 401.

A statute relating to the assessment of taxes repealing all acts and parts of acts inconsistent therewith does not prevent the collection under the general law of the state of a tax regularly assessed under a repealed law but which the taxpayer had refused to pay when it was due. *Weld v. Bangor*, 59 Me. 416.

Where a bank has paid the tax for a given year, which is stated to be in lieu of all other taxes, it does not become subject to additional tax on the passage of a statute which takes effect about the time the tax is paid, making such payment in lieu of all other taxes except real estate,—especially where a compliance with the terms of the new statute would have required performance of its conditions more than three months before its taking effect. *Cumberland County v. First Nat. Bank*, 12 W. N. C. 187.

When a state bank surrenders its charter as such and becomes a national bank it will be liable for the state tax up to the time the charter is surrendered. *Manufacturers' & M. Bank v. Com.* 72 Pa. 70.

A state bank which by its charter is required to pay to the state a yearly tax of a certain amount on every \$100 of its stock cannot, after it has surrendered its charter and been reorganized as a national bank, be required to continue the payment of the bonus. *State v. National Bank*, 33 Md. 75.

If national bank shares were not legally assessed for a certain year by reason of a defect in the law under which the assessment was attempted the legislature may supply the defect by a statute giving the power to make a new assessment. *McVeagh v. Chicago*, 49 Ill. 318.

f. Where tax is to be assessed.

Prior to the passage of the act of 1868 there was considerable conflict in opinion as to the meaning of the proviso in the statute that the tax should be assessed at the place where the bank was located and not elsewhere. One line of cases held that the reference was to the state in which the bank was located, and another line confined it to the municipal subdivision where the bank was located.
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In Massachusetts it was held that the shares should be assessed in the city or town where the owner resides if that is within the same state where the bank is located. *Austin v. Boston*, 14 Allen, 350. The court says the true construction of the act of Congress does not confine the assessment of the tax to the place where the bank is located, but it merely requires that the tax to be valid shall be imposed under the state authorities existing at the place where it is thus located. The question whether the taxation of the shares which was allowed to the states shall be imposed in the state where the bank was situated or in that where the stockholder might reside was that which the proviso was designed to settle.

Congress has no power over the subject of taxation by the state, so that in case the state laws provide for the taxation of the shareholders at the place of their residence they cannot be taxed at the place where the bank is located if they do not reside there. *Utica v. Churchill*, 43 Barb. 550.

The reference in the act to the place where the tax is to be assessed was not to localize the assessment at the place where the bank is located, but to localize the authority which imposes the tax. To localize the assessment at the place where the bank is would be to confine the assessment either to the bank itself or to half of its shareholders, or to confine it to its shareholders at the place where the bank is located. The former is inconsistent with the remainder of the section. The latter savors of injustice in exempting other shareholders residing out of the place where the bank is located. *Markoe v. Hartranft* (Pa.) 6 Am. L. Reg. N. S. 487.

The proviso in the 41st section of the act of Congress that the shares of stock might be taxed at the place where the bank is located was intended only to confine the power of taxation to the state having jurisdiction at that place, and does not prevent the state from requiring shares to be placed in the grand list in the town or city where the owner resides. *Clapp v. Burlington*, 42 Vt. 579, 1 Am. Rep. 355. The court says that the sole object of Congress was to impose certain restrictions upon the state government in respect to taxation of the owners of shares in national banks

MONTANA SUPREME COURT.

STATE of Montana, *Respt.*,
v.
THOMAS CRUSE SAVINGS BANK, *Appt.*

(21 Mont. 50.)

The license tax on banks created by the state, which is imposed by Pol. Code, § 4061, although it is not imposed upon national banks, is not for that reason in conflict with Const. art. 15, § 11, providing that no corporation formed under the laws of any other country, state, or territory shall have any greater rights or privileges than corporations of the "same or similar character" created under the laws of the state, since national banks, being governmental agencies, are not of the same or similar character as banks created under the laws of the state.

(April 11, 1898.)

so as to prevent unjust and unequal taxation that might be hostile to the national banking system. The purpose of the proviso was to prevent the same stock being taxed in two different states. This reference to the place where the bank is located is for the sole purpose of determining what state shall have jurisdiction to tax the owners of the stock therein for such stock, and when this was done the end in view was accomplished. The general government could have no interest or object in determining into the treasury of which particular municipal government within the state the taxes should go after they had been properly assessed and collected. The language used in respect to the authority to tax should be construed to refer to the action of the state legislatures when it is susceptible of such a construction, rather than to the action of the officers of the several municipal corporations within the states. By so doing ail is accomplished that Congress designed, and the states left to regulate their own system of taxation in their own way without the unnecessary, not to say offensive, interference, by Congress therein.

If a shareholder is taxed upon his shares at the place where the bank is located he cannot question in the Federal courts the validity of the statute under which the taxes are assessed, although it provides for the assessment of the shares at the place where the shareholder resides, and not where the bank is located. *Austin v. Boston*, 7 Wall. 604, 19 L. ed. 224.

Conversely, some of the courts held that the law of Congress creating national banks requires that all taxes assessed by virtue of state laws on the shares of such banks shall be applied to the use and benefit of the city and town in which the same are located, although shares in such banks are owned in some other city or town in the state. *Opinion of the Justices*, 53 Me. 504.

The word "place" in the act of 1864 refers to the location of the bank, and not to the state authority under which the tax is to be asserted, so that the product of the assessment is for the benefit of and belongs to the place where made. *Packard v. Lewiston*, 55 Me. 458.

And in some cases the influence of those decisions was felt even after the passage of the act of 1868 which gave the states discretionary powers to levy the tax where it chose.

The shares of stock must be taxed at the 45 L. R. A.

A PPEAL by defendant from a judgment of the District Court for Lewis and Clarke County in favor of the state in an action brought to compel payment of a license tax. *Affirmed.*

Statement by **Pemberton, Ch. J.**:

The defendant is a corporation engaged in the banking business in the city of Helena. This action is brought to recover of the defendant the sum of \$800, alleged to be due for license under the provisions of § 4061 Pol. Code, which imposes upon banks and banking institutions a license for carrying on such business in this state. The answer avers that the defendant is not subject to the imposition and payment of the license claimed in this suit under the statute aforesaid, for the reason that national banks or

place where the bank is located, and not where the shareholders reside; so that a statute of the state which requires all personal property to be assessed in the county where it is at the time of the assessment, which by the rule of law requires the taxation of bank shares to be at the place of their owner's residence, cannot be enforced in case of national bank shares, and in the absence of further legislation such shares are not taxable. *Nashville v. Thomas*, 5 Coldw. 600.

The shares of stock are taxable where the bank is located and not elsewhere, without regard to the domicile or residence of the shareholder. *First Nat. Bank v. Smith*, 65 Ill. 44; *Baker v. First Nat. Bank*, 67 Ill. 297.

The shares of stock of national banks are taxable at the place where the bank is located without regard to the residence of the shareholders. *Melver v. Robinson*, 53 Ala. 456.

The requirement of the act that the stock shall be taxed at the place where the bank is located is not invalid, although the owner of the stock lives in another country or state. *Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185.

A state law is necessary to permit the taxation of the shares in the place where the bank is located if the shareholders reside elsewhere, but statutes making such provision, passed after the act of Congress of 1864, may be effective against shares in banks organized under the act of 1863. *Utica v. Churchill*, 33 N. Y. 161.

The clause "the valuation of personal property in the assessment of taxes imposed by or under state authority at the place where the bank is located, and not elsewhere," means in the case of taxes uniform throughout the state the whole state, in case of county taxes the whole county, and in the case of local taxes the district for whose special use they are imposed. It is not declared or implied that there shall be but one assessment or one tax. And this prohibits the assessment of shareholders who reside out of the district for which the tax is assessed. *State, Jewell, Prosecutor, v. Hart*, 31 N. J. L. 434.

The provision that the shares can be taxed only at the place where the bank is located means that all shares are to be taxed at the place where the bank is located by all taxing authorities having jurisdiction of such place only when the shareholder is also resident within the jurisdiction of the taxing authority.

ganized under the laws of the United States, during all the time for which said license is claimed were, and still are, doing a like business as that carried on by the defendant, in competition with the defendant, and which said national banks were not and are not subject to the payment of such license under the law imposing the license upon this defendant. The defendant claims that the law imposing a license upon it in this case is void, and of no binding force and effect, because it is in conflict with § 11, art. 15, of the Constitution of the state, which is as follows: "No foreign corporation shall do any business in this state without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served. And no company or corporation formed under the laws of any other country, state, or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or

enjoyed by corporations of the same or similar character created under the laws of the state." The plaintiff filed a general demurrer to the answer, which demurrer having been sustained by the court, and the defendant declining to further plead, judgment was rendered against it in accordance with the prayer of the complaint, from which judgment the defendant appeals.

Mr. T. J. Walsh, for appellant:

Except as the power is limited by act of Congress, in all matters of taxation, rates and other police regulations, they are subject to the control of the state.

Reagan v. Mercantile Trust Co. 154 U. S. 413, 38 L. ed. 1028, 4 Inters. Com. Rep. 575.

The liability of anyone for damages resulting in the death of another from the negligence of the former is a liability strictly arising from a state statute.

The Northern Pacific Railroad Company is subject to this liability.

State, Fox, Prosecutor, v. Haight, 31 N. J. L. 399.

Since the act of 1868 there is no question as to the power of the state.

But if the stock is taxed where the bank is located it is not liable to another assessment at the residence of the stockholder. *Strader v. Manville*, 33 Ind. 111.

By the act of 1868, it was declared that the words "place where the bank is located" shall be construed and held to mean the state within which the bank is located, and the legislatures of each state may determine and direct the manner and place of taxing all the shares of national banks located within said state provided that the shares of nonresidents shall be taxed in the city where the bank is located, and not elsewhere. *First Nat. Bank v. Douglas County*, 3 Dill. 298.

The states may direct the manner and place of taxing the shares of resident owners, and if the legislature has not otherwise provided they will be held subject to taxation at the place where the owner resides. *Strong v. O'Donnell*, 10 Phila. 575.

The shares of a nonresident of the state may be taxed at the place where the bank is located. *Curtis v. Ward*, 58 Mo. 295.

The act of 1868, defining the place where the shares could be taxed, had no retrospective effect so as to validate taxes assessed under a law which had been held to be out of conformity to the provisions of the act of 1864. *Abbott v. Bangor*, 56 Me. 310.

Shares in national banks owned by residents of the state may be taxed either where the bank is located or at the residence of the shareholders as the legislature may direct. *Bule v. Fayetteville Comrs.* 79 N. C. 267; *Moore v. Fayetteville*, 80 N. C. 154.

The owner of bank shares is rightfully taxed upon them in the town where he resides, although by an honest mistake he has notified the cashier of the bank that he resides in another town. *Goldsbury v. Warwick*, 112 Mass. 384.

The restriction of the right to tax the shares of a national bank to the place where the bank is located is to be construed as the state where the bank is located. *People v. Moore*, 1 Idaho, 504.

Nonresidents.

That the owner of shares of stock in a national bank is not a resident of the state where 45 L. R. A.

the bank is located does not prevent the taxation of his shares there as authorized by the act of Congress. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 180.

States other than that where a national bank is located cannot tax the shares of its capital stock. *State. De Baun, Prosecutor, v. Smith*, 55 N. J. L. 110.

Stock in a national bank located in one state is not taxable at the residence of the owner in another state. *Bucks County v. Ely*, 6 Phila. 414; *Ellis v. Boston*, 99 Mass. 141.

A nonresident stockholder may be taxed upon his stock at the place where the bank is located, and the fact that they are not included in the valuation upon which the rate of taxation is to depend, so that the rate is higher than it otherwise would be, is immaterial. *Providence Inst. for Savings v. Boston*, 101 Mass. 575, 3 Am. Rep. 407.

Shares owned by nonresidents must be taxed in the city or town where the bank is located, and not elsewhere. *Kyle v. Fayetteville Comrs.* 75 N. C. 445.

Under the New Jersey statutes of 1866 and 1869, stock owned by persons nonresident in the state is taxable in the township or ward where the bank is located, and that owned by residents of the state in the township or ward where the owner resides. *State. North Ward Nat. Bank, Prosecutor, v. Newark*, 39 N. J. L. 380.

For the purpose of taxation a national bank is not located within a state in which it carries on no business except that of receiving deposits, maintaining an office for that purpose, and transmitting them at the close of each day to the bank in another state. *National State Bank v. Pierce*, 5 W. N. C. 344, 18 Alb. L. J. 15, 5 Reporter, 682.

Particular statutes.

Taxing the shares all at the location of the bank is a violation of the Illinois Constitution requiring taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing them. *Union Nat. Bank v. Chicago*, 3 Biss. 82.

Where the state statute provided that personal property should be assessed to the owner in the town where he is an inhabitant, shares in a national bank cannot be assessed in the town where the bank is located if owned by

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958; *Northern P. R. Co. v. Everett*, 152 U. S. 107, 38 L. ed. 373; *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766; *Southern P. Co. v. Tomlinson*, 163 U. S. 369, 41 L. ed. 193.

Such a corporation was held liable for failure to maintain a fence pursuant to statute, in—

Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434.

And another was held liable for an injury to a servant by the negligence of a fellow servant under a statute, in—

Union P. R. Co. v. Wyler, 158 U. S. 235, 39 L. ed. 983.

The popular error that Federal corporations are exempt from the influence of state legislation is thoroughly refuted on the authorities.

The United States is a "state."

Bouvier, Law Dict.; Rapalje & Lawrence's

citizens of the state resident in other towns within the state. *Abbott v. Bangor*, 54 Me. 540.

A municipal corporation which has authority merely to tax the real estate and personal property within its limits cannot lay a tax on the shares of nonresidents in a national bank located within its territory. *National Bank v. Long* (Ariz.) 57 Pac. 630.

Under the New Jersey law every stockholder of a national bank who resides in the state is to be assessed for his shares in the township or ward where he resides, and in order to uphold a tax on all the shares in the ward where the bank is located it will not be presumed that all the stockholders were resident there. *State, North Ward Nat. Bank, Prosecutor, v. Newark*, 40 N. J. L. 558.

The Massachusetts Statute of 1872, relating to the collection of taxes upon bank shares, did not apply to shares belonging to the estates of deceased persons, since the result of making it do so would change the general system of taxation and make the shares taxable where the executor happened to live while as to all other parts of the personal estate no change was made, but such shares would be taxed in the place where all other personal property of the deceased is subject to taxation. *Revere v. Boston*, 123 Mass. 375.

Under a statute providing that all shares of national banks shall be assessed to the owners in the cities or towns where the banks are located and not elsewhere, in the assessment of all state, county, and town taxes, whether such owner be a resident of said city or town, or not, and that school district taxes shall be assessed in the same manner as town taxes, the owner of bank stock who resides in the school district is not taxable upon his stock there if the bank is located in another township. *Little v. Little*, 131 Mass. 369.

Where the general tax law provides that the stock held by nonresidents of the town in which the bank is located who reside in another town in the same county shall be taxed in the township where the holders reside, a village charter giving power to tax all property, real and personal, within the limits of the village, will not give power to tax the stock of parties residing in other towns in the same county. *Howell v. Cassopolis*, 35 Mich. 471.

g. Territories may exact tax.

The territories possess the same power of
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Law Dict.; *Talbott v. Silver Bow County Comrs.* 139 U. S. 438, 35 L. ed. 210.

Savings banks are not so similar to national banks, within the purview of § 5219, U. S. Rev. Stat. as that the shares of the latter cannot be assessed at a greater rate than the deposits of the former.

Mercantile Nat. Bank v. New York, 121 U. S. 138, 30 L. ed. 895; *Bank of Redemption v. Boston*, 125 U. S. 60, 31 L. ed. 689.

Savings banks proper, the original savings banks, had no capital stock, such institutions were not business or trading corporations, strictly speaking, but rather trustees administering upon the property of those who stand in the relation of *cestuis que trust*, from motives of kindness and charity, and not for the purpose of gain.

Boone, Banks & Banking, 263-259; Morse, Banks & Banking, 617; 618; *Huntington v. National Sav. Bank*, 96 U. S. 388, 24 L. ed. 777; *Lewis v. Lynn Inst. for Savings*, 148

taxing national bank shares which the states enjoy. *Talbott v. Silver Bow County*, 139 U. S. 438, 35 L. ed. 210; *People v. Moore*, 1 Idaho. 504; *Silver Bow County Comrs. v. Davis*, 6 Mont. 306.

There is nothing in the Federal law which precludes a territorial legislature from taxing the franchise of banking by a national bank by placing a tax upon the individual shares of the stockholders. *Salt Lake City Nat. Bank v. Golding*, 2 Utah, 1.

V. Bank officers to assist.

A state may compel a national bank to disclose the names of its depositors in order to ascertain whether any money deposited therein has not been duly returned for taxation by its owners. And the fact that the exhibition of its books will lessen public confidence, diminish its deposits and consequent profits, and impair the value of its franchise, is immaterial. *First Nat. Bank v. Hughes*, 6 Fed. Rep. 737.

The state may require the officers of the bank to transmit to the tax officers of the state a list of the names of the shareholders to assist in fixing the tax upon them. *Waite v. Dowley*, 94 U. S. 527, 24 L. ed. 181.

The state may require the officers of the bank to list the stock of the individual holders for taxation. *Whitney v. Ragsdale*, 33 Ind. 107, 5 Am. Rep. 185.

The state may require the cashier of a national bank to transmit to the clerks of the several towns in the state in which any stockholder of the bank resides a true list of the names of the stockholders, and impose a penalty for the neglect of such duty. *Newman v. Walt*, 46 Vt. 689.

The duty of the officers of national banks to exhibit lists of shareholders as prescribed by U. S. Rev. Stat. § 5210, may be enforced by mandamus in a state court. But where in accordance with state law the officer of the bank has furnished to the proper officer a statement giving the amount of paid-up capital stock, the amount of surplus, and the amount of undivided profits of the bank there will be no ground for an issuance of the writ. *Paul v. McGraw*, 3 Wash. 296.

The fact that the officers of the bank refused to furnish the assessors with a list of shareholders does not entitle them to enforce the tax against the property of the bank. *Springfield v. First Nat. Bank*, 87 Mo. 441.

Mass. 235, 1 L. R. A. 785; *Morristown Inst. for Savings v. Roberts*, 42 N. J. Eq. 496.

The distinction between them and the modern savings bank, so-called, which has a capital stock, whose depositors have no share in the profits but get a definite interest on their deposits, and who occupy to the bank the relation, not of trustee and *cestui*, but of debtor and creditor, is pointed out in—

Los Angeles v. State Loan & T. Co. 109 Cal. 396; *Security Sav. Bank & T. Co. v. Hinton*, 97 Cal. 221; *Wells v. Black*, 117 Cal. 157, 37 L. R. A. 619.

A bank so organized plainly comes into competition with a national bank, and so the Supreme Court of the United States held, having under consideration a cognate statute, with reference to a bank organized under the laws of California, in—

Oulton v. Savings Inst. 17 Wall. 109, *sub nom. Oulton v. German Sav. & L. Soc.* 21 L. ed. 618.

And when the very question came before

The cashier of a national bank may be subjected to a penalty for neglect to deliver to the taxing officers a list of the shareholders of the bank. *Newman v. Walte*, 43 Vt. 587.

A town injured by the failure of the cashier of a bank to furnish the list of the shareholders cannot recover the statutory penalty for such failure, and in addition hold the cashier liable for the damages which the town has suffered. *Brattleboro v. Walt*, 44 Vt. 459.

The officers of a national bank cannot be compelled to exhibit the books of the bank to state officers for the purpose of furnishing a basis for state taxation of the deposits as against the depositors. *First Nat. Bank v. Hughes*, 2 Browne, Nat. Bank Cas. 176.

VI. Provisions of state Constitutions.

National banks are entitled to the protection against discrimination in taxation provided by the Constitutions of the states in which they are located. *First Nat. Bank v. Lindsay*, 45 Fed. Rep. 619.

To tax both the real estate and the shares of stock of a national bank is double taxation within the prohibition of the Maryland bill of rights. *Frederick County Comrs. v. Farmers' & M. Nat. Bank*, 48 Md. 117.

A national bank is not subjected to unequal taxation within the meaning of a state Constitution by the fact that the value of shares of stock held by it in other corporations which are taxed within the state is not deducted in ascertaining the value of the shares, whereas in case of some other corporations whose property is all assessed against themselves for taxation such deduction is allowed. *Pacific Nat. Bank v. Pierce County*, 20 Wash. 675.

A taxpayer is not deprived of his property without due process of law because he is not permitted to appear before the tax commissioners, if a board of revision is provided authorized to hear complaints respecting the justice of the assessment, and a time and place are prescribed where complaints may be made; or where the remedy of certiorari is open to review an assessment which is too high after having been partially reduced at the complaint of the taxpayer. *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 772.

VII. Remedies.

The general question of the right to injunction against collection of illegal taxes is found 45 L. R. A.

that court as to an Iowa savings bank, so-called, which did a general banking business, the law was sustained, not because the bank in question was not similar, but because, although a different system of taxation was followed, it did not appear that the burden on the national banks was any heavier, and therefore there was no unjust discrimination apparent.

Davenport Nat. Bank v. Davenport Bd. of Equalization, 123 U. S. 83, 31 L. ed. 94.

Whenever moneyed capital is employed for investment in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of business, reduced to money and reinvested, then it comes in competition with national banks, and corporations engaged in such business must be taxed in the same manner.

First Nat. Bank v. Ayers, 160 U. S. 660, 40 L. ed. 573; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440, *sub nom. First Nat. Bank v. Chehalis County*, 41 L. ed. 1069.

In a note to *Odlin v. Woodruff* (Fla.) 22 L. R. A. 699. So that matter will not be fully treated here. Attention is merely called at this place to a few decisions affecting taxes against interests in national banks.

The United States circuit courts have jurisdiction of suits to protect the rights conferred by the law regarding the taxation of national banks regardless of the citizenship of the parties. *Stanley v. Albany County Supers.* 19 Blatchf. 147.

A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65.

If national bank shares are subjected to a higher rate of taxation than other moneyed capital in the state they will be relieved from any contribution whatever to the general burden of taxation. *Mercantile Nat. Bank v. New York*, 28 Fed. Rep. 776.

The United States Supreme Court will not decide whether or not a tax is void as in conflict with the act of Congress until the case by positive averment or by necessary implication of such averment is shown to be within the prohibitory clause. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903.

To be entitled to relief the shareholder must show that the assessment upon the shares of stock is higher than other moneyed capital generally, and it is not sufficient to show that such is the fact in particular instances. *First Nat. Bank v. Farwell*, 10 Blas. 270, 7 Fed. Rep. 518.

An action at law, and not a bill in equity, is the proper remedy to recover back taxes illegally exacted. *Kimball v. Corn Exch. Nat. Bank*, 1 Ill. App. 209.

The question whether or not the state law conforms to the act of Congress cannot be raised in an action to recover back the tax which has been paid. *Stephenson County Supers. v. Manny*, 56 Ill. 160.

If inequality to the prejudice of shareholders in national banks is shown in the assessment of taxes either the assessment must be declared void, or at least the excess of the tax above the rate imposed upon other moneyed capital must be abated. *First Nat. Bank v. Hungate*, 62 Fed. Rep. 548.

Taxpayers against whom unjust discrimination has been attempted are not precluded from obtaining relief by failure to exhaust the

Mr. C. B. Nolan, Attorney General, for respondent:

There is nothing in the law itself to suggest that any class of banks is allowed to exercise any greater rights or privileges than are exercised by the banks organized under the laws of this state, but national banks are not subject to the payment of the license for the reason that they are Federal agencies.

Desty, Taxn. p. 75; *Cooley*, Taxn. pp. 83, 84.

The doctrine which exempts the instrumentalities of the Federal government from the influence of state legislation is not founded on any express provision of the Constitution, but on the implied necessity for the use of such instruments by the Federal government.

First Nat. Bank v. Kentucky, 9 Wall. 353, 19 L. ed. 701.

The taxing power is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment, surrender, or abandonment. Its abandonment must not be presumed in any case where the deliberate purpose of the state does not appear. The surrender cannot be extended by implication, but only in plain and explicit terms—clear and unequivocal.

Desty, Taxn. p. 79.

There are four classes of banks in this state: (1) National banks, (2) banks and banking corporations organized under title 2 of the Civil Code, (3) trust deposit and security corporations organized under chapter 1 of title 3 of the Civil Code, and (4) savings bank corporations, organized under chapter 2 of title 3 of the Civil Code.

Banks so different in character as those above named may even be divided into classes for the purpose of taxation without violating the constitutional requirement that taxation shall be uniform.

means of redress afforded by the laws authorizing the county commissioners to equalize assessments where that is the practice in the state where the court is sitting. *Ibid*.

But until the holder of shares in a national bank has applied for a reduction of overvaluation of his shares for taxation in the proper period provided for revision of the assessment, he cannot apply to the courts and recover back the excess of taxes paid. *Stanley v. Albany County Supers*, 121 U. S. 535, 30 L. ed. 1000.

Although he may resort to equity to enjoin collection of the excess. *Williams v. Albany County Supers*, 122 U. S. 154, 30 L. ed. 1088.

By the Wisconsin act of 1865, chap. 400, the taxes imposed upon national bank stock became a lien upon the shares taxed which continued until the taxes were paid. *Simmons v. Aldrich*, 41 Wis. 241.

VIII. Contract for special rates.

Under the Massachusetts statutes exempting corporations from taxation on their personal property they are not taxable for shares held by them in national banks. *Murray v. Berkshire L. Ins. Co.* 104 Mass. 586.

A tax imposed with consent of the bank, of 1 per cent upon all its capital stock at par value in lieu of all other taxes, will prevent the imposition of a county tax upon the building erected for the banking business, although a portion of it is rented out for other purposes. 45 L. R. A.

New Orleans v. People's Bank, 32 La. Ann. 82; *Hughes v. Cairo*, 92 Ill. 339; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810.

Pemberton, Ch. J., delivered the opinion of the court:

It is conceded that national banks cannot be required, under the section of our Code referred to in the statement, to pay the license imposed by such section upon the defendant. It is therefore contended by counsel that national banks are corporations "formed under the laws of another country, state, or territory," within the contemplation of § 11, art. 15, of the Constitution of the state; and that, as such corporations may do business in this state without being liable for the license imposed by said section of the Code upon the defendant, the section of the statute in question is void, because, in violation of said section of the Constitution of the state, it allows national banks, which are organized under the laws of the United States, "to exercise or enjoy within this state greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state." It is claimed by counsel that the statute of the state imposing this license discriminates in favor of national banks and against the defendant, and is therefore in conflict with the clause of the state Constitution quoted above. It is not denied, and in view of the authorities it cannot be questioned at this late day, that national banks are necessary agencies and "instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end." *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196:

Lackawanna County v. First Nat. Bank, 92 Pa. 221.

Or is used by the cashier as a residence. *Lancaster County v. Lancaster County Nat. Bank*, 7 W. N. C. 29.

The state may provide that all banks may in lieu of all taxation except upon its real estate collect from its shareholders and pay into the state treasury a tax of eight mills on the dollar on the par value of its shares, and that any bank which fails to do so shall be subject to a tax of four mills upon the actual value of all shares of its capital stock, and shall also be subject to local taxation, and such provision is not repugnant to the enabling act of Congress, nor to a constitutional provision that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. *Com. v. Merchants & Mfrs. Nat. Bank*, 168 Pa. 309.

IX. Tax on bank officers.

The state cannot place a tax on the president of a national bank as such. *Linton v. Childs*, 105 Ga. 567.

But in *State, Fox, Prosecutor, v. Haight*, 31 N. J. L. 399, it is said that all persons would probably admit that it would be irrational in the extreme to contend that the salaries or private property of officers of national banks are protected from the imposition of state taxes.

H. P. F.

National Commercial Bank v. Mobile, 62 Ala. 284, 34 Am. Rep. 15; *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank of United States*, 9 Wheat. 740, 6 L. ed. 204; 1 Desty, Taxn. p. 75; Cooley, Taxn. 2d ed. 83. The question is, then, Can the state tax such agencies of the general government, and, if so, what is the extent of the power of the state to tax them? In *M'Culloch v. Maryland*, 4 Wheat. 416, 4 L. ed. 603, Chief Justice Marshall, speaking of the power of a state to tax national banks, said: "It may be objected to this definition that the power of taxation is not confined to the people and property of a state. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them. If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, What degree of taxation is the legitimate use, and what degree may amount to the abuse of the power? The attempt to use it on the means employed by the government of the Union.

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in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise.

In *Weston v. Charleston*, 2 Pet. 471, 7 L. ed. 489, this great jurist, reaffirming the doctrine so forcibly expressed in *M'Culloch v. Maryland*, summarizes his views of this important question as follows: "This subject was brought before the court in the case of *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, when it was thoroughly argued, and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations and examined by the court with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that 'all subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation.' 'The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission,' but not 'to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.' 'The attempt to use' the power of taxation 'on the means employed by the government of the Union in pursuance of the Constitution is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give.' The court said in that case that 'the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government.' We retain the opinions which were then expressed." The doctrine announced by the great Marshall in those cases has been followed by the courts of this country, both Federal and state, down to the present time, and may now be considered so well settled as not to admit of argument. 1 Desty, Taxn. 75; Cooley, Taxn. 2d ed. 82 *et seq.*, and authorities cited in the notes. Now then, if national banks are corporations formed under the laws of another country, state, or territory, as claimed by the defendant, and are agencies of the general government, designed to be used to aid it in the administration of an important branch of the public service, and as such agencies cannot be taxed by the state except in so far as Congress shall expressly permit, does it follow that the law imposing the license on the defendant in this case, and not on national banks, is in conflict with § 11, art. 15, of the Constitution of the state? This clause of the Constitution, it is conceded, was intended to prevent discrimination by the legisla-

ture in favor of foreign corporations against corporations created under the laws of the state. But what corporations did the framers of the Constitution have in view when they used the words in this clause, "corporations formed under the laws of any other country, state, or territory?" They certainly had in contemplation those corporations "over which the sovereign power of a state extends." They could not have had in contemplation those companies, corporations, and agencies organized by the general government for government purposes, which the sovereign power of the state had no authority to tax except by special permission of Congress. The framers of the Constitution were not ignorant of the principles underlying our system of government. They knew that a law of the Federal government, constitutionally enacted, was the supreme law of the land, and was binding upon the constitutional convention as well as the legislature of the state. They adopted this clause of the Constitution, having in view such corporations as might exist by authority of the state, or might be introduced into the state by its permission. National banks are not such corporations. They are organized by the general government to aid in the administration of an important branch of government. They are established and authorized to do business in the state, not with the permission of, but in spite of, the state, and are not subject to the laws or Constitution of the state in the transaction of their business, and cannot be taxed upon their property, except as Congress may expressly permit. If the clause of the state Constitution and the statute in question had both provided in express terms that national banks should pay a license, like banking corporations created under the laws of the state, to entitle them to do business in the state, then, without doubt, both such clause and statute would have been null and void in that respect, because both would have been in conflict with the laws of Congress in relation to such Federal agencies. We cannot agree with counsel that the law imposing the obligation upon the defendant in this case to pay a license to enable it to carry on its business in the state, without imposing the same duty upon national banks, thereby discriminates in favor of the latter corporation. Legislative discrimination between corporations, persons, or things occurs when all of such subjects of legislation exist by authority of, or are introduced into the state by, its permission, and are, consequently, rightful subjects of the sovereign control or power of the state. The legislature cannot legally, or in legal contemplation, discriminate for or against a class of persons, corporations, or property unless such subjects are all within the sovereign power of the state for legislative purposes. National banks, for the reasons given above, are such governmental agencies as do not come within the sovereign power of the state for legislative purposes except in so far as Congress has expressly permitted. Being such governmental

agencies, national banks cannot be held to be "of the same or similar character" as the defendant corporation and banking corporations created under the laws of the state. The rule announced in the case of *Criswell v. Montana C. R. Co.* 18 Mont. 167, 33 L. R. A. 554, is inapplicable to this case.

Counsel for defendant contends that, if national banks are exempt, under the law, from the license tax imposed upon defendant because they are Federal agencies, then the Northern Pacific Railroad Company, being a Federal instrumentality, is also exempt from state taxation. The right of the state to tax the property of railroads incorporated by Congress is well settled by the courts. In the cases holding that national banks are Federal agencies, or means designed to aid in the administration of an important branch of government, it is not held that the property of such institutions may not be taxed by the state. In *M'Culloch v. Maryland* it was held that the tax was not upon the property of the bank, but upon one of its operations, in fact, upon its right to exist. It was a direct impediment in the way of a governmental operation performed through the bank as an agent. It was a very different thing, both in its nature and effect, from a tax on the property of the bank. It was a tax on the operations of the bank, and is, consequently, a tax on the operations of an instrument employed by the government of the Union to carry its powers into execution. *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *Osborn v. Bank of United States*, 9 Wheat. 740, 6 L. ed. 204. In *Union P. R. Co. v. Peniston* the court said: "It is therefore manifest that exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers." Judge Cooley says: "The mere fact that a corporation receives its charter and pecuniary or other aid from the United States does not fix its character as a Federal agency. nor does the fact that the United States sometimes makes use of it for its purposes, as it might of a similar convenience brought into existence in some other way. And a state may tax the property of Federal agencies with other property in the state, and as other property is taxed, when no law of Congress forbids, and when the effect of the taxation will not be to defeat or hinder the operations of the national government." Cooley, *Taxn.* 2d ed. 85. At any rate, the Supreme Court of the United States has settled the question that national banks cannot be taxed by a state except in so far as Congress has ex-

pressly permitted, and that the property of railroad companies organized and incorporated by Congress may be taxed by the state. Id. 85, and notes.

We are unable to agree with the contention of counsel that the statute imposing a license on the defendant corporation and like corporations created under the laws of the state is in conflict with the article of the Constitution of the state invoked in this controversy, because it does not impose a like liability upon national banks. We cannot agree with the argument that the license law of the state, imposing liabilities upon corporations created under the laws of the state, is unconstitutional and void because it does not impose like liabilities and burdens upon

certain designated agencies of the general government over which the state has no sovereign power. Because the state has no power to burden the necessary governmental agencies with a license tax is no reason why it may not impose such liability upon corporations, companies, or persons within the sphere of its power, because they are within the state by virtue of its laws or its permission.

The judgment appealed from is affirmed.

Hunt, J., concurs.

Pigott, J.: I concur in the result announced in the foregoing opinion.

ALABAMA SUPREME COURT.

PULLMAN'S PALACE CAR COMPANY,
Appt.,
v.

J. B. ADAMS.

(.....Ala.....)

1. A sleeping-car company may be found liable for loss of a passenger's effects where the porter went to sleep during his watch, and also left the car at a station with no one on watch on the inside of the car.
2. A passenger on a sleeping car is not required to place his pocket book in the safest place in order to hold the sleeping-car company liable for its loss.
3. The negligence of a fellow traveler will not deprive a passenger on a sleeping car of the right to hold the sleeping-car company liable for loss of his effects by theft while he is asleep in the car.
4. The mere fact that the porter did not go to sleep during his watch will not relieve the sleeping-car company of liability for loss of effects of a passenger if he was guilty of other negligence which caused the loss.
5. A passenger on a sleeping car cannot recover from the sleeping-car company the value of a ring carried in his pocket book and which was not capable of being used by him on the journey, although the loss occurred through its negligence.
6. That a passenger removes a ring from his finger to his pocket book upon retiring for the night in a sleeping car will not deprive him of the right to hold the sleeping-car company liable for its loss by theft through its negligence.
7. A sleeping-car company must exercise reasonable diligence in looking after the person and property of passengers while they are asleep on the car.
8. To justify a verdict in favor of one on whom rests the burden of proof, the evidence as to any material fact must be such as to reasonably convince or satisfy the minds of the jury that the fact exists.

(November 22, 1898.)

NOTE.—As to liability of sleeping-car companies, see note to Mann-Boudoir Car Co. v. Dupre (C. C. App. 5th C.) 21 L. R. A. 289; also Ball v. Chesapeake & O. R. Co. (Va.) 32 45 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Shelby County in favor of plaintiff in an action brought to recover the value of certain property stolen from plaintiff while he was asleep in one of defendant's cars. *Reversed.*

The plaintiff alleged that defendant was engaged in operating and running a sleeping car on the Louisville & Nashville Railroad between Montgomery, Alabama, and New Orleans, Louisiana, for the purpose of accommodating for hire travelers on said road who desired to take a sleeping berth on said journey. That plaintiff was a traveler on said day, from Montgomery to New Orleans, and purchased from defendant a berth on said car, paying therefor the sum of \$2, receiving a ticket entitling him to said berth; that on retiring to sleep he placed his pocketbook containing \$25 and a diamond ring of the value of \$125 in his vest pocket in the hammock provided for that purpose in the rear of the berth. That when he arose in the morning, he found his vest on the floor and his pocketbook and ring stolen out of said vest. That he immediately made known this fact to the conductor of the car, and that none of the property had ever been restored to him.

The second count of the complaint concluded with the allegation that "all of which occurred by reason of defendant's negligence in failing to provide suitable, proper, and efficient employees for the protection of plaintiff's property during his passage on the car."

The third count after making the same allegations, concluded as follows: "All of which grievance occurred by reason of defendant's employees on said car, whose duty it was so to do, negligently failing to protect said property from depredation by thieves on said car, to the damage of plaintiff \$150."

Defendant demurred to the several counts of the complaint, upon which plaintiff amended by striking out the first count.

L. R. A. 702: Pullman's Palace Car Co. v. Martin (Ga.) 29 L. R. A. 498; and Pullman's Palace-Car Co. v. Hall (Ga.) 44 L. R. A. 790.

The demurrers to the second and third counts were upon the general ground that they failed to show negligence on the part of the defendant, and were overruled. The defendant then pleaded the general issue, and that plaintiff was negligent in placing the pocketbook in the hammock instead of under his pillow, and that plaintiff was guilty of negligence in not properly taking care of his pocketbook. Demurrers were sustained to these pleas.

Defendant also filed a fourth plea in which it alleged that plaintiff himself was guilty of negligence in that he placed his pocketbook in a hammock suspended over his berth, which said hammock was distant from his person while asleep over 2 feet, and in the reach of other persons in said car; that said hammock was an unsafe place for valuables, in that it was exposed and rendered the pocketbook more easily stolen, and that he should have placed said pocketbook under his pillow, or otherwise nearer his person, which would have been a safer way; said negligence contributing proximately to the loss of said pocketbook and contents. A demurrer to this plea was overruled.

The court at the request of plaintiff gave the following instructions:

No. 28.—“It is the duty of a sleeping-car company to exercise reasonable diligence in looking after the person and property of passengers on its car while they are asleep.”

No. 29.—“It is the duty of the defendant to make out its defense of plaintiff's contributory negligence by a preponderance of the evidence, and if the evidence as to which was the safer place, under the pillow or otherwise nearer his person or in the hammock, for plaintiff to put his pocketbook, is equally balanced, then the defendant has failed to make out his plea of contributory negligence.”

The material requests for instructions on the part of defendant which were refused by the court were as follows:

No. 1.—“If the jury believe the evidence, they must find for the defendant.”

No. 4.—“The court charges the jury that if under the evidence in this case the hammock in which plaintiff says he put his vest was not the safest place in which he could have put said vest, in said berth, and if they believe from the evidence that his loss occurred by reason of his not putting his vest in the safest place available in the berth, plaintiff cannot recover.”

No. 6.—“If the jury believe from the evidence that the loss of plaintiff's property was the result of negligence on the part of plaintiff or of Alcorn, who occupied the berth with plaintiff, then the plaintiff cannot recover in this case.”

No. 9.—“There is no evidence in this case that the porter went to sleep after the train reached Mobile, and, if the jury believe from the evidence that the pocketbook was not lost or stolen until after the train reached Mobile, they must find for the defendant.”

No. 17.—“Under the evidence in this case Dr. Alcorn was awake in the berth occupied by the plaintiff, and walking up and down

the aisle, until the train reached Mobile, and, therefore, the plaintiff's property could not have been stolen without Dr. Alcorn's knowledge before reaching Mobile.”

No. 18.—“The court charges the jury that there is no evidence in this case of negligence on the part of the defendant after the train reached Mobile.”

No. 19.—“If the jury believe from the evidence that the diamond ring alleged to have been lost or stolen was not in a condition that it could be worn for the use, convenience, or ornament of plaintiff on said trip, they cannot find against defendant on account of its loss.”

No. 21.—“The court charges the jury that unless the ring alleged to have been lost by plaintiff was in such condition that it could be of service to plaintiff for his personal use, comfort, convenience, or ornament on said trip, they cannot find against defendant for its loss under the evidence in this case.”

No. 23.—“If the jury believe from the evidence that the loss of the money and ring was occasioned by plaintiff's companion's (Alcorn's) negligence in allowing the pocketbook to fall out into the aisle of the car, they must find for the defendant.”

No. 24.—“If the jury believe from the evidence that the pocketbook was lost or stolen by reason of Alcorn's negligence in taking the vest out of the hammock in such manner as to allow the pocketbook to fall on the floor and thereby become exposed, they must find for the defendant.”

No. 25.—“If the jury believe from the evidence that plaintiff's companion, Alcorn, did not go to sleep nor leave the car before the train reached Mobile, and that when Alcorn got up he handled plaintiff's vest in such a manner as to allow the pocketbook to fall out on the floor, and if they further believe that said pocketbook was lost or stolen by reason of its thus exposed condition, without fault or negligence on the part of defendant's agents, they must find for the defendant.”

No. 26.—“If the jury find from the evidence that the ring was not in such condition that it could be worn by him in the usual manner, they cannot find against the defendant for the damage occasioned by the loss of it. If they find from the evidence that the ring could be worn in the usual manner, the defendant was guilty of contributory negligence in not keeping it on his finger, and there can be no recovery for its loss.”

No. 27.—“The court charges the jury that the plaintiff himself in taking the journey from Montgomery to New Orleans was bound to take such care and precaution for the safety of his property as an ordinary, reasonable man would take, and if they find from the evidence that plaintiff placed his pocketbook in a place that was obviously more dangerous than some other place nearer his person, or in such a place that his companion on arising was liable to let the pocketbook fall to the floor, or to any other still more dangerous and exposed place, and that such negligence contributed proximately to the loss complained of, they must find for the defendant.”

No. 33.—“If the jury believe from the evidence that the plaintiff on retiring placed his pocketbook in a place which was dangerous, and from which it was likely that the same would be lost or stolen, when he could have placed it in a safer place, then he was guilty of contributory negligence, and cannot recover in this case.”

No. 34.—“Under the evidence in this case there can be no recovery for the value of the diamond ring that was lost by the plaintiff.”

No. 35.—“Unless the jury believe from the evidence that the diamond ring, the value of which is sued for, was in such condition at the beginning and during the journey made by the plaintiff that the same could be used or worn by him, they cannot find against the defendant for any damages for its loss.”

The facts sufficiently appear in the opinion.

Messrs. J. M. Falkner and Ray Rush-ton, with **Mr. George W. Jones**, for appellant:

The burden of proof is upon the plaintiff, to establish negligence on the part of defendant.

Carpenter v. New York, N. H. & H. R. Co. 124 N. Y. 53, 11 L. R. A. 759.

A sleeping-car company is not a common carrier nor an innkeeper.

Hutchinson, Carr. § 617*e*; *Whitney v. Pullman's Palace Car Co.* 143 Mass. 243; *Lewis v. New York Sleeping Car Co.* 143 Mass. 267, 58 Am. Rep. 135; *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Pullman Palace Car Co. v. Gardner*, 3 Pennyp. 78; *Pullman Palace Car Co. v. Gaylord* (Ky.) 23 Am. L. Reg. N. S. 788, 26 Am. L. Reg. N. S. 512; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120; *Blum v. Southern Pullman Palace Car Co.* 1 Flipp. 500; *Dargan v. Pullman Palace Car Co.* 2 Tex. App. Civ. Cas. (Willson) 607; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. Rep. 258; *Welch v. Pullman Palace Car Co.* 16 Abb. Pr. N. S. 352; *Palmeter v. Wagner* (N. Y.) 11 Alb. L. J. 149; *Pfaelzer v. Pullman Palace Car Co.* 4 W. N. C. 240; *Scaling v. Pullman's Palace Car Co.* 24 Mo. App. 29; *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759.

Obviously, therefore, the trial court erred in overruling defendant's demurrers to the second and third counts of the complaint.

Birmingham R. & Electric Co. v. Allen, 99 Ala. 359, 20 L. R. A. 457; 3 Lawson, Rights, Rem. & Pr. 2159.

To hold this defendant liable under circumstances such as are shown from this record would establish a precedent which would inevitably lead to innumerable frauds. Many unscrupulous persons would take a berth in a sleeper for no other purpose than to lose money and other valuables, if the mere fact of loss was all that it was necessary for them to establish.

Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258.

Plaintiff having failed to make out a case of negligence on the part of defendant, but, on the contrary, having established negli-

gence against himself, defendant was entitled to the general charge.

Hutchinson, Carr. § 617*f*; *Illinois C. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Whitney v. Pullman Palace Car Co.* 143 Mass. 243; *Wilson v. Baltimore & O. R. Co.* 32 Mo. App. 682; *Lanier v. Youngblood*, 73 Ala. 587.

Baggage is such articles of apparel, ornament, etc., as are in daily use by travelers for convenience, comfort, or recreation.

Hutchinson, Carr. § 617*f*; 3 Wood, Railroads, Minor's ed. 1707, § 369; *Root v. New York Cent. Sleeping-Car Co.* 28 Mo. App. 199.

Messrs. Browne & Leeper, for appellee:

The court did not err in refusing to give the affirmative charge for the defendant.

Alabama G. S. R. Co. v. Jones, 71 Ala. 487; *Montgomery v. Wright*, 72 Ala. 421; *Alabama G. S. R. Co. v. Dobbs*, 101 Ala. 219.

When a passenger in a sleeping car awakes and finds that his valuables which he has placed under his pillow have been stolen during the night, and he proves that the car was so constructed that a porter or watchman stationed at one end of the car would have an unobstructed view of the whole aisle, it is a question for the jury whether the sleeping-car company was guilty of negligence, and whether the passenger may recover.

Bevis v. Baltimore & O. R. Co. Cir. Ct. of St. Louis, Mo.; *Pullman Palace Car Co. v. Gardner* (Pa.) 16 Am. & Eng. R. Cas. 324; *Illinois C. R. Co. v. Handy*, 63 Miss. 609, 56 Am. Rep. 846; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Lewis v. New York Sleeping-Car Co.* 143 Mass. 267, 58 Am. Rep. 135.

Haralson, J., delivered the opinion of the court:

There was no error in overruling the demurrers to the second and third counts of the complaint. They sufficiently advised defendant of what the plaintiff complained, and against which he was called to defend.

Nor was there error in sustaining the demurrers to defendant's second and third pleas of contributory negligence.

The cause was tried on issue joined on the plea of the general issue, and on the fourth plea, to which a demurrer was overruled.

In this case the appellee, plaintiff below, with his friend, Alcorn, left Longview on the afternoon of February 20, 1895, to go on a journey to New Orleans. On reaching Montgomery, he and his friend went into a sleeper of the defendant company; the plaintiff bought and paid \$2 for an upper berth, for himself and Alcorn. About 9 o'clock, the two retired, Alcorn taking the back and plaintiff the front side of the berth. The plaintiff testified that he placed his pocketbook, which was a large one, on the inside of his vest pocket, and placed the vest in a hammock that was swinging just above on the back side of the berth, and went to sleep shortly after retiring; that he did not awake

until the train was within about an hour's run of New Orleans, and it was then daylight; that Alcorn was up and dressed, and waked him up; that his vest was lying on the outer edge of the berth on the top of the cover; that his watch was in the vest as he left it, but the pocketbook was gone; that it contained, among other things, \$25 in money and a diamond ring, worth \$125; and the property has never been recovered. He testified on cross-examination, that the setting of the ring had been loose for some time; that he had worn it until two or three weeks before going to New Orleans, and, the stone being loose, on the advice of a jeweler that it was unsafe to wear it, he had carried it for that length of time in his pocketbook, with the intention of having the diamond set in a plain gold band.

Alcorn testified for plaintiff that prior to starting out on their journey the plaintiff had shown him two certificates of deposit on a bank amounting to \$5,000, and something wrapped up in a paper which he said was his diamond ring, and the setting was loose, was the reason he had wrapped it up; that he occupied the berth with plaintiff, slept on the back side of the berth and placed his coat in the hammock first; that plaintiff, when he got in the berth, placed his vest in the hammock on witness's coat; that he could not sleep, and got up about midnight, took hold of his coat with his right hand, and, with his left, held plaintiff's vest while he drew out his own coat from the hammock, and crawled out over plaintiff who he thought was asleep; that he saw the porter sitting on something, asleep, but did not see the conductor till the train whistled to stop at Mobile, and from the time he got out of the berth until they got to Mobile, he walked back and forth through the car, as there was no seat for him to take, and saw no one awake; that if the porter was awake, he had his eyes closed; that at Mobile he got out of the sleeper and went into the day coach, where he remained until about sun-up, when he returned to the sleeper, and, finding plaintiff asleep, he aroused him; saw nothing on the floor, nor did he see plaintiff's vest, but it was yet quite dark in the sleeper; that as soon as plaintiff got up, he came forward to the wash room, where witness had gone, and stated that his vest had been rifled and his pocketbook emptied of its contents; that the loss was reported to the conductor, who caused search to be made in every nook and corner without avail.

The conductor for defendant testified that as soon as the porter had made up the berths, he went on watch and remained until 3 o'clock in the morning, and did not leave the car at all, and sat and remained in such position that he could see down the aisle the whole length of the car; that during his watch, no one went about plaintiff's berth or disturbed anything in it, and no one entered the car that did not belong there; that about 3 o'clock he called the porter, who was sleeping in the smoking room, and as soon as the porter came and went on watch, he went to bed and slept till morning; that he retired

about forty minutes before the train reached Mobile.

The porter swore that he was making up the berths and the like, till all the passengers retired, and the conductor came in and went on watch, and he then went off and went to sleep, until 3 o'clock in the morning, when the conductor woke him up about thirty or forty minutes before reaching Mobile, and as soon as he went in, the conductor retired from watch; that he sat at the end of the car, in a position to see down the aisle from one end to the other, and was engaged in blacking the boots of the passengers; that he was continually in the position the remainder of the night, with the exception of the time when the train stopped at Mobile, when, according to the rules, he went to the end of the car to receive passengers, and did not lock the other end of the car, the rule being that the porter of the front car was to lock his front door, and that each was to guard the rear end of his car and the front end of the next car, while the train was stopped; that the porter of the front car was in his place, and witness did not know or remember anything about Alcorn getting up out of his berth and going to the day coach.

The rule now seems to be well settled that sleeping-car companies are not held to the responsibility of common carriers and innkeepers. Many reasons for this distinction will be found stated in the text-books and decisions, and nowhere more fully, perhaps, than in *Blum v. Southern Pullman Palace Car Co.* 1 Flipp. 500. See also *Hutchinson, Carr.* 617d; 22 Am. & Eng. Enc. Law, p. 797, where the authorities may be found collated.

In *Lewis v. New York Sleeping-Car Co.* 143 Mass. 267, 58 Am. Rep. 135, the rule as to the liability of such companies as stated by Morton, Ch. J., seems to have been generally approved on principle and authority. It is there said: "A sleeping-car company holds itself out to the world as furnishing safe and comfortable cars, and, when it sells a ticket, it impliedly stipulates to do so. It invites passengers to pay for, and make use of, its cars for sleeping, all parties knowing that, during the greater part of the night, the passenger will be asleep, powerless to protect himself or to guard his property. He cannot, like the guest of an inn, by locking the door, guard against danger. He has no right to take any such steps to protect himself in a sleeping car, but, by the necessity of the case, is dependent upon the owners and officers of the car to guard him and the property he has with him from danger from thieves or otherwise. The law raises the duty on the part of the car company to afford him this protection. While it is not liable as a common carrier or as an innkeeper, yet it is its duty to use reasonable care to guard the passengers from theft, and if, through want of such care, the personal effects of a passenger, such as he might reasonably carry with him, are stolen, the company is liable for it. Such a rule is required by public policy, and by the true interests of both the passenger and the com-

pany; and the decided weight of authority supports it."

In *Blum's Case*, 1 Flipp. 500, Brown, J., in his instructions to the jury, after a careful statement of the liability of such a company, concludes: "The substance of the law, then, is this: The defendant was not only bound to furnish the plaintiff with a berth for his accommodation, but to keep watch and take reasonable care that he suffered no loss. If plaintiff's loss was occasioned by the want of such care, and his own negligence did not contribute to it, he is entitled to recover such sum as you may deem reasonably necessary for his personal expenses, considering the length of the journey, and all the other circumstances of the case." *Woodruff Sleeping & Parlor Coach Co. v. Diehl*, 84 Ind. 474, 43 Am. Rep. 102; *Illinois O. R. Co. v. Handy*, 63 Miss. 809, 56 Am. Rep. 846; *Carpenter v. New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759. The liability of the company in such cases, it has also been held, entirely consonant with reason, does not include anything except the clothing, ornaments, and such articles as are usually carried by travelers in their hands, together with a sum of money reasonably sufficient for the expenses of the journey in which one is engaged. The ground upon which the principle rests, so well stated by the Mississippi court in *Handy's Case* cited above, where the traveler had with him a sum of money he was carrying to New Orleans to pay debts with, is, that "it was a much greater sum than was necessary for the payment of any expenses incident to the journey he was upon, and as to all in excess of such sum there was no liability of the company, . . . for the reason that as to such excess it stood in no contract relation with him, owed and undertook no duty, nor authorized its servants to do anything in reference to it." The Ohio court, in a well-considered case, holds that a railroad company, even as a common carrier of passengers, is not liable for the loss of money kept in the sole custody of a passenger, and which he carries without notice to the company, for purposes disconnected with the expenses of the journey, notwithstanding such loss was occasioned by the negligence of the defendant's servants. *First Nat. Bank v. Marietta & O. R. Co.* 20 Ohio St. 259, 5 Am. Rep. 655. The same principle would apply, as stated in the cases last cited, in *arguendo*, as to small parcels of great value. On no good principle could a traveler be allowed to carry in his pocket jewels and ornaments, wholly disconnected with his personal attire and the necessary and reasonable expenses of his journey, and hold a sleeping-car company liable for them in case of loss. Such a liability would be entirely foreign to the ordinary undertaking of the company in its engagement to furnish the traveler protection and reasonable accommodations on his journey.

From the foregoing, we may pass on the assignments of error insisted on. There was no error in refusing the general charge for 45 L. R. A.

the defendant, as from all the evidence the jury were authorized to draw an inference unfavorable to defendant. The plaintiff's evidence tended to show that the porter went to sleep while on his watch, and that of defendant, that he did not sleep. Besides, the porter testified that he left the car at Mobile and went outside to receive passengers; and during his absence, it is not shown that anyone was on watch inside the car. This furnished occasion when the theft may have been committed by some of the passengers, of whom there were many. The watching to secure safety of the passengers in the night-time should be continuous and active. *Pullman Palace-Car Co. v. Gardner* (Pa.) 16 Am. & Eng. R. Cas. 324.

There was no error in refusing charge 4 for defendant. This charge was not within the plea numbered 4 on which plaintiff by the ruling of the court was forced to take issue. It may be difficult for a passenger to tell where is the safest place in his berth to place his valuables, to keep them from being stolen. The plea under which the charge was requested does not postulate that it was plaintiff's duty to put his purse in the safest place, nor could any such duty be properly required of him.

Charges 6, 23, and 24 were properly refused. They each contain the instruction for a verdict for defendant, if the loss of plaintiff's property was the result of the negligence of Alcorn, a third person, who happened to be traveling with and shared the berth of plaintiff. From the evidence, we fail to see in what Alcorn was negligent, and if he was, the plaintiff, certainly, would not be responsible for it.

Charge 9 was an improper instruction. The porter may not have gone to sleep after the train left Mobile, and it would not follow he may not have been guilty of other negligence, which the charge does not hypothesize.

Though Alcorn may have been awake until the train reached Mobile, there is no evidence that he was on watch, or ought to have been, to protect plaintiff's property. Nor does it follow, because he walked the aisle until he reached Mobile, that plaintiff's purse could not have been stolen. In walking, his back was turned from plaintiff's berth as much as it was towards it. Charge 17 was properly refused.

If there was no evidence of negligence of defendant shown, occurring after the train left Mobile, it would not follow that there had not been negligence of defendant, and that the property had not been stolen before it reached that point. The eighteenth charge ignores evidence tending to show negligence of defendant at Mobile, and before reaching that point, on account of which the theft may have occurred, and was properly refused.

Charge 25 is abstract. There is no evidence that Alcorn handled the vest, as the charge hypothesizes, in such a manner as to allow the pocketbook to fall on the floor. Alcorn testified that he took his coat out

of the hammock and left plaintiff's vest, which contained the purse, in the hammock. Plaintiff testified that when he awoke his vest was lying on the outer edge on the cover, and this was all the evidence there was as to the position of the vest, after the theft. If Alcorn's evidence is true,—and there is nothing to the contrary,—the pocketbook, as for anything he did, could not have fallen out on the floor.

Charge 27 seems to require that plaintiff should have placed his vest in the safest place in his berth, and certainly distinguishes between places of safety in the berth, assuming that by depositing it in the hammock it caused the pocketbook to be liable to fall to the floor or to some other more dangerous and exposed place by the act of Alcorn, of which there is no proof; and makes the negligence of Alcorn the negligence of plaintiff. If a charge as to such negligence could be considered at all, it should have postulated the loss as wholly attributable to Alcorn's negligence, and not to a mere liability of loss arising from his acts. Moreover, for the purposes of another trial, as the cause must be reversed, it is well to add that the demurrer to the fourth plea was, in our judgment, improperly overruled, and that plaintiff was entitled to the exercise of proper reasonable care on the part of the company to prevent the theft of his pocketbook, placed anywhere in his berth. The law draws no distinction as to places of safety in the berth; and as for this, the hammock must be regarded as safe as any other place therein for the deposit of the valuables of the passenger while asleep.

Charge 33, without reference to any other fault, bases the instruction on the postulate that plaintiff was guilty of contributory negligence alone on the ground of his having placed his purse in a dangerous place, when he could have placed it in a safer one, and does not hypothesize that the pocketbook was lost on account of such contributory negligence. We may add, however, as we have said in another connection, it was entitled to protection anywhere in the berth.

From what has been said, it will appear that defendant's charges 19, 21, 34, and 35 should have been given. Charge 26 was an improper instruction, in its last branch, in which it is said: "If they [the jury] find from the evidence that the ring could be worn in the usual manner, the defendant [plaintiff] was guilty of contributory negligence in not keeping it on his finger, and there can be no recovery for its loss." The proposition asserted is, if one wears a ring on a sleeper, which he had been accustomed to wearing on his finger, and should take it off at night and put it in his pocketbook, and the book containing the ring should be stolen from his berth, that this would be contributory negligence on his part, disentitling him to recover, although the theft occurred from the negligence of the defendant—a proposition finding no support in law or reason.

Charge 28 requested by plaintiff asserts 45 L. R. A.

generally, a correct principle of law. If the defendant apprehended that it was misleading in that it did not limit the duty of the company in the care to be taken by it of such property, as, under the rules stated, a passenger may properly carry with him on a sleeper, an explanatory charge should have been requested by it.

It is well settled that the burden of proof as to contributory negligence is in all cases on the defendant, unless the plaintiff's own evidence establishes it. *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 166; *Montgomery & E. R. Co. v. Chambers*, 79 Ala. 338; *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 428; *McDonald v. Montgomery Street R. Co.* 110 Ala. 161, 175, 176. And in civil cases, as we have heretofore held, when the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof; but a charge asserting that the jury must find according to the preponderance of the evidence is erroneous, for the reason that preponderance may not convince the minds of the jury. The measure or weight of proof, to justify a verdict based upon it as to any material fact is, that it shall reasonably convince or satisfy the minds of the jury that the fact exists. *Vanderenter v. Ford*, 60 Ala. 610; *Life Asso. of America v. Neville*, 72 Ala. 517; *Rowe v. Baber*, 93 Ala. 422; *Glover v. Gentry*, 104 Ala. 222.

For the errors indicated, let the judgment be reversed, and the cause remanded.

STATE of Alabama *ex rel.* I. BRICKMAN,
Appt.,
v.

Massey WILSON *et al.*

(.....Ala.....)

1. The clerk of the house of representatives of a state cannot be compelled by mandamus to erase and expunge false entries from the journal after he has delivered it properly attested to the secretary of state according to law for safe-keeping, and all his control over it, except for the purpose of making a copy of it for the printer, has ceased.
2. One having a license to engage in the sale of intoxicating liquor has sufficient interest to entitle him to file a petition for mandamus to compel erasure by one whose duty it is to do so, of erroneous entries in the journals of the legislature showing the passage of a statute imposing an additional tax upon such business, payment of which is necessary to protect him from fine or imprisonment.
3. Mandamus to compel the erasure from journals of the legislature of entries showing the passage of a statute imposing an additional tax upon the

NOTE.—As to power of courts to make inquiries into the correctness of legislative journals, see also *State ex rel. Cheyenne v. Swan* (Wyo.) 40 L. R. A. 195, and cases cited in footnote thereto; also *Wilkes County Comrs. v. Call* (N. C.) 44 L. R. A. 252.

liquor business, which were erroneously made after the journal had been attested and delivered to the secretary of state for safe-keeping, is the only adequate remedy for one who will be subject to fine or imprisonment for carrying on his business without paying the required tax.

4. That it doubts, as matter of law, the existence of a duty, will not justify a court in refusing to issue a writ of mandamus to compel its performance, since the court's duty is to solve such doubts.
5. To require the issuance of a writ of mandamus to compel a public officer to perform an alleged duty, the duty must be imposed in terms by the statute, or must result therefrom by fair and reasonable construction or interpretation.
6. The duty to erase unauthorized matter interpolated into the records of the legislature is not imposed upon the secretary of state by a statute requiring him to "keep such records."

(June 30, 1899.)

APPEAL by relator from a judgment of the Montgomery City Court in favor of respondents in a mandamus proceeding to compel respondents to expunge certain entries from the journal of the House of Representatives. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lomax, Crum, & Weil, Thomas G. Jones, and Charles P. Jones, for appellant:

Under the Constitution the house of representatives is required to keep a journal of its proceedings, and to record therein certain matters specifically set forth in that instrument.

Const. art. 4, §§ 13, 21, 22.

The house performs this legislative duty through its creature, its clerk.

Under the statutes, it was the duty of Wilson, as clerk and the servant of the house, to keep, and file with the secretary of state, a correct journal; and it was the duty of McDavid, as secretary of state, and the designated custodian of the public records of the state, and the records of the general assembly, to preserve these records, and therefore, of necessity, to preserve the journal in its integrity after it was filed.

Code 1896, §§ 1974, 2224, 2240.

If Wilson had no further duty with reference to the journal after he had filed it with the secretary of state, except to copy it, his improper joinder is not fatal to the case of relator. Under the statute as many parties might be joined as seemed necessary or proper to the doing of substantial justice.

Code 1896, § 2825; High, Extr. Legal Rem. § 440; *State ex rel. Carpenter v. Beloit Supers.* 20 Wis. 79.

McDavid is specially charged by statute with the custody and keeping of the journal of the house.

Is not the preservation of such a record a public duty of the highest moment?

Some person, unknown to relator, added to the journal of the house important matter—matter upon which the life or death of a revenue law might hinge—after the record had 45 L. R. A.

been made up by the house, after the final adjournment of the general assembly, after its own record of its proceedings had been, by its servant, delivered into the hands of the secretary of state.

Knowing that, under such circumstances, this addition and alteration were made to the journal of the house while in his custody, is there not a clear legal duty upon him to expunge the extraneous matter from the journal—a duty purely ministerial and not involving the exercises of judicial power?

Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65.

The relator, as a citizen and taxpayer, has the right to ask the relief sought in the petition for mandamus. First, he avers in the petition, and the demurrers admit, that he is a liquor dealer, and, as such, must either pay the license tax which he avers is illegal, or else he must, if he so refuse to pay, subject himself to pay a fine, or be imprisoned in default thereof, unless this alteration be expunged.

Second, if it has been shown that there is any duty on these respondents or either of them to expunge the extraneous matter from the journal, then that duty is plainly a public duty.

High, Extr. Legal Rem. 431.

There is no adequate legal remedy.

The fact that the party sought to be compelled by mandamus to do an act is liable to indictment and punishment for his omission to do the act constitutes no objection to the granting of the writ.

Com. ex rel. Thomas v. Allegheny County Comrs. 32 Pa. 218; 14 Am. & Eng. Enc. Law, p. 103.

The theory under which it is claimed that the relator has an adequate remedy at law, by submitting to prosecution, or by paying under protest and bringing suit, is that the court judicially knows what the true journal of the house is, and hence the false entry deceives no one, and is absolutely without force or effect. This is absolutely untenable.

Jones v. Hutchinson, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *State ex rel. Atty. Gen. v. Buckley*, 54 Ala. 613; *Henderson v. State*, 94 Ala. 97.

Judicial knowledge of legislative acts and records is the exercise by the court of its knowledge,—not of facts of general notoriety, but of facts of historic sanction.

12 Am. & Eng. Enc. Law, p. 151.

If the law has established no specific remedy, and in justice there should be one, mandamus will lie.

High, Extr. Legal Rem. § 1; *Rea v. Baker*, 3 Burr. 1267; *Stephenson v. Mansony*, 4 Ala. 317; *Wise v. Bigger*, 79 Va. 274.

If the book signed by the speaker and clerk, and on deposit in the office of the secretary of state, is not the journal of the house as to the record of the votes by yeas and nays, the record is the journal.

State ex rel. Atty. Gen. v. Buckley, 54 Ala. 613; *Ex parte Howard-Harrison Iron Co. (Ala.)* 24 So. 516.

The alteration is a cloud on the citizen's right.

Rea v. Longstreet, 54 Ala. 291.

The adequacy of another legal remedy so as to prevent interposition by mandamus is tested by its sufficiency to place the party in the position he would have occupied before the omission of duty complained of, or would have occupied if the duty had been performed.

Sessions v. Boykin, 78 Ala. 330.

Messrs. Gordon MacDonald and Lee H. Weil, for respondents:

Mandamus is an extraordinary legal remedy, and is only granted in extraordinary cases, where, without its use, injustice and oppression would result, and there is no other existing remedy to the party invoking it, all usual and ordinary modes of proceeding and forms of remedy being powerless to afford redress to the party aggrieved.

High, Extr. Legal Rem. § 5.

Admitting as a fact that the attempted alteration is of no legal effect and utterly void, what can be the benefit or necessity to relator to compel some person to expunge or erase it; being illegal and void it cannot affect relator.

Its existence or nonexistence is immaterial to him or to anyone else.

While it may be true that a journal of the house imports absolute verity, and what appears in said journal could not be controverted by extrinsic evidence, yet it is clear that only that which is the journal itself imports verity. If there appears to be written in the same book in which the journal is written some other matter which is not part of the journal, that matter does not become part of the journal from the fact that it appears in the same book, and if there is found in the same record book in which the journal is kept extraneous matter, which appear to be part of the journal, but which in fact are not, can it be doubted that evidence can be introduced to show what part is the journal and what part is not.

Evidence of what is and what is not the journal of the house of representatives is admissible on the trial of relator if he were prosecuted for a violation of the law.

Clough v. Curtis, 134 U. S. 372, 33 L. ed. 949.

In order to invoke the remedy of mandamus, it must further affirmatively appear that respondent has failed and refused, and still fails and refuses, to perform a plain, certain, and unambiguous duty due from him to the public, and the failure to perform which will be of peculiar and special damage to the relator, or in the performance of which the relator has some special interest.

High, Extr. Legal Rem. § 33; Merrill, Mandamus, § 60; *State ex rel. Sheridan v. Van Winkle*, 43 N. J. L. 579.

Can we by any possible distortion construe the statute so as to imply a duty on both respondents to alter or change or expunge from the records of the journal, after it has been deposited in the office of the sec-

retary of state, anything which may thereafter be added by any unauthorized person.

In order for this writ to be granted it must appear that it is the duty of both respondents beyond a doubt to perform the act which is sought to be coerced.

People ex rel. Harless v. Yates, 40 Ill. 126; High, Extr. Legal Rem. § 440; 14 Am. & Eng. Enc. Law, 1st ed. p. 220.

It is incumbent upon a person seeking the extraordinary aid of a mandamus to show, not only that he has no other specific remedy, but that he has a special right.

High, Extr. Legal Rem. § 450; *State ex rel. Hamilton v. Everett*, 52 Mo. 89; 12 Am. & Eng. Enc. Law, 1st ed. p. 218.

If a private individual makes himself relator he must show some particular right or privilege of his own independently of that which he holds with the public at large as a citizen.

United States ex rel. Pollok v. Hall (D. C.) 1 L. R. A. 738, note; *Territory ex rel. Graves v. Cole*, 3 Dak. 301; *State ex rel. Bamford v. Hollingshead*, 47 N. J. L. 439.

This court in a mandamus proceeding has no jurisdiction or authority to interfere with or direct how the journal of the house of representatives shall be made up or prepared, and has no power or authority to order the erasure or expunging therefrom of any matter alleged to have been added to said journal.

Clough v. Curtis, 134 U. S. 372, 33 L. ed. 949.

The precise thing which is required should be set out with great particularity.

14 Am. & Eng. Enc. Law, 1st ed. p. 101, note 6, p. 216; High, Extr. Legal Rem. §§ 450, 538; *State v. Milwaukee*, 22 Wis. 397; *State ex rel. Jeffries v. Pacific Trustees*, 61 Mo. 155.

If the relator is not entitled to relief against either of the respondents for any reason, he is not entitled to relief against the other, but the writ must fail as to both.

People ex rel. Harless v. Yates, 40 Ill. 126; High, Extr. Legal Rem. § 440; 14 Am. & Eng. Enc. Law, 1st ed. p. 220.

McClellan, Ch. J., delivered the opinion of the court:

This is a petition by the state, on the relation of Brickman, for mandamus to issue to Massey Wilson, as clerk of the house of representatives, and to R. P. McDavid, as secretary of state. The petition is as follows:

"Your petitioner, I. Brickman, a resident citizen of the county of Montgomery and state of Alabama, relates and shows unto your honor that on the 1st day of January, 1899, relator, who is over the age of twenty-one years, was a taxpayer and voter in the county and state aforesaid, and is now such citizen, taxpayer, and voter: that on, to wit, said 1st day of January, 1899, your relator was engaged in, and is now engaged in, the business of a retail dealer in spirituous, vinous, or malt liquors in the city and county of Montgomery and state of Alabama, and that on, to wit, said 1st day of January,

1899, your relator paid for and took out a license as such retail dealer in spirituous, vinous, or malt liquors for the year 1899, in all respects in strict compliance with law; that on, to wit, the 15th day of April, 1899, an additional license tax of \$25.00 was demanded of relator for the carrying on of his said business as a retail liquor dealer, said demand being made under and by virtue of an alleged act of the general assembly of Alabama entitled 'An Act to Amend the Revenue Laws of the State of Alabama,' approved on the 23d day of February, 1899; that relator refused, and still refuses, to pay said additional license tax so demanded, and has thereby rendered himself liable to a criminal prosecution, and to pay a fine, on account of his said refusal to pay said additional license tax so demanded, if said act is a valid and legal enactment; that relator is informed and advised by counsel, and upon such information believes and charges, that said act entitled 'An Act to Amend the Revenue Laws of the State of Alabama,' approved February 23, 1899, is wholly unconstitutional and void, in that after the passage of the bill, entitled as aforesaid, by the house of representatives, the same was amended by the senate in several particulars, which said amendments were not concurred in by the house by a vote of a majority of its members, taken by yeas and nays, and the names of those voting for and against recorded upon the journal of the house, nor was the report of the committee of conference appointed upon the disagreement of the two houses, which said report recommended the adoption of said amendments, adopted by a vote of a majority of its members, taken by yeas and nays, and recorded upon the journal of the house, as required by § 22, art. 4, of the Constitution of the state of Alabama; and that the journal of the house, as kept by the house, signed by its speaker and clerk, and deposited in the office of the secretary of state, shows that said bill failed to become a valid law, for this want of conformity to the Constitution in its passage. Relator has been informed and advised, and he believes such information to be true, and upon such information and belief charges, that subsequent to the signing of the official journal of the house by its speaker and clerk, and subsequent to the adjournment of the general assembly *sine die*, and after said official journal had been deposited in the office of the secretary of state, that some person unknown to relator, and without any authority of law, and illegally and wrongfully, wrote upon the margin of volume 2, on page 839, of said official journal of the house, the following words and figures, to wit:

"Report of Committee of Conference. Mr. Speaker: The undersigned committee of conference to consider the difference of the two houses on H. B. 935 beg leave to report as follows: After considering the matter, they recommend (1) the adoption of all the senate amendments; (2) the adoption of the following additional amendments: 45 L. R. A.

"Sec. —. Be it further enacted, that the dispensaries in each municipality shall pay 50 per cent of such state and county license as were paid by all the saloons in such municipality during the year 1898, payable quarterly, and in no case, less than amount paid by one saloon,"—by striking out the words "or long distance telephones" where they occur in the third and fourth lines thereof; by inserting in line 19, after the word "each" and before the word "company," the word "telegraph;" by inserting in line 16 of said section, after the word "lines," the following: "and each long distance telephone company, whose lines within the state do not exceed 100 miles, shall pay at the rate of fifty cents per mile, and each long distance telephone company, whose lines within the state exceed 100 miles, shall pay \$250. Respectfully submitted. D. J. Meador, G. B. Deans, W. D. Jelks, on Part of the Senate. J. J. Mitchell, W. W. Brandon, O. Kyle, on Part of House.

"The house concurred in the conference report. Yeas, 52; nays, 0. Yeas: Messrs. Speaker, Address, Arrington, Bayles, Box, Brandon, Brown, Bruner, Burkhalter, Byars, Cameron, Capps, Cheatham, Cofer, Collier, Cornelius, Dameron, Davidson, Davis, Flewellen, Forrester, Fuller, Garrett, George, Gibson, Greene, Harris, Haynie, Hood, Huey, Hurt, Kelly, Killen Kyle, Lavretta, Long, Lyle, Matthews, Mitchell, McQueen, Patterson, Poole, Reynolds, Rogers, Sloan, Spears, Stodghill, Tate, Thigpen, Vaughn, Wallace, White (52)."

"Relator is further informed, and upon such information believes, and therefore charges, that said attempted alteration of the journal is of no legal effect, and utterly void, but that the fact that it was so placed upon the journal after the house had adjourned *sine die*, and the speaker had signed said journal, and the same had been deposited in the office of the secretary of state, does not appear from anything shown by said journal; that, the alteration thus appearing, the journal, on its face, is made to speak an untruth, and, if permitted to stand, cuts off the right of relator, in the event he is prosecuted for doing business without a license, from showing that said alleged act never became a law in the mode provided by the Constitution, and that it is therefore null and void and of no effect. Relator further shows that, if said wrongful and illegal alteration of said journal is allowed to stand, relator will be forced either to pay said illegal license, or to pay a fine for his refusal to make such payment, or be imprisoned in default thereof; and relator is therefore directly and personally interested in the expunging of said alteration from the pages of said journal, so that it may in fact speak the absolute verity which the law imports to it.

"Relator further shows that the said Massey Wilson, as clerk of the house of representatives, is the person who is charged by law with the preparation of said journal, and with the duty of keeping it accurately and truthfully, and that the said Robert P. Mc-

David, as secretary of state, is the person charged by law with the custody and preservation of said journal as it was delivered to him at the adjournment of the general assembly, and that the duty rests upon the said Wilson, as such clerk, to strike out and expunge from said journal the said illegal and wrongful alteration made thereto, and that the duty rests upon the said McDavid, as secretary of state, and as custodian of said journal, to permit the said Wilson to strike out and expunge said illegal alteration of said journal; that on the 15th day of May, 1899, relator demanded of the said Wilson, as such clerk, to expunge said illegal and wrongful alteration from said journal, and also demanded of said McDavid, as such secretary of state, to permit said Wilson to expunge said alteration from said journal, or to expunge the same himself, and both the said Wilson and the said McDavid, respectively, refused, upon said demand, to comply therewith. Wherefore, inasmuch as your petitioner is entirely without remedy in the premises, unless it be afforded by the interposition of this honorable court with its writ of mandamus, he prays your honor to direct and order that an alternative writ of mandamus issue to the said Massey Wilson, as clerk of said house of representatives of said state, commanding him forthwith to strike out, erase, and expunge from the journal of said house of representatives the said illegal and wrongful addition and alteration which is hereinbefore set out, and also that an alternative writ of mandamus issue to the said Robert P. McDavid, as secretary of state for the state of Alabama, commanding him to permit the said Wilson, as such clerk, to strike out, erase, and expunge from said journal said illegal and wrongful addition and alteration thereof, hereinbefore specifically set out, or if the said Wilson is without authority to strike out, erase, and expunge the said illegal and wrongful alteration, then, that the said McDavid, as the custodian of the said journal, be commanded forthwith to strike out, erase, and expunge from the journal of said house of representatives the said illegal and wrongful addition and alteration, or else that the said Wilson and said McDavid show cause, on a day to be fixed by your honor, why they should not do so. And he further prays your honor that all such other orders may be had in the premises as justice requires."

Alternative writs having issued, in accordance with the prayer of the petition, to said McDavid and Wilson, respectively, McDavid appeared and demurred to the petition and to the writ issued to him, and also moved to quash the writ on various grounds; and Wilson appeared and demurred to the petition and to the alternative writ issued to him, and moved to quash said writ on various grounds. Some of the assignments of objections to the writs in the demurrers and motions of both McDavid and Wilson went specially to the sufficiency of the case made against Wilson and against Wilson and McDavid conjunctively, and to the propriety of

the joinder of Wilson as a party. The demurrers of both respondents were sustained generally by the court, and thereupon, by leave of the court, the petition was amended by striking therefrom all averments and prayer looking to relief against Wilson. The demurrer of McDavid was reinterposed after this amendment of the petition, and was again sustained by the court. And, the relator declining to further amend his petition, judgment was rendered quashing the alternative writ and dismissing the petition. From that judgment this appeal is prosecuted, and it is here assigned for error (1) that the court sustained the demurrer of Wilson to the petition and alternative writ; (2) that the court sustained the demurrer of McDavid to the petition and alternative writ; (3) that the court sustained the demurrer of McDavid to the amended petition and alternative writ; and (4) that the court quashed the alternative writ.

We do not understand counsel for appellant to seriously, or at all, insist that Wilson, the clerk of the house of representatives, is under any duty to erase and expunge the extraneous and false entry from the journal. Certainly there is no ground to base such a contention upon. It cannot be doubted, we think, and it is, indeed, quite obvious, that the clerk's official connection with the original journal—all his duties in respect of it, except the duty of copying it for the printer—ceases upon his delivering it to the secretary of state for safe-keeping after it has been signed by the speaker and himself. From and after that time he has no custody of it, no control over it, no right to its possession, except for the specific purpose above referred to, no power to alter it nor to prevent others altering it, and is under no duty to keep it safely or to preserve it from mutilation or interpolation. And we deem it unnecessary to say more than this in justification of the city court's ruling in respect of the relator's right to coerce Wilson to expunge and erase from the journal the alleged interpolated matter.

Whether, assuming that the secretary of state was under the duty sought to be enforced in this proceeding, and the relator had such interest as would entitle him to demand the performance of that duty, the petition is defective for joining as respondents both the clerk and the secretary, is a question upon which there is conflict of authority, and which need not be decided. If this petition was originally bad on this account, it would seem that, under the liberal spirit of amendment which pervades our statutes and decisions, the defect was eliminated by the amendment which was made.

That the relator has such interest in having the integrity of the journal conserved in the manner prayed as authorizes him to exhibit this petition, and will entitle him to the relief he seeks if the duty of expurgation is upon the secretary of state, we do not doubt. His attitude bears a striking similitude to that of relators who seek to coerce by mandamus the issuance to them of li-

cesses to carry on certain occupations and businesses; and it is well settled in this court and generally that, where the duty of issuing such licenses is ministerial, mandamus is the appropriate, indeed the only, remedy for its enforcement. This relator's interest in the premises is to carry on a business for which a license has all along been required, upon the license which the law requires, and which has been issued to him, without being subjected to additional license taxation in consequence of the failure of the secretary of state to perform an alleged ministerial duty. He asks that that officer be ordered to perform that duty, to the end that he may carry on the business in which he is now engaged; and his interest and right are the same as if the duty upon that officer was to issue him a license, instead of being, in effect, to authorize him to continue to carry on the business without taking out and paying for an additional license.

Nor—again assuming the secretary of state is under the alleged duty—has the relator any other remedy than by the writ of mandamus to enforce the performance of the duty. The “other remedy,” the existence of which will oust—or, rather, prevent the invocation of—jurisdiction by mandamus, must be equally convenient, beneficial, and effective as mandamus. *Raisch v. San Francisco City & County Bd. of Edu.* 81 Cal. 542; *Porter Twp. Overseers of Poor v. Jersey Shore Overseers of Poor*, 82 Pa. 275. It must be a remedy which will place the relator *in statu quo*; that is, in the same position he would have been had the duty been performed. *Etheridge v. Hall*, 7 Port. (Ala.) 47. Indeed, it must be more than this. It must be a remedy which itself enforces in some way the performance of the particular duty, and not merely a remedy which in the end saves the party to whom the duty is owed unharmed by its nonperformance. *Sessions v. Boykin*, 78 Ala. 328; 2 Spelling, Extraordinary Relief, § 1375; Merrill, Mandamus, § 53. Hence it is that, while mandamus will not lie to enforce a duty which may be coerced by the ordinary civil actions at law, as where the duty is merely to pay money or to deliver property, it does lie whenever such actions cannot be availed of to the specific performance of the official act which the relator is entitled to have performed, as where a disbursing officer refuses to draw a warrant it is his duty to draw, in which case an action for damages, while it would eventually save the relator harmless, would not coerce the discharge of the specific duty. And so it is here. This relator might defend against an indictment for carrying on his business without paying the additional license tax intended to be imposed by this alleged statute, or, paying it upon compulsion, he might recover back the amount so paid, upon showing the falsification of the journal, and, of consequence, the invalidity of the supposed enactment; but neither of these remedies would be as convenient, beneficial, and effective as a proceeding by mandamus, neither would

put him *in statu quo*, as that expression is employed in our decisions, and neither would compel the expurgation of the journal by the secretary of state. It is plain, we think, that those assignments of demurrer which proceed upon the theory that the petition discloses another adequate remedy for the relator are not well taken.

There remains for consideration but one question. It is, abstractly, the most important in the case. It is also the most difficult. It is whether the secretary of state was under a duty to erase and expunge the alleged unauthorized entries from the house journal. That he was under such duty must be made to clearly appear before the writ of mandamus will lie against him in respect of it. If the duty exists, it is purely statutory. The secretary of state has no duties to perform except those imposed upon him by the Constitution and statutes of the state. Mandamus is a conservative, not a creative, remedy. It enforces existing duties, but does not impose new duties. By it the officer may be coerced to an act which it was his duty to perform without it, but to no act as to which he was under no duty before its issuance. And the duty must be clear upon the statute. The rule as to the duty and the right to its performance is variously, and not always accurately, expressed in the adjudged cases. The right must be “certain and positive.” *Beaman v. Lake County Bd. of Police*, 42 Miss. 237. The duty must be “clear, and if there be doubt, involving the necessity for litigation,” the writ will not lie. *Townes v. Nichols*, 73 Me. 515. There must be “a specific legal right and a positive duty.” *State ex rel. Burnett v. Burnside*, 33 S. C. 276. “Duty must be specifically enjoined by law.” *Freon v. Carriage Co.* 42 Ohio St. 30, 51 Am. Rep. 794. Right “must be clearly established. If right doubtful, writ will be refused.” *Mobile & O. R. Co. v. People*, 132 Ill. 559. “Writ will not issue, where there is a substantial doubt of respondent's duty.” *State ex rel. Faires v. Buhler*, 90 Mo. 560. “Will not be awarded when there is a doubt of the relator's right to the relief sought.” *People ex rel. Wallace v. Salomon*, 46 Ill. 415. “Duty must be clearly enjoined by law.” *Draper v. Noteware*, 7 Cal. 276. “It must be clearly commanded by law.” *Puckett v. White*, 22 Tex. 559. “When the legal right is doubtful, writ will be denied.” *State ex rel. Myers v. Appleby*, 25 S. C. 100. Issued when there is a failure to perform “plain official duty” (*Maddox v. Neal*, 45 Ark. 121, 55 Am. Rep. 540), not “when well-founded doubt as to the alleged duty arises” (*People ex rel. Hurd v. Johnson*, 100 Ill. 537, 39 Am. Rep. 63; *People ex rel. Harless v. Hatch*, 33 Ill. 9). “Where the validity of a judgment of conviction is doubtful, writ will not issue to enforce it.” *Rea v. Broderip*, 5 Barn. & C. 239; *Reg. v. Ray*, 44 U. C. Q. B. 17. The act sought to be compelled must be “clearly defined and enjoined by law.” *Glasscock v. General Land Office Commissioner*, 3 Tex. 51. “The writ of mandamus does not lie to

compel him [a county judge] to perform an act which the law does not specially enjoin upon him as a duty resulting from his office." *State ex rel. Brooks v. Naper*, 7 Iowa, 425. The duty must be either imposed upon the officer "by some express enactment, or necessarily result from the office he holds." *Pond v. Parrott*, 42 Conn. 13. Officer must be "expressly authorized by law" to do the act. *Ohisholm v. McGehee*, 41 Ala. 192. "A clear specific legal right" to have the act performed must be shown. 3 Brickall, Dig. p. 625.

As we have said, some of the foregoing expressions are inaccurate or misleading. A doubt that may arise in the mind of the court in matter of law, as to the existence of the duty, will not, as some of the cases seem to hold, require or justify the denial of the writ. It is the court's province and duty to solve all such doubts, and declare the duty as it finds it to be, after its misgivings as to the intent and meaning of the statute involved, or as to any other question of law, have been eliminated. Substantial doubt as to whether the facts of the particular case present the conditions upon which the officer is bound to act may, it would seem, justify or require a refusal of the writ. Of course, the doubts of the officer as to his duty are of no consequence. *State ex rel. Mania v. Tarpen* (Ohio) 1 N. E. 209. Again, the duty need not be "specifically enjoined" or "expressly prescribed" by law. The true rule in this connection, we apprehend, is that the duty must be imposed in terms by the statute, in cases like the one in hand, or must result therefrom by fair and reasonable construction or interpretation. It must appear from the statute in terms or by fair implication. *Mobile & O. R. Co. v. Wisdom*, 5 Heisk. 125; *Brown v. Duane*, 60 Hun, 98; *Hambleton v. Dexter*, 89 Mo. 188; *Pond v. Parrott*, 42 Conn. 13. And the question recurs: Is the act which relator seeks through this proceeding to have performed by the secretary of state imposed as an official duty upon him, expressly or by implication, by statute? The only statutes bearing upon the matter are embodied in §§ 2240 and 1974 of the Code, as follows:

"Sec. 2240. Secretary of senate and clerk of house to file papers and furnish copy of journal. Within forty days after the adjournment of any session of the general assembly, the secretary of the senate and the clerk of the house of representatives must file and arrange the papers of their respective houses in the office of the secretary of state and copy and deliver to the public printer the journals of their respective houses, with proper indexes thereto; and for such services, when performed, they shall receive respectively, the sum of four hundred dollars."

"Sec. 1974. Duties of secretary of state. It is the duty of the secretary of state (1) to keep the state seal, the original statutes and public records of the state, the records and papers belonging to the general assembly,

keeping the papers of each house separate."

The duty alleged in the petition arises, if at all, under the section last quoted. The duty by it imposed is "to keep the records and papers of the general assembly." Obviously, the duty in question is not specifically enjoined or expressly imposed by the terms employed in the enactment, and counsel for appellant do not insist that it is. If said duty exists at all, it must be implied from an interpretation of the phrase "to keep the records." The legislature has not said that it shall be the duty of the secretary of state to erase unauthorized matter interpolated into these records, but it has said only that he shall keep the records. Is the duty to erase a fair and just implication from the duty to keep? When the legislature constituted the secretary of state the custodian of a record made by the house of representatives, did it thereby require him to know at all times what that record contained in its original integrity, so that he would know at any given time whether it had been falsified by the interpolation of spurious and unauthorized entries upon it? When the legislature laid upon him the command to preserve the records of the general assembly, did it intend also to command him to expurgate from those records, or from the paper upon which they are written, any matter or entry he might at any time find thereon, which, according to his belief, based upon what he should regard as the best information obtainable, was not a part of the true record, but had been placed upon it without authority of law? Did the law-makers intend that the secretary of state, upon receiving an intimation that the recital in the house journal, that the speaker of the house, in the presence of the house, signed a bill providing a general revenue system for the state, was not in the journal as it was signed by the speaker and clerk and delivered to him for safe-keeping, should institute an inquiry on the point, and, upon being assured by A. B. that this entry had been interpolated, and by C. D. that it was so written originally, should see fit to believe the statement of A. B., in preference to the statement of C. D., and should thereupon expunge the recital, and thereby destroy the important statute to which it related, when it might well be, in point of fact, that the statement of C. D. was true, and the vital matter erased was part of the true record? Is any such intention to be gotten by implication from the language of the statute? We think not. Let the phrase "to keep" be given its broadest meaning; let it involve the duty to preserve, the duty to prevent spoliation, the duty to prevent interlineation, the duty to prevent entries of any and every kind upon the record as it comes to the secretary of state, the duty to bring back the record when it is wrongfully taken from his office, the duty to replace leaves that have been torn from it if he can recover them, the duty to blot out ink that may be splotted upon the writing so as to render

it illegible; let the duty to keep be extended by implication to all these things, and yet it falls short of imposing upon the secretary of state the duty or conferring on him the right, to strike from this record any writing, purporting to be part of it, that may at any time appear upon it; for if he has the right and it is his duty to erase any one entry upon assurance, more or less certain, of its falsity, he has the same right, and is under a like duty to expunge any other entry, or any part of what appears to be the record, upon like assurance of its falsity. He is not required by law, nor is he supposed in fact, to know what the journal of the house contains or does not contain, or should contain or should not contain. He in fact cannot know. If he is to determine upon any means of assurance that an entry is improperly upon the journal, and it is his duty upon such determination to erase such entry, it must also be upon him to determine, upon any other means of assurance that is satisfactory to him, that an entry has been interpolated, and he is also under a duty to erase such entry. If by the evidence of his own senses he may determine that an entry appearing on the record is an unauthorized interpolation, and is thereupon in duty bound to erase it, he may in like manner determine, upon the evidence of the senses of another, conveyed to him by statements he feels justified in relying on, that a part of the journal is an unauthorized interpolation, and thereupon it would be his duty to expunge it. And so there may be conflicting assurances as to whether a given entry is false and foreign, or true and original; and, if he is under any duty of expurgation in the premises, he must assume to find the truth between such contradictory statements as best he may, and erase the entry in question, if he is led to believe that it does not belong in the record. And he may be entirely mistaken and misled in each of the instances supposed. His own senses may deceive him. The senses of another may deceive that other, or that other may intentionally or otherwise misrepresent the fact to him. And, where there are the conflicting statements of two, he may rely upon the false statement and discredit the true one. And what would be the result? A solemn and true record would be destroyed, beyond recovery or substitution, and the most important, formal, and constitutional exercise of power by one of the great departments of government, resulting in statutes of the highest moment to the commonwealth, involving, it may be, the life, liberty, and property of the citizen, would go for naught. This would not be "to keep the records of the general assembly," but to destroy them. And all this by the purely ministerial officer, who is charged with their preservation, acting *ex parte*, or, rather, upon his own motion, without power to examine witnesses or even to receive affidavits, while the courts, whose business it must be to determine, upon proper presentation, what does constitute the records of the general assembly, are

not invoked, and may be powerless to seasonably interfere to preserve those records from spoliation. It is no answer to say that in the case at bar the court is to determine whether there is an interpolation in the house journal, and in what it consisted, and order its expurgation if it is found to be unauthorized. The court in this proceeding can only do that after determining that it was the secretary of state's duty, in the absence of all action by any court, to have so determined and thereupon proceeded to erase the alleged foreign matter; and the court cannot so adjudge in this instance without affirming for all time the power and duty of that officer to pass upon what these records contain, and to expunge all that he finds in them which he thinks does not belong there. Nor is it any answer to the views we entertain, nor to their application in the case at its present stage, to say that this is an appeal from a judgment on demurrer to the petition and alternative writ, that the demurrer admits the facts alleged in the petition, and that we must assume the verity of those allegations. This is mere sticking in the bark. The question presented is not whether the averments of the petition are true, but whether, conceding their truth, the secretary of state was under a duty to expunge these entries. We say he was not, because such duty would be so fraught with and productive of evil, in the way of the spoliation and mutilation of the very record which the legislature has charged the secretary of state safely to keep and preserve, or, at the very best, so subject it to imminent risks of destruction, as that the lawmakers could not have intended to have imposed it,—could not, while expressly providing for preservation, have intended to afford opportunity and occasion for destruction,—and an implication will not be allowed which is not only not in line with the expressed intent, but offers a means of defeating that intent. A duty which puts it in the power of a ministerial officer, without adversary proceedings, without notice to anybody, without record of his acts, and without his proceedings being subject to review, to change, amend, and destroy public records of the most vital importance to the state and to its citizens, cannot be implied from the imposition upon him of the duty to safely keep and preserve those records. A power to thus destroy, even with the honest intent to preserve, cannot be implied from a duty to keep, guard, and protect. And this is our conclusion,—that from the statute which requires the secretary of state to keep the house journal after it has been delivered into his custody by the clerk of the house, there is no implication of a duty or right in him to erase and expunge any entry that he may at any time find in that journal, or upon the margin of the paper upon which it is written down, and that officer has no such right, nor is he under any such duty.

We have been at some pains in the examination of authorities with reference to this case. We believe there are none directly

upon the point last discussed, or upon any really analogous question. There are *dicta* on a somewhat similar question in the case of *Wise v. Bigger*, 79 Va. 269, opposed to the view we have adopted, and in the case of *Clough v. Curtis*, 134 U. S. 361, 33 L. ed. 945, in line with the doctrine we have declared. The well-considered case of *Legg v. Annapolis*, 42 Md. 203, is interesting and instructive on the subject of the authentication, etc., of statutes, as is the elaborately

considered case of *People ex rel. Harless v. Hatch*, 33 Ill. 9, on the general subject of mandamus to public officers. But neither the *dicta* in the cases first named, nor the decisions in the latter two, nor any other adjudged case has been of any direct assistance in the consideration of the main point in this case.

The record presents no error, and the judgment of the City Court must be affirmed.

CALIFORNIA SUPREME COURT.

Re Estate of George H. NEWMAN, Deceased.

(.....Cal.....)

1. The commission of bigamy by a woman and her administration as widow upon the estate of the second husband will not deprive her of the right to administer as widow upon the estate of the first husband, where after the death of the second husband she resumes her relations with the first one.
2. A decree of a probate court adjudging a person to be the widow of a decedent and entitled to administer on his estate is not conclusive in another state that she was not at the time the wife of another person upon whose estate she claims to administer as widow.
3. The law of one state declaring that cohabitation for a period of years is proof of marriage is not effective in another state to dissolve a former marriage of one of the parties to a person residing there.
4. A woman who goes to the state where her husband died leaving property, solely because of that fact, but who forms the intention of remaining and making her future home there, is a resident of that state within the meaning of the laws limiting the right of administration to residents.
5. Lack of integrity within the meaning of a statute defining the qualifications of administrators is not shown by the fact that the applicant has been an unfaithful wife and violated her marital obligation.
6. Letters passing between a man and his wife, who has been guilty of bigamy, are admissible upon the question of her right to administer upon his estate.

(June 6, 1899.)

APPEAL by L. M. Cutting from an order of the Superior Court for Contra Costa County granting letters of administration upon the estate of George H. Newman, deceased, to Rose A. Newman his alleged wife. *Affirmed.*

The facts are stated in the opinion.

Messrs. Minor & Ashley, for appellant: Rose A. Newman is not a bona fide resident of California.

NOTE.—For conclusiveness of probate as *res judicata*, see *Sly v. Hunt* (Mass.) 21 L. R. A. 680, and *note*; also *Springer v. Shavender* (N. C.) 33 L. R. A. 772.
45 L. R. A.

Rose A. Newman's want of integrity is apparent from the record.

Integrity is unimpaired morality; soundness of moral principle and character; entire uprightness or fidelity.

3 Century Dictionary, 3131.

Rose A. Newman is not such a surviving wife of George H. Newman, deceased, as § 1365 of the Code of Civil Procedure of California contemplates shall be entitled to succeed to his personal estate.

The question of her right to inherit is necessarily involved in her application for letters.

Re Davis, 106 Cal. 453; *Howell v. Budd*, 91 Cal. 342; *Re Carmody*, 88 Cal. 616; *Pico's Estate*, 56 Cal. 413.

In this respect a widow occupies a position no different from that of any other relative.

She may remain the widow of the deceased, and yet not be entitled to succeed to his personal estate and to letters of administration thereon.

Re Davis, 106 Cal. 453; *Re Eggers*, 114 Cal. 464.

She could by express agreement have waived her right to share in decedent's estate, or to receive a homestead therefrom, while remaining his wife, and becoming his widow.

Re Davis, 106 Cal. 456; *Wickersham v. Comerford*, 96 Cal. 433; *Re Noah*, 73 Cal. 583, 88 Cal. 468; *Dutton v. Dutton*, 30 Ind. 454.

What executed express agreement could there be which would appeal to the court, to justice, as strongly as the facts shown by this record?

The wife who leaves her husband and renounces all conjugal intercourse a considerable time before his death is not such a widow after his death as is entitled to administer upon his estate.

Arthur v. Israel, 15 Colo. 147, 10 L. R. A. 693; *Re Davis*, 106 Cal. 456; *Prater v. Prater*, 87 Tenn. 78; *Re Noah*, 88 Cal. 468, 73 Cal. 589; *Richeson v. Simmons*, 47 Mo. 20; *Odiorne's Appeal*, 54 Pa. 175, 93 Am. Dec. 683.

No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his iniquity, or to acquire property by his own crime.

Riggs v. Palmer, 115 N. Y. 506, 5 L. R. A. 340; *People ex rel. Onondaga County Sav. Bank v. Butler*, 147 N. Y. 169; *Harris v. Webster*, 58 N. H. 481; *Clough v. Russell*, 55 N. H. 279; *Cross v. Cross*, 58 N. H. 373.

A perfected negotiation, or treaty of marriage, is undoubtedly a civil contract, but it is also a civil institution in which society has an interest; the evil consequences of too great restriction upon it having sometimes induced the legislative authorities to modify its regulations, and the judicial to admit certain exceptions in relation to it.

Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165; *Pidgin v. Cram*, 8 N. H. 350; *Allen v. Aldrich*, 29 N. H. 63; *Cogswell v. Tibbetts*, 3 N. H. 41.

Under the law of New Hampshire, Rose A. Newman must be deemed to have been legally married to J. Warren Colburn, and hence to be his widow.

Emerson v. Shaw, 56 N. H. 418.

The judgment of the court of probate of New Hampshire adjudging Rose Ann Newman to be the widow of J. Warren Colburn cannot be questioned.

Kearney v. Kearney, 72 Cal. 592; *State v. McGlynn*, 20 Cal. 263, 81 Am. Dec. 118; *Re Griffith*, 84 Cal. 107; *Ions v. Harbison*, 112 Cal. 268; Code Civ. Proc. 1908; *Re Burton*, 93 Cal. 459; *Burris v. Kennedy*, 108 Cal. 331; *Merrill v. Harris*, 26 N. H. 142, 57 Am. Dec. 360; *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 217; *Lucas v. Todd*, 28 Cal. 182; *Mathes v. Bennett*, 21 N. H. 202; *Jones v. Chase*, 55 N. H. 236.

The effect in California of the New Hampshire judicial record in the estate of Colburn is the same as in the eastern state.

Code Civ. Proc. § 1913; *Caujolle v. Ferrie*, 13 Wall. 465, 470, 472, 20 L. ed. 507, 510, 511.

The grant of letters upon the estate of Colburn to Rose Ann Colburn cannot be questioned.

Stearns v. Wright, 51 N. H. 600; *Jones v. Chase*, 55 N. H. 234; *Dublin v. Chadbourn*, 16 Mass. 433.

The allegation in Rose A. Newman's petition for letters in New Hampshire that she was the widow of Colburn was indispensable. It was a fact upon which the authority of the court to make the decrees depended.

Gordon v. Gordon, 55 N. H. 399; *Haynes v. Meeks*, 20 Cal. 288.

It was a positive averment which she cannot dispute.

Brusie v. Gates, 96 Cal. 265; *Hatch v. Partridge*, 35 N. H. 148.

And her account is her statement under oath.

Cook v. Brown, 34 N. H. 460.

Her appointment as the administratrix of the estate of J. Warren Colburn is a judgment, and cannot be attacked collaterally, just as the appointment of a guardian is a judgment.

Hodgdon v. Southern P. R. Co. 75 Cal. 642; *Tebbetts v. Tilton*, 24 N. H. 120; *Stearns v. Wright*, 51 N. H. 600; *Blanchard v. Webster*, 62 N. H. 468; *Simmons v. Goodell*, 63 N. H. 459; *Cross v. Brown*, 51 N. H. 486; 45 L. R. A.

Boody v. Emerson, 17 N. H. 577; *Turner v. Billagram*, 2 Cal. 520; *Poplin v. Hawke*, 8 N. H. 124; *Spofford v. Smith*, 59 N. H. 366.

By accepting the appointment and the estate of Colburn, Mrs. Newman is forever estopped by the record of the court of probate from questioning her status as the widow of Colburn.

Fox v. Minor, 32 Cal. 111, 91 Am. Dec. 566; *Shaw v. Abbott*, 61 N. H. 254; *Walker v. Loughton*, 31 N. H. 111; *Hamblett v. Hamblett*, 6 N. H. 333; *Holt v. Rice*, 54 N. H. 398, 20 Am. Rep. 138; *Ashuelot R. Co. v. Elliot*, 57 N. H. 397; *Shaw v. Abbott*, 61 N. H. 254; *Hatch v. Partridge*, 35 N. H. 148; *Boody v. Emerson*, 17 N. H. 577; *Cross v. Brown*, 51 N. H. 489; *Zoellner v. Zoellner*, 46 Mich. 511; *Denver City Irrigation & Water Co. v. Middaugh*, 12 Colo. 434; *Duff v. Wynkoop*, 74 Pa. 300; *Baily v. Baily*, 44 Pa. 274; *Ellis v. White*, 61 Iowa, 644; *Garner v. Garner*, 38 Ind. 139; *Sedlak v. Sedlak*, 14 Or. 540; *Turner v. Billagram*, 2 Cal. 520; *Fox v. Minor*, 32 Cal. 112, 91 Am. Dec. 566; *Curtis v. Underwood*, 101 Cal. 661; *Elliott v. Wohlfrom*, 55 Cal. 384; *Valentine v. Mahoney*, 37 Cal. 389; *Arnold v. Kahn*, 67 Cal. 472; *Reis v. Lawrence*, 63 Cal. 129, 49 Am. Rep. 83.

The husband, who has causelessly deserted his wife, may in good faith seek a reconciliation, and if the wife, under such circumstances, refuses to live with him again without good cause, she becomes from that time the party in the wrong, and has no longer any authority to pledge his credit, even for necessities, more than she would have had if she had herself originally left him without cause.

Walker v. Loughton, 31 N. H. 111.

Messrs. Hartley & Abbott and W. S. Tinning, for respondent Newman:

Rose A. Newman was the innocent party, and Newman had abandoned her.

Grieve's Estate, 165 Pa. 126.

The "simplest principles of justice" require that Rose A. Newman should receive such poor amends as can be made to her out of the estate of the deceased, for her years of abandonment, disappointment, and unrequited affection, and her ruined life, of which he was the voluntary cause.

Reel v. Elder, 62 Pa. 316; *Graham v. Law*, 6 U. C. C. P. 310; *Shaffer v. Richardson*, 27 Ind. 122; *Cogswell v. Tibbetts*, 3 N. H. 41; 1 Bishop, Marr. Div. & Sep. ed. 1891, § 1521; *Lies v. De Diablar*, 12 Cal. 328.

The forfeiture of dower for adultery is of statutory origin, and did not arise from judicial legislation on the grounds of public policy.

Reel v. Elder, 62 Pa. 316; *Cogswell v. Tibbetts*, 3 N. H. 42; 1 Bishop, Marr. Div. & Sep. §§ 1517-1520; *Owens v. Owens*, 100 N. C. 242.

The reasoning of the case of *Riggs v. Palmer*, 115 N. Y. 506, has not been generally approved or followed.

Shellenberger v. Ransom, 41 Neb. 631, 25 L. R. A. 564; *Carpenter's Estate*, 170 Pa. 203, 29 L. R. A. 145; *Re Ingram*, 78 Cal. 586; *Black v. Tricker*, 59 Pa. 13; *D'Arros's*

Appeal, 89 Pa. 51; *Cremer's Estate*, 12 Phila. 153; *Jewell v. Jewell*, 1 How. 220, 11 L. ed. 108; *Gaines v. Relf*, 12 How. 473, 13 L. ed. 1071; *Re James*, 99 Cal. 375.

The marriage to Colburn was absolutely void, and could not be validated by any subsequent cohabitation while Newman was still living.

Emerson v. Shaw, 56 N. H. 418; 1 Bishop, Marr. Div. & Sep. § 258; *Mountholly v. Andover*, 11 Vt. 226, 34 Am. Dec. 685; *Patterson v. Gaines*, 6 How. 550, 12 L. ed. 553; *Blossom v. Barrett*, 37 N. Y. 434, 97 Am. Dec. 747; *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Gathings v. Williams*, 27 N. C. (5 Ired. L.) 487, 44 Am. Dec. 49; *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253; *Dunbarton v. Franklin*, 19 N. H. 264.

The statute of New Hampshire was intended to apply only to persons who are legally competent to contract marriage, for the purpose of validating a union that has not been solemnized in the manner prescribed by law.

Emerson v. Shaw, 56 N. H. 418.

Judgments and orders of the probate court are conclusive only between the same parties and their privies litigating in relation to the same subject-matter.

Howell v. Budd, 91 Cal. 350; Greenl. Ev. § 55; *Caujolle v. Ferrie*, 13 Wall. 465, 20 L. ed. 507.

Letters of administration are not even prima facie evidence of death.

Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144; *Mutual Ben. L. Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. ed. 314; *English v. Murray*, 13 Tex. 366; *Brigham v. Fayerweather*, 140 Mass. 411; *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253; *Parsons v. Copeland*, 33 Me. 370, 54 Am. Dec. 628; *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 24 Am. Dec. 51; *Williams v. Williams*, 3 Barb. Ch. 628; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

Admissions of record may be explained by parol.

Parks v. Mosher, 71 Me. 307; *Muller v. Pondir*, 55 N. Y. 335, 14 Am. Rep. 259; *Baker v. Union Mut. L. Ins. Co.* 43 N. Y. 289; *Otis v. Sill*, 8 Barb. 108; *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253.

The estoppel against the appellant arising from Newman's conduct in recognizing the marriage relation after knowledge of the facts overcomes the effect of any admission she may have made as to being the wife or widow of Colburn.

Bigelow, Estoppel, 360; *Page v. Smith*, 13 Or. 410.

Mr. R. H. Latimer for respondent Gunter.

Per Curiam:

This is a contest for letters of administration. There were three petitioners—the public administrator, L. M. Cutting, a cousin of the deceased, and Rose A. Newman, widow of deceased. Letters were granted to the widow, and Cutting appeals.

Rose A. Newman and the deceased intermarried in New Hampshire, November, 1856. 45 L. R. A.

He was then nineteen years of age, and she was sixteen. Within a very short time after the marriage he came with his father to California. There was, however, no desertion, as the parties continued to correspond at least up to 1862, recognizing in all their letters their marital relation. He did not prosper in California, but occasionally sent her small sums of money. In 1864 she, knowing that her husband was still alive, and that he had not deserted her, and although, as she testified, she received a letter from him about a year before, went through the forms of marriage with one Colburn. She continued to live with Colburn in this adulterous and criminal relation for fifteen years, when Colburn died. She had a daughter by this bigamous union, born in 1866. Colburn left an estate, which apparently went to the child and petitioner, as his widow, administered upon it, and received an allowance from the estate as his widow. In 1883, petitioner, having heard that her husband was still alive, had the hardihood to write to him, and he, in ignorance of her criminal career, at once responded, recognizing his marital obligations. In this letter he said: "I was surprised to hear from you after waiting so long for an answer to my last letter [about twenty years]. I sent you some money to come out here on, and never got any answer. I have been looking for you ever since. You could have found out that I was here if you had written to me, instead of to the postmaster. . . . Why did you not write before, and let me know that you wanted help? I would have helped you. I wish you had come out here when I sent for you. I think it would have been better for you if you had. . . . Write and let me know if you received that money I sent you to come out on; if so, why you did not come. I believe it was in 1864. Inclosed you will find \$10," etc. It is evident that he had never had any thought of deserting her, and, unsuspecting of wrong on her part, sent her money while she was living in adultery with Colburn. After this letter they continued to correspond for about nine years. She says that she informed him by letter of her bigamous marriage, but his letters, put in evidence by her, disclose no such knowledge. Finally, about 1892, Newman ceased to write, but why is not made to appear. Newman died intestate in the county of Contra Costa on the 24th day of November, 1897, leaving an estate in said county. The order made awarding letters of administration to Rose A. Newman is attacked upon various grounds: First: It is denied that she has the rights of a widow in the estate of Newman. The marriage is not denied, nor is it claimed that the parties were ever divorced; but it is argued that in some way she is estopped by her commission of the crime of bigamy and her passing for fifteen years as the wife of another, having a daughter born of this criminal union, her administering upon Colburn's estate, claiming the right so to do as his widow, and her utter disregard of her marital duties to

Newman for some twenty years, and especially by the decree of the probate court of New Hampshire, adjudging her to be the widow of Colburn. That she was an unfaithful wife must be admitted. She testified that she married Colburn, knowing that her husband was living, and that she had received a letter from him about one year before her marriage. She knew she had not been divorced, and she also knew that her husband had not deserted her. But the statute does not make adultery on the part of the wife, of itself, a forfeiture of marital rights. It only authorizes a divorce. It might be a good law to ordain that when one spouse has committed bigamy all rights with reference to the estate of the other are forfeited; but there is no such law. There are cases in which it has been held that, when a wife leaves her husband and renounces conjugal obligations before his death, she cannot be such a widow as was contemplated by the legislature when it provided for her rights in reference to the husband's estate. *Odiorne's Appeal*, 54 Pa. 175, 93 Am. Dec. 683. By the bigamous marriage, it might be held that the petitioner renounced her conjugal obligations; but, after the bigamous spouse was dead, she resumed her relations with Newman, who continued to recognize the relation, apparently even after knowledge of the facts. Suppose she had, in response to his letters, come to California, and they had lived together as husband and wife, could her rights as a widow have been denied, even though it were proved that he was kept in utter ignorance of her delinquency? Of course not. The rights of a widow in the estate of her husband cannot be questioned on the claim that during the life of her husband she was unfaithful to her vows.

The case of *Arthur v. Israel*, 15 Colo. 147, 10 L. R. A. 693, was a hard case, and perhaps was well disposed of. There is nothing in it which has any bearing upon this case. The matter of succession is purely statutory, and it would be better for the legislature to provide for such cases, which may arise anywhere, rather than put the court to the necessity of such logic to do justice.

It is contended that the decree of the probate court of New Hampshire, adjudging that petitioner was the widow of Colburn, is conclusive that she was not the wife of Newman. Had she died in New Hampshire, leaving an estate, such decree could not have barred Newman; therefore it could not estop her. A probate decree, according to our rulings, is *in rem*, and concludes all the world as to the succession. The marriage relation of Newman and wife was not the *res* before the court in that proceeding. The law of New Hampshire declaring that cohabitation for a period of years is proof that the parties so cohabiting were married is cited, and it is contended that petitioner so cohabited with Colburn, and therefore was his lawful wife, and could not also have been Newman's. The laws of New Hamp-

shire can declare how marriage shall be entered into there, but they assume that the parties are competent to marry. But if this were not so, and the laws of New Hampshire authorized married people to marry again in that state, such marriage would not be recognized here as a dissolution of the former marriage.

It is contended that petitioner was not a resident of California, and therefore was not entitled to letters. She testified that she came to this state because her husband left an estate here; that, if he had not left such estate, she would not have come, but that, being here, it was her intention to remain and make this her future home. The court found in her favor. Her intention constituted the material issue, and there certainly was evidence to support the finding. The difference between this case and the case of *Re Donovan*, 104 Cal. 623, is that there the court found against the petitioner as to the fact. In each case this court must abide the conclusion. It is said that the evidence shows that the petitioner lacks integrity, and therefore should not have been appointed. She was shown to have been an unfaithful wife, and to have violated her marital obligation, but that does not tend to show lack of integrity, within the meaning of the statute. *Re Bauquier*, 88 Cal. 302.

We think the letters passing between the husband and wife were properly received in evidence.

Order affirmed.

PEOPLE of the State of California, *Resp't.*,
v.

Frank A. LEWIS, *Appt.*

(.....Cal.....)

1. The supreme court has no jurisdiction of criminal cases on questions of fact.
2. Where a defendant in a criminal case, instead of submitting the case upon the evidence of the prosecution which is lacking upon some essential issue, introduces his own evidence, the court may on just terms allow the defect to be supplied at any time before the final submission of the case.
3. Questions of law in regard to the legal sufficiency of the evidence to sustain a verdict in a criminal case may be presented by motion for new trial, which may be reviewed by the supreme court.
4. That one dying from a wound is induced by the pain, by remorse, or a

NOTE.—The decision in the above case as to the effect of suicide by a person mortally wounded on a liability for homicide seems to be a novel one.

As to the proximate cause of death, see also *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 241; *Thompson v. Louisville & N. R. Co.* (Ala.) 11 L. R. A. 146; *Cincinnati, H. & D. R. Co. v. Kassen* (Ohio) 16 L. R. A. 674; *Lutz v. Atlantic & P. R. Co.* (N. M.) 16 L. R. A. 819; *Atlanta Consolidated Street R. Co. v. Owings* (Ga.) 33 L. R. A. 798; *Meyer v. King* (Miss.) 35 L. R. A. 474.

desire to shield his assailant, to end his life sooner than the wound would have done, will not, if the wound actually contributes to the death, relieve the one who inflicted it from being guilty of manslaughter.

5. A statement by the prosecuting attorney in opening a case of homicide by shooting and throat-cutting, that he will show that defendant did both, will not require reversal of a conviction, although no attempt is made to prove that defendant did the latter, if there is nothing to show that the statement was not made in good faith, and the effect was in fact to weaken the case of the prosecution.
6. Permitting the prosecution to offer unimportant evidence after the defense has closed does not require reversal of a conviction.
7. An instruction that one on trial for killing another, who, after receiving a gunshot wound from accused, cut his own throat, must be acquitted if it was impossible to tell which wound caused the death, is properly refused, since conviction would be proper in case both wounds contributed thereto.

(May 31, 1899.)

APPEAL by defendant from a judgment of the Superior Court for Shasta County convicting him of manslaughter. *Affirmed.*

The facts are stated in the opinion.

Messrs. Henry E. Highton and Theodore J. Roche, for appellant:

When the prosecution rested its case and, *a fortiori*, at the close of the evidence, not only had the state failed to overcome the presumption of innocence and to prove the charge of manslaughter beyond a reasonable doubt, but, under the law of the case, as settled on the former appeal, justifiable homicide had been demonstratively established.

People v. Lewis, 117 Cal. 187; *People v. Sherman*, 103 Cal. 409; *People v. Hecker*, 109 Cal. 462, 30 L. R. A. 403; *People v. Conkling*, 111 Cal. 627; *Saylor v. Com.* 17 Ky. L. Rep. 959; *State v. Raper*, 141 Mo. 327; *State v. Foutch*, 96 Tenn. 242; *Eversole v. Com.* 95 Ky. 623.

To constitute homicide, the party killed must have been living at the time the blow was struck. The death must be imputed to the act of the defendant.

9 Am. & Eng. Enc. Law, pp. 533, 534; *State v. Scates*, 50 N. C. (5 Jones, L.) 420; *State v. Wood*, 53 Vt. 560; *Morgan v. State*, 16 Tex. App. 628; *Brown v. State*, 38 Tex. 486; *People v. Ah Fat*, 48 Cal. 63; *People v. Mitchell*, 100 Cal. 328; *People v. Lanagan*, 81 Cal. 142; *Smith v. State*, 50 Ark. 546; *Kee v. State*, 28 Ark. 155.

If a new and wholly independent instrumentality interposed and produced death, it cannot be said that the wound was the actual or proximate cause of death.

Bush v. Com. 78 Ky. 271; *Parsons v. State*, 21 Ala. 301; *Livingston v. Com.* 14 Gratt. 601; *Ex parte Curnow*, 21 Nev. 33; *Lewis v. Com.* 19 Ky. L. Rep. 1139; *People v. Woody*, 45 Cal. 290; *People v. Holmes*, 118 Cal. 455; *Rogers v. State*, 60 Ark. 76; 45 L. R. A.

Lemons v. State, 97 Tenn. 560; *State v. Hagan*, 49 La. Ann. 1625; *People v. Seaman*, 107 Mich. 348.

The only testimony offered by the state to maintain the charge of manslaughter being that appellant shot the deceased, and that Will Farrell either died from the knife wound or it was impossible to determine from which wound he died, the prosecution failed to prove the *corpus delicti*, and appellant should have been acquitted.

Dreessen v. State, 38 Neb. 375.

The promise of the learned special counsel for the prosecution to prove by circumstantial evidence that Will Farrell's throat was cut by the appellant became, and it was, an abuse of privilege, which entailed great injury upon the appellant.

People v. Lee Chuck, 78 Cal. 327; *People v. Devine*, 95 Cal. 231; *People v. Wells*, 100 Cal. 459; *People v. Searcey*, 121 Cal. 1, 41 L. R. A. 157.

Mr. Tiley L. Ford, Attorney General (**Messrs. W. F. Fitzgerald**, Attorney General, and **Charles H. Jackson**, on the brief), for respondents:

Defendant, having put deceased in this imbecile or blinded condition of mentality, must stand for all the consequences of that condition.

Scott v. Shepherd, 2 W. Bl. 892, 1 Smith, Lead. Cas. *210.

There was more than "some" evidence here. The evidence of guilt was more than "slight."

People v. Strong, 30 Cal. 151; *People v. Dick*, 32 Cal. 214; *People v. Ybarra*, 17 Cal. 171; *People v. Ah Fung*, 17 Cal. 377; *People v. Dick*, 34 Cal. 663; *People v. Sansome*, 98 Cal. 235; *People v. Estrada*, 53 Cal. 601; *People v. Manning*, 48 Cal. 335; *People v. Freeman*, 92 Cal. 359; *People v. Ah Jake*, 91 Cal. 98; *People v. Wong Chong Suey*, 110 Cal. 117; *Lick v. Madden*, 36 Cal. 213, 95 Am. Dec. 175; *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126; *Wilson v. Fitch*, 41 Cal. 385; *People v. Ah Loy*, 10 Cal. 301; *People v. Ross*, 103 Cal. 425.

There was no reversible error in the hope expressed by the district attorney in his opening.

People v. Barnhart, 59 Cal. 402; *People v. Wheeler*, 65 Cal. 77; *People v. Hamberg*, 84 Cal. 473; *People v. Ross*, 85 Cal. 384; *People v. Kamaunu*, 110 Cal. 609; *People v. Lee Ah Yute*, 60 Cal. 95; *People v. Ah Fook*, 64 Cal. 383; *People v. Ward*, 105 Cal. 340; *People v. Mayes*, 113 Cal. 621; *People v. Lane*, 101 Cal. 513; *People v. Yokum*, 118 Cal. 438.

Temple, J., delivered the opinion of the court:

The defendant was convicted of manslaughter, and appeals from the judgment and from an order refusing a new trial. It is his second appeal. The main facts are stated in the decision of the former appeal, 117 Cal. 186. Since, however, it is now claimed that the people failed to overcome the presumption of innocence upon the last trial, it may be noted that the jury, in the

proper exercise of their functions, may have found the facts to be much less favorable to the defendant than the statement contained in the opinion on the former appeal. It was within their province to reject some testimony, and to accept such as to them seemed credible. For instance they may have rationally concluded from the evidence that Lewis did not, in the altercation, say that he did not question the veracity of Farrell, but that, on the other hand, when asked by Farrell whether his word was not good, replied, "No, not with me," and that when this was resented he jumped up from the table, and drove Farrell from the house; that Farrell fled before him until, out of doors, he took up a singletree, and challenged Lewis to come out and fight, and did not advance or threaten to strike otherwise than by such challenge; and that thereupon Lewis, being in no danger whatever, raised his rifle to his shoulder, and with the remark, "Damn you, I'll teach you to fight me," fired the fatal shot, and soon after, when his wife asked some one to go for a doctor, he said: "Don't go for a doctor. Damn him, let him die." All contradictory evidence may well have been discredited. As has often been stated, this court has no jurisdiction of criminal cases on questions of fact, and, consequently, I fail to see why there should have been a hundred pages of printed brief carefully reviewing the testimony, witness by witness, showing what contradictory statements were made by some of them, that some had evidently been drilled, or for various reasons the testimony of some of the witnesses for the prosecution was entitled to less credence than the testimony for the defense. Even if, at the conclusion of the evidence for the prosecution, the defense asked the court to advise the jury to acquit, and the request was refused, and such refusal could be reviewed here, such review would only go to the extent of determining whether there was an absence of any substantial evidence as to some fact that the prosecution was bound to prove. I know of no mode by which it can be made proper for this court to enter upon such a minute inquiry as to the value of the testimony and the credibility of the witnesses as we are invited to in this case. But I think no exception is authorized to a refusal of the court to give such advice. Had it been given, the jury would not be bound to obey it. If the defense was satisfied that there was a total lack of evidence upon some essential issue, it could have submitted the case upon the evidence of the prosecution. But, as it did not do so, it was proper for the court on just terms to allow the defect to be supplied at any time before the final submission of the case. See Penal Code, §§ 1118, 1170 *et seq.*

Upon a motion for a new trial questions of law may be presented in regard to the legal sufficiency of the evidence, and such questions may be reviewed here. In fact, in this case the only substantial questions presented are so presented, but their consideration does not require this elaborate

consideration and discussion of the evidence. The evidence upon which these points are based is not conflicting, and, of course, there is no substantial disagreement in regard thereto. But for the considerations presented in these few propositions, really constituting but one point, we may assume, and the fact is, that the evidence abundantly sustains the verdict. Defendant and deceased were brothers-in-law, and not altogether friendly, although they were on speaking and visiting terms. On the morning of the homicide the deceased visited the residence of the defendant, was received in a friendly manner, but after a while an altercation arose, as a result of which defendant shot deceased in the abdomen, inflicting a wound that was necessarily mortal. Farrell fell to the ground, stunned for an instant, but soon got up, and went into the house, saying: "Shoot me again. I shall die anyway." His strength soon failed him, and he was put to bed. Soon afterwards,—about how long does not appear, but within a very few minutes,—when no other person was present except a lad about nine years of age, nephew of the deceased, and son of defendant, the deceased procured a knife, and cut his throat, inflicting a ghastly wound, from the effect of which, according to the medical evidence, he must necessarily have died in five minutes. The wound inflicted by the defendant severed the mesenteric artery, and medical witnesses testified that under the circumstances it was necessarily mortal, and death would ensue within one hour from the effects of that wound alone. Indeed, the evidence was that usually the effect of such a wound would be to cause death in less time than that, but possibly the omentum may have filled the wound, and thus, by preventing the flow of the blood from the body, have stayed its certain effect for a short period. Internal hemorrhage was still occurring, and, with other effects of the gunshot wound, produced intense pain. The medical witnesses thought that death was accelerated by the knife wound. Perhaps some of them considered it the immediate cause of death. Now, it is contended that this is a case where one languishing from a mortal wound is killed by an intervening cause and therefore deceased was not killed by Lewis. To constitute manslaughter, the defendant must have killed someone, and if, though mortally wounded by the defendant, Farrell actually died from an independent intervening cause, Lewis, at the most, could only be guilty of a felonious attempt. He was as effectually prevented from killing as he would have been if some obstacle had turned aside the bullet from its course, and left Farrell unwounded. And they contend that the intervening act was the cause of death, if it shortened the life of Farrell for any period whatever. The attorney general does not controvert the general proposition here contended for, but argues that the wound inflicted by the defendant was the direct cause of the throat-cutting, and

therefore defendant is criminally responsible for the death. He illustrates his position by supposing a case of one dangerously wounded, and whose wounds had been bandaged by a surgeon. He says, suppose, through the fever and pain consequent upon the wound, the patient becomes frenzied, and tears away the bandage, and thus accelerates his own death, would not the defendant be responsible for a homicide? Undoubtedly he would be, for in the case supposed the deceased died from the wound, aggravated, it is true, by the restlessness of the deceased, but still the wound inflicted by the defendant produced death. Whether such is the case here is the question. The attorney general seems to admit a fact which I do not concede,—that the gunshot wound was not, when Farrell died, then itself directly contributing to the death. I think the jury were warranted in finding that it was. But, if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible, if it was made to appear, and the jury could have found from the evidence, that the knife wound was caused by the wound inflicted by the defendant, in the natural course of events. If the relation was causal, and the wounded condition of the deceased was not merely the occasion upon which another cause intervened, not produced by the first wound, or related to it in other than in a casual way, then defendant is guilty of a homicide. But, if the wounded condition only afforded an opportunity for another unconnected person to kill, defendant would not be guilty of a homicide, even though he had inflicted a mortal wound. In such case, I think, it would be true that the defendant was thus prevented from killing.

The case, considered under this view, is further complicated from the fact that it is impossible to determine whether deceased was induced to cut his throat through pain produced by the wound. May it not have been from remorse, or from a desire to shield his brother-in-law? In either case the causal relation between the knife wound and the gunshot wound would seem to be the same. In either case, if defendant had not shot the deceased, the knife wound would not have been inflicted. Suppose one assaults and wounds another, intending to take life, but the wound, though painful, is not even dangerous, and the wounded man knows that it is not mortal and yet takes his own life to escape pain, would it not be suicide only? Yet the wound inflicted by the assailant would have the same relation to death which the original wound in this case has to the knife wound. The wound induced the suicide, but the wound was not, in the natural course of things, the cause of the suicide. Though no case altogether like this has been found, yet as was to have been expected, the general subject has often been considered. In 1 Hale, P. C. 428, the law is stated. So far as material here, his views may be thus summarized: (1) If one gives another a dangerous wound, which might, by very skilful treatment, be cured, and is

not, it is a case of homicide. (2) If one inflicts a dangerous wound, and the man dies from treatment, "if it can clearly appear that this medicine, and not the wound, was the cause of his death, it seems it is not homicide; but then it must appear clearly and certainly to be so." (3) If one receives a wound, not in itself mortal, and fever or gangrene sets in because of improper treatment or unruly conduct of the patient, and death ensues, it is homicide, "for that wound, though it were not the immediate cause of his death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is *causa causati*." (4) One who hastens the death of a person languishing with a mortal disease is guilty of a homicide, for the death is not merely by a visitation of Providence, but the hurt hastens it, and the wrongdoer cannot thus apportion the responsibility, etc. It would make no difference, I presume, if the person killed was languishing from a mortal wound, rather than from an ordinary disease. In *State v. Scates*, 50 N. C. (5 Jones, L.) 420, a child was found dead, badly burned, and with a wound from a blow on the head. The burning was admitted by defendant, but the blow was not, and it was not proved who inflicted it. The medical witness thought the burning was the primary cause of death, but the blow may have hastened it. The jury was told that, if it was doubtful which was the immediate cause of death, they must acquit, but if they found that the burning was the primary cause of death, and the blow only hastened it, they could convict. The case was reversed, the appellate court holding that the blow might have been the independent act of another, and, if it hastened the death, it, and not the burning, was the cause of death. In *Bush v. Com.* 78 Ky. 268, the deceased received a wound not necessarily mortal, and, in consequence, was taken to a hospital, where she took scarlet fever from a nurse, and died of the fever. The court said: "When the disease is a consequence of the wound, although the proximate cause of the death, the person inflicting the wound is guilty, because the death can be traced as a result naturally flowing from the wound, and coming in the natural order of things; but when there is a supervening cause, not naturally intervening by reason of the wound, . . . the death is by the visitation of Providence, and not from the act of the party inflicting the wound. . . . If the death was not connected with the wound in the regular chain of causes and consequences, there ought not to be any responsibility." The last case, in my opinion, so far as it goes, correctly states the law. The facts of this case do not bring it strictly within any of the propositions found in 1 Hale, P. C. 428. The second and third propositions both predicate a wound not necessarily mortal. What the law would have been in the second case, had the wound been mortal, and the applica-

tions had hastened the death, is not stated. It seems to me, however, the case of a person already languishing from a mortal wound is precisely that of one suffering from a mortal disease. Certainly, the wilful and unlawful killing of such a person would be a felony, and it cannot be true that the first offender and the last can each be guilty of murdering the same man, if they had no connection with each other, and both wounds were not actively operating to produce death when it occurred.

But why is it that one who inflicts a wound not mortal is guilty of a homicide, if through misconduct of the patient or unskillful treatment gangrene or fever sets in, producing a fatal termination, when, if it can be clearly made to appear that the medicine, and not the wound, was the cause of the death, he is not guilty of a homicide? In each case, if the wound had not been, the treatment would not have been, and the man would not then have died. In each case the wound occasioned the treatment which caused or contributed to the death. The reason, I think, is found in the words advisedly used in the last sentence. In the one case the treatment caused the death, and in the other it merely contributed to it. In one case the treatment aggravated the wound, but the wound thus aggravated produced death. In the other the wound, though the occasion of the treatment, did not contribute to the death, which occurred without any present contribution to the natural effect of the medicine from the wound. Take, for instance, the giving of a dose of morphine, by mistake, sufficient to end life at once. In such case it is as obvious that the treatment produced death as it would have been had the physician cut off his patient's head. But see *People v. Cook*, 39 Mich. 236, 33 Am. Rep. 380. In this case it appears that defendant had inflicted a dangerous wound, but it was contended by the defense that death was caused by an overdose of morphine. Defendant asked an instruction as follows: "If the jury shall believe that the injury inflicted by the prisoner would have been fatal, but that death was actually produced by morphine poisoning, they must acquit." The instruction was refused, but the jury were told that if the wound was not in itself mortal, and death was caused solely by the morphine, they must acquit. The action of the trial court was sustained on the ground that a mortal wound had been given, which necessitated medical treatment; that the physicians were competent, and acted in good faith; and that it was not made clearly to appear that the morphine solely produced death, and that the wound did not at all contribute to the death at that time. Under the authorities, this was equivalent to a finding that the wound did not contribute to the death. This case differs from that in this: That here the intervening cause, which it is alleged hastened death, was not medical treatment, designed to be helpful, and which the deceased was compelled to procure because of the wound, but

was an act intended to produce death, and did not result from the first wound in the natural course of events. But we have reached the conclusion by a course of argument unnecessarily prolix, except from a desire to fully consider the earnest and able argument of the defendant, that the test is—or, at least, one test—whether, when the death occurred, the wound inflicted by the defendant did contribute to the event. If it did, although other independent causes also contributed, the causal relation between the unlawful acts of the defendant and the death has been made out. Here, when the throat was cut, Farrell was not merely languishing from a mortal wound; he was actually dying; and after the throat was cut he continued to languish from both wounds. Drop by drop the life current went out from both wounds, and at the very instant of death the gunshot wound was contributing to the event. If the throat-cutting had been by a third person, unconnected with the defendant, he might be guilty; for, although a man cannot be killed twice, two persons, acting independently, may contribute to his death, and each be guilty of a homicide. A person dying is still in life, and may be killed; but, if he is dying from a wound given by another, both may properly be said to have contributed to his death.

Other points are raised by the defense. One is that the prosecuting attorney told the jury in his opening that he would prove that the defendant himself did the throat-cutting. No evidence tending to establish this proposition was offered by the prosecution, and it is contended the defendant was prejudiced by this statement. We cannot say that the statement was not made in good faith, and with the intent to attempt its proof. If so, it was not an abuse of his position by the prosecuting officer. It was made, not by the district attorney, but by an assisting attorney, who probably was not as well advised of the case as he should have been. But the defense could not have been prejudiced. It doubtless weakened the case for the prosecution, which, by the statement, seemed to admit that such proof was essential to its case.

After the defense had closed, the prosecution was permitted to call a witness to prove the facts concerning the knife wound. This had only been shown before by the medical witness who testified as to the wounds, and one witness who came in just as Farrell breathed his last, and who spoke of the wounds. The witness called was the son of defendant, and he is strongly indorsed by the defense as a truthful witness. It appears that there was no other witness who could have testified to the occurrences at that time. The procedure was irregular, but the defense was certainly not injured thereby. In fact, I do not see that the evidence was at all important to the prosecution.

The court refused to instruct the jury as follows: "If you believe from the evidence that it is impossible to tell whether Will

Farrell died from the wound in the throat or the wound in the abdomen, you are bound to acquit." The instruction was properly refused. It assumed that death must have resulted wholly from one wound or the other, and ignored the proposition that both might have contributed, as the jury could have found from the evidence.

The other points are relatively trivial. I have examined them, and cannot see how injury could have resulted, supposing the rulings to have been erroneous.

The judgment is affirmed.

We concur: **McFarland, J.; Henshaw, J.**

Petition for hearing in banc refused.

IN THE MATTER OF the Estate of Leland STANFORD, Deceased.

(.....Cal.....)

The claim of the state to a portion of a decedent's estate under a statute asserting the right and making the amount due and payable at death cannot be released by the legislature, even prior to the state's receipt of the amount, where the Constitution prohibits the legislature from making any gift to any individual or corporation, and from passing any special law releasing any indebtedness to the state.

(*Harrison, J., dissents.*)

(September 15, 1899.)

A PPEAL by parties interested in the estate of Leland Stanford, deceased, from an order of the Superior Court of the City and County of San Francisco directing the executrix to pay into the treasury a certain sum as collateral inheritance tax. *Affirmed.*

The facts are stated in the opinions.

Messrs. Wilson & Wilson, Edward R. Taylor, A. N. Drown, Gordon & Young, Francis E. Spencer, and S. F. Leib, for appellants Stanford et al.:

The nieces and nephews of decedent residing in the state of California, and the trustees of the Leland Stanford Junior University, should be exempted from the payment of the collateral inheritance tax.

To make this retroactive exemption in favor of resident nieces and nephews and educational institutions was entirely within the scope of the power of the legislature.

Re Wilmerding, 117 Cal. 281; *United States v. Perkins*, 163 U. S. 626, 41 L. ed. 267; *State v. Dalrymple*, 70 Md. 294, 3 L. R. A. 372.

The exemptions provided by the amendment of 1897 are entitled to be relieved of the imposition of the tax.

First Nat. Bank v. Henderson, 101 Cal.

307; *Excell v. Daggs*, 108 U. S. 143, 27 L. ed. 682; *United States v. The Peggy*, 1 Cranch, 103, 2 L. ed. 49; *Yeaton v. United States*, 5 Cranch, 281, 3 L. ed. 101; *The Rachel v. United States*, 6 Cranch, 329, 3 L. ed. 239; *Cooley*, Const. Lim. 469.

A state may constitutionally pass a retroactive law impairing her own rights.

Davis v. Dawes, 4 Watts & S. 401; *Lewis v. Turner*, 40 Ga. 416.

By the act of 1893 the state, through its legislature, simply changed the conditions and the subjects of inheritance and testamentary disposition.

The amendment of 1897 did not seek to, and did not, release or extinguish any indebtedness, liability, or obligation.

Montague v. State, 54 Md. 481.

Discriminations against nonresidents have been upheld.

Robinson v. Oceanic Steam Nav. Co. 112 N. Y. 315, 2 L. R. A. 636; *Adams v. Penn Bank*, 35 Hun, 393; *Duquesne Club v. Penn Bank*, 35 Hun, 390; *Frost v. Brisbin*, 19 Wend. 11, 32 Am. Dec. 423; *Campbell v. Morris*, 3 Harr. & M'H. 535; *Haney v. Marshall*, 9 Md. 194; *Lemmon v. People*, 20 N. Y. 562; *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. ed. 806; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989.

Messrs. Cotton & Cotton for nonresident nephews and nieces.

Mr. Elliott McAllister, with Messrs. Tiley L. Ford, Attorney General, and W. S. Barnes, for respondent.

Van Dyke, J., delivered the opinion of the court:

Leland Stanford died June 21, 1893, leaving a last will and testament, by which he gave the sum of \$2,500,000 to certain trustees for the benefit of Leland Stanford Junior University, and also legacies amounting to \$2,200,000 to certain of his nephews and nieces. April 14, 1896, the superior court of San Francisco, in which the settlement of said estate was pending, on application of the treasurer of the city and county of San Francisco, made an order requiring June L. Stanford, as executrix of the last will and testament of said Leland Stanford, deceased, to pay into the treasury of the said city and county \$235,750, as and for a tax on collateral inheritances. From this order an appeal was taken May 18, 1896. The act under which the order directing the inheritance tax to be paid over was approved March 23, 1893, and took effect sixty days thereafter. Stat. 1893, p. 193. It is entitled "An Act to Establish a Tax on Collateral Inheritances, Bequests, and Devises, to Provide for Its Collection, and to Direct the Disposition of the Proceeds." The 1st section reads as follows:

"Sec. 1. After the passage of this act, all

NOTE.—For prohibited gifts of public money under the California Constitution, see *Daggett v. Colgan* (Cal.) 14 L. R. A. 474; *Bourn v. Hart* (Cal.) 15 L. R. A. 431; *Patty v. Colgan* (Cal.) 18 L. R. A. 744; *Conlin v. San Francisco City* 45 L. R. A.

& County Supers. (Cal.) 21 L. R. A. 474; *Ingram v. Colgan* (Cal.) 28 L. R. A. 187; and *Conlin v. San Francisco City & County Supers.* (Cal.) 33 L. R. A. 752.

property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, or any interest therein or income therefrom which shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, other than to or for the use of his or her father, mother, husband, wife, lawful issue, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the state of California, and any lineal descendant of such decedent, born in lawful wedlock, or the societies, corporations, and institutions now exempted by law from taxation, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property, or to the income thereof, shall be and is subject to a tax of \$5 on every \$100 of the market value of such property, and at a proportionate rate for any less amount, to be paid to the treasurer of the proper county, as hereinafter defined, for the use of the state; and all administrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid, as hereinafter directed; provided, that an estate which may be valued at a less sum than \$500 shall not be subject to such duty or tax."

Section 4 reads: "All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of 10 per centum per annum shall be charged and collected from the time said tax accrued; provided that if said tax is paid within six months after the accruing thereof a discount of 5 per centum shall be allowed and deducted from said tax. And in all cases where the executors, administrators, or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond, in the form and to the effect prescribed in section 2 of this act, for the payment of said tax, together with interest."

In another section it is provided that if litigation becomes necessary, or because of other unavoidable cause for delay the estate cannot be settled at the end of eighteen months, then only 7 per cent should be charged. The tax paid over to, or collected by, the county treasurer is by him required to be paid into the treasury of the state for the use of the state school fund.

45 L. R. A.

After the appeal herein was perfected, this court, in *Re Wilmerding*, had occasion to consider the nature and character of this collateral inheritance tax, and therein, also, held the act in question to be constitutional, 117 Cal. 281. In the opinion in that case it is said: "Similar statutes have been enacted in other states, and, with the exception of New Hampshire, have been sustained by the courts in those states, upon the ground that the charge thus imposed is in the nature of an excise tax, or a tax upon the right of succession, and is within the constitutional power of the legislature. [Citing a number of cases of the various states.] The principles upon which the tax is upheld have been so fully and clearly elaborated in the above cases that it is necessary to do no more than refer to the cases. The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly within the legislative discretion." And again: "As this tax is not upon property, but upon the right of succession, the constitutional provision that all property shall be taxed according to its value is inapplicable. The right of the legislature to impose an excise tax includes the right to select the subjects upon which it shall be imposed." In *Re Swift*, 137 N. Y. 83, 18 L. R. A. 709, cited by appellants, that court, in speaking of this question, says: The "precise definition of the nature of this tax is not essential, if it is susceptible of exact definition. Thus far, in this court we have not thought it necessary in the cases coming before us to determine whether the object of taxation is the property which passes or not, though, in some, expressions may be found which seem to regard the tax in that light. [Referring to a number of cases in that state.] The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the subjection of property, ownership of which has ceased by reason of the death of the owner, to a diminution, by the state reserving to itself a portion of its amount, if in money, or of its appraised value, if in other forms of property."

The decision in the *Wilmerding Case* would have disposed of this appeal were it not that the act in question was amended by the legislature of 1897. The act of 1897 is entitled "An Act to Amend an Act Entitled 'An Act to Establish a Tax on Collateral Inheritances, Bequests, and Devises, to Provide for Its Collection, and to Direct the Disposition of the Proceeds,' Approved March 23,

1893." It amends § 1 of the act of 1893 by including among those who are exempt from the tax the niece or nephew when a resident of this state, along with certain classes of corporations, of which the above-named university is one. Such amendatory act contains an independent section, numbered 2, reading as follows: "The exemptions contained in this act shall apply to all property which has passed by will, succession, or transfer, since the approval of the act of which this act is amendatory, except in those cases where the tax has been paid to the treasurer of the proper county." It is claimed on the part of the appellants that the appeal herein must be determined in accordance with the act of 1893, as amended, referring, in support of such contention, to *First Nat. Bank v. Henderson*, 101 Cal. 307, and other cases in the same line. Such decisions are to the effect that in certain cases where, subsequent to the appeal, matters arise affecting the same, upon proper suggestion and proof of such matters they will be considered by the appellate court; especially is this so when the action is of a penal character, as it was in the *Henderson Case*. On the other hand, it is contended upon the part of the respondent that the amendatory act in question, so far as it attempts to relieve these appellants, and other beneficiaries similarly situated, from the conditions or obligations contained in the act of 1893, being in effect a relinquishment to them of the sums due the state under said act, is unconstitutional and void. It will be seen by the express terms of the act of 1893 all taxes imposed thereby "shall be due and payable at the death of the decedent," and also that such taxes "shall be immediately due and payable to the treasurer of the proper county." By § 25, art. 4, of the Constitution, it is declared: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Fifteenth. Refunding money paid into the state treasury. . . . Sixteenth. Releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or person to this state, or to any municipal corporation therein." In answer to the foregoing provisions of the Constitution, it may be claimed that the act in question is not local or special legislation, and in form it may not be so. But the framers of the Constitution, and the people who adopted it, did not hedge about the legislature with such restraints in the matter of conferring favors or making gifts or donations by special and local legislation, and at the same time leave the door wide open for similar abuses to enter under the guise of general legislation. By § 22 of the same article, the legislature is prohibited from making any grant or donation of property to any institution not under the exclusive management and control of the state, except institutions conducted for the care and support of orphans and half orphans, and aged indigent persons, and in such excepted cases reserving to the state the right of visitation.

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By § 31 of said article it is declared, among other restrictions imposed upon the legislature: "Nor shall it have the power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; provided, that nothing in this section shall prevent the legislature granting aid pursuant to section twenty-two of this article."

In answer to the contention on the part of the respondent that by the amendatory act of 1897 it is attempted to give or donate public money or thing of value, appellant's counsel say "that the state never had possession of any part of the 'accumulations or acquisitions' of Leland Stanford, deceased; . . . and he [respondent] has not shown how the state could give away what it never had." In other words, it is claimed that one not in the possession of property is not the owner of it. The law of 1893 repeatedly declares that the portion coming to the state "shall be due and payable at the death of the decedent." And it is further provided that from that time, until paid over in the course of administration, the sum so due the state shall bear interest, and interest shall be paid on the sum so due the state. It would be absurd to exact interest for the detention or use of money or property not belonging to the party who demands it. It is elementary law that the right of inheritance, including the designation of heirs and the portions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. It is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate, and the legislature can provide that the whole or only a portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and the legislature in this case having determined that 95 per cent of the decedent's estate may go to his heirs and beneficiaries, and that 5 per cent be retained to the state, it is too clear for argument that this 5 per cent vested in the state at the same time that the 95 per cent vested in the heirs or other beneficiaries. "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment." Kent, Com. 202. The state here, from the death of the decedent, had a present fixed right of future enjoyment to the 5 per cent of his estate. This is property or a thing of value belonging to the state.

The following from the Civil Code is merely reciting the common law: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code the thing of which there may be ownership is called property." § 654. "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition

of an author, goodwill of a business, trademarks and signs; and of rights created or granted by statute." § 655. It is therefore not the possession alone, but the right to possess, which constitutes the ownership; and ownership may be "of rights created or granted by statute," as the case here. It would be altogether a new definition in the law to hold that one who had not obtained possession of a thing or had parted with its possession could not be the owner of such thing. This would be contrary to the teachings of elementary law, which recognizes a right in action as well as a right in possession. The rule contended for would make ownership depend altogether upon strength and agility in obtaining and holding possession of things. The purpose of the act of 1897, as appears by its title, was merely to amend the act of 1893. Section 1 of the latter act amends § 1 of the act of 1893 by reenacting said section at length, as required by the Constitution. Thereafter is added to the act of 1897 the independent § 2, which attempts to release the payment of the taxes imposed by the act of 1893, except such as have already been paid over to the treasurer of the proper county.

Passing consideration of the question whether this section is not invalid, because not embraced in the title of the act, and for the further reason that it in effect amends other sections of the act of 1893 without reenacting them, it would strike the ordinary mind as a strange piece of legislation. The one who had been prompt in complying with the law, and paid into the county treasury what belongs to the state, is punished for his good conduct by retaining the money so paid; whereas, he who has refused to obey the law is rewarded by giving or releasing to him that which belongs to the state, and which he unjustly withheld. The object of this unjust discrimination is apparent. To take public funds from the treasury, and give them away, would be a more bald and palpable violation of the Constitution than to arrest such funds in transit and return them or give them away. The latter, however, is only an indirect mode of accomplishing the same result; but in law that which cannot be done directly may not be done indirectly. The funds in question here were never in the possession of the appellants, but in the possession of the administratrix of the estate, as an agent under the law to hand them over to the state as the owner thereof.

It is said, however, on behalf of appellants, that the legislature may not only amend, but repeal the law altogether, in which case there would be no means of obtaining possession of the sums due the state not already turned over. The legislature might, perhaps, abolish or repeal all laws for the collection of debts. This, however, would not have the effect of paying or discharging the debts, or in the least impair the obligation to pay them. Property rights and obligations would remain as before. These, by fundamental law, are placed beyond the reach of legislative interference. In sub-

stance, if not in form, to turn over the fund in question belonging to the state to the appellants would be to make a gift or donation of the same, and the law regards substance rather than form. We are therefore of the opinion that to give retroactive effect to the law of 1897 would conflict with the provisions of the Constitution prohibiting the legislature from making any gift or donation of any public money or thing of value. The amendatory act of 1899 (Stat. 1899, p. 101), passed after the rehearing was granted herein, has no application in this case. By its terms it applies only to such property as has passed since the first amendatory act. We quite agree with appellant's counsel that "an heir or legatee must take his estate on such conditions as at the time the state may have imposed," and that subsequent legislation could not affect such vested right; and this rule, as already held, applies equally to the state, whose right to the fund in question accrued under the act of 1893.

Order affirmed.

We concur: **Beatty, Ch. J.; Temple, J.; Henshaw, J.; Garoutte, J.**

McFarland, J., being disqualified, did not participate in the foregoing opinion.

Harrison, J.: I dissent for the reason stated in my opinion reported in 54 Pac. 259.

That opinion was as follows:

Leland Stanford died June 21, 1893, leaving a last will and testament by which he gave the sum of \$2,500,000 to certain trustees for the benefit of the Leland Stanford Junior University, and also legacies amounting to \$2,200,000 to certain of his nephews and nieces. May 7, 1896, the superior court for San Francisco made an order requiring the executrix of his will to pay into the treasury of the city and county \$235,750 as and for the collateral inheritance tax upon these and other bequests. From this order the present appeal was taken, May 18, 1896. After the appeal had been taken, the legislature, at its next session, passed an act, March 9, 1897 (Stat. 1897, p. 77), amending § 1 of the collateral inheritance act, approved March 23, 1893, by including among those who are exempt from the tax "niece or nephew when a resident of this state," together with certain classes of corporations, of which the above-named university is one, and provided that the exemption should apply to all cases arising subsequent to the passage of the original act, "except in those cases where the tax has been paid to the treasurer of the proper county."

1. The appeal herein must be determined in accordance with the law as it now exists, and not as it stood at the time the court made the order appealed from. *First Nat. Bank v. Henderson*, 101 Cal. 307.

2. The power of the legislature to determine whether to impose a succession tax or an excise tax upon the right of inheritance, as well as its right to determine upon which

heirs or legatees of a decedent such a tax shall be imposed was held in *Re Wilmerding*, 117 Cal. 281, to be plenary; and any statute enacted for this purpose may be amended equally with any other statute. The legislature has the same power to add other classes to those who are to be exempted from the tax by an amendment to the original act as it would have had to exempt them from the tax in the original statute. The respondent does not controvert the effect of the amendment upon the estates of persons dying subsequent to its enactment, but insists that the provision in the 2d section of the act extending the exemption to cases arising prior to its enactment, when the tax has not been already paid, is in violation of subdivision 16 of § 25 of article 4 of the Constitution of this state, by which the legislature is prohibited from passing local or special laws "releasing or extinguishing in whole or in part the indebtedness, liability, or obligation of any corporation or person to this state, or to any municipal corporation therein." The right of the legislature to repeal the entire act cannot be questioned, and upon such repeal without any saving clause there would be no statute authorizing the collection of any portion of the tax then unpaid, and the tax could not be collected. If the legislature was of the opinion that the tax ought not to have been imposed upon nephews and nieces, it had the same power to repeal that portion of the statute authorizing the collection from them of the tax then imposed as it had to exempt them from the payment of the tax. Such a statute is neither a local nor a special act. It extends to every part of the state, and applies to every person within the class. A classification of the persons thus to be exempted from the collection of the taxes previously imposed is no more a special act than the same classification of those upon whom the tax is to be imposed, or who are to be exempt from its payment; and whether the legislature takes away the power of collecting the tax by direct words to that effect, or by a declaration that the persons in the class shall be exempt from its payment, is immaterial. In *Montague v. State*, 54 Md. 481, the legislature of Maryland had, by an amendment to the statute, included the "husband" in the exempted classes, and provided that the exemption should apply in all cases where the tax had not been actually paid. In passing upon the question here presented, the court reached the same conclusion as above, saying: "If the legislature is satisfied that a given tax is no longer necessary, that it is unjust, that a change of circumstances requires its repeal, that public policy demands that the repeal should be prompt, should give instant relief, and should therefore extend to all who had not yet actually paid, the legislature has in its discretion the constitutional right so to enact, without being at the same time compelled to embarrass the treasury by a sweeping restitution to all who had paid the tax from the time of its imposition. Un-

der some circumstances such a retrospective exemption might be highly expedient, and under others not. The question is one of policy for the legislature, and not one of law for the courts." It was further objected in that case, as by the respondent here, that the tax claimed from the appellant had become a specific, ascertained debt due from him to the state, and that the act exempting the husband from its payment was void under a provision of the Constitution of that state similar to the above subdivision of § 25, forbidding the general assembly from passing local or special laws releasing persons from their debts or obligations to the state; but it was held that this provision of the Constitution did not apply to a public general law releasing persons from their debts or obligations to the state, but that the inhibition was directed to "local" or "special" laws, and that the law under consideration was neither local nor special.

3. Of the nephews and nieces who are appellants herein, seven are residents and citizens of other states, and it is contended on their behalf that the provision in the statute, as amended in 1897, which purports to exclude them from the exemption given to resident nephews and nieces, contravenes the provisions of § 2, art. 4, of the Constitution of the United States, which declares, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and is therefore invalid. The charge imposed upon the inheritance by the statute under consideration is in the nature of an excise tax (*Re Wilmerding*, 117 Cal. 281), but, by whatever name it is designated, the power to impose the charge is referable to the power of taxation, and the above provision of the Constitution guarantees to the citizens of each state an immunity in any other state from the burdens of taxation upon their persons or property or occupations which that state does not impose upon the persons or property or occupations of its own citizens. Mr. Cooley says (Const. Lim. p. 490) that this provision "secures in each state to the citizens of all other states . . . the right to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same state are not subject to." In *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449, it was held that a statute imposing a higher license tax for the sale of goods within the state of the nonresident than was imposed upon the resident of the state was in violation of this section, and invalid. In defining the words "privileges and immunities," as used in the Constitution, the court said: "Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into another state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property, to take and hold real estate; to maintain actions in the

courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." In *Oliver v. Washington Mills*, 11 Allen, 268, it was held that a statute of Massachusetts which required corporations to reserve from each of their dividends one-fifteenth part of whatever was payable to holders of stock residing out of the state, and to pay it into the state treasury, was violative of this provision of the Constitution; the court saying: "It is obvious that the power of a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with this constitutional provision. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy an immunity of which the latter would be deprived." See also *Corfield v. Coryell*, 4 Wash. C. C. 381; *Campbell v. Morris*, 3 Harr. & M'H. 554; *Crandall v. State*, 10 Conn. 344; *Wiley v. Parmer*, 14 Ala. 627. Section 1978 of the Revised Statutes of the United States provides: "All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." If, however, the state imposes upon the citizens of another state a tax upon their right of inheritance which it does not impose upon its own citizens, they do not have the "same right" to inherit property as is enjoyed by the citizens of that state. It must be held, therefore, that it is not within the power of the state, while exempting its own citizens from a tax upon their inheritances, to impose such tax upon the inheritances falling to citizens of other states.

4. It is then contended on behalf of the respondent that, by reason of the invalidity of this clause in the amendatory statute, the entire provision for exempting the succession of nieces and nephews from the tax must fail. A comparison of the statute as amended with the original statute makes it very evident that the purpose of the legislature was to include nephews and nieces with other relatives of the decedent whose inheritances should not be liable to the tax. The position in the section of the added clause—being placed in connection with other near relatives of the decedent—implies that the legislature intended them to be exempt from the tax equally with the other enumerated relatives. The clause "when resident in this state" was intended as a limitation upon the extent of the exemption, and not as a condition upon which the exemption should be extended to any of the nephews and nieces. That the legislature intended that the exemption should extend to nephews and nieces resident in this state is evident from its language, and that it did not intend that the exemption should extend to nephews and nieces not resident in this state is equally evident. But its intention in this latter respect fails by reason of its 45 L. R. A.

want of power to make such discrimination between the two classes. The statute is therefore within the rule of construction that, if the objects of a statute are so severable that one is not dependent upon the other, effect will be given to the object which is valid, while that which is invalid will be rejected, and the statute construed as if the invalid part had never been enacted. Mr. Cooley says (page 211): "If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained." See also *People v. McCreery*, 34 Cal. 433; *Hale v. McGettigan*, 114 Cal. 112; *People, ex rel. Angerstein, v. Kenney*, 96 N. Y. 294; *Com. v. Hitchings*, 5 Gray, 482; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59.

5. It is not contended by the respondent that the bequest to the Leland Stanford Junior University is subject to the tax, if the provision making such exemption applicable to past cases is valid. The order is reversed, and the superior court is directed to make its order for the payment of the tax in conformity with the foregoing opinion.

Lucy HITE, *Respt.*,
v.

John R. HITE, *Appt.*

(.....Cal.....)

1. Ordering a man to pay alimony and suit money without having had his day in court and a hearing on the question of the marriage, when that is denied, is a taking of his property without due process of law.
2. A prima facie case of marriage on the plaintiff's own showing, without a preponderance of evidence, when there is a counter showing, is not sufficient to entitle her to alimony and suit money in an action for divorce, but the judge should be satisfied from the entire proof made of the fact of marriage.

(McFarland and Garoutte, JJ., dissent.)

(May 13, 1899.)

APPEAL by defendant from an order of the Superior Court for Mariposa County granting suit money and temporary alimony to plaintiff in a divorce proceeding. *Reversed.*

The facts are stated in the opinions.

Messrs. W. W. Foote, F. J. Castlehurn, and Congdon & Congdon, for appellant:

Discretion is given the court to require the payment of alimony and costs by the husband

NOTE.—On the question of the proof necessary to authorize an allowance of temporary alimony, see also *Harding v. Harding* (Ill.) 21 L. R. A. 310.

For proof of wife's residence as condition of recovering alimony, see *Miller v. Miller* (Fla.) 24 L. R. A. 137.

to the wife, but not to compel a man to pay money to a woman who may not turn out to be his wife.

Vreeland v. Vreeland, 18 N. J. Eq. 43; *York v. York*, 34 Iowa, 530; *McFarland v. McFarland*, 51 Iowa, 565; *Smith v. Smith*, 61 Iowa, 138; *McKenna v. McKenna*, 70 Ill. App. 340.

Prima facie proof can only mean that the evidence produced on the hearing of the motion shows an apparent preponderance in favor of the applicant. In other words, the claimant must establish "a fair presumption of the fact of marriage or a reasonably plain case of the existence of the marital relations."

Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; *Collins v. Collins*, 71 N. Y. 279, 80 N. Y. 1; *Carroll v. Carroll*, 68 Mo. App. 190; *Bowman v. Bowman*, 24 Ill. App. 165; *York v. York*, 34 Iowa, 530; *Vincent v. Vincent*, 16 Daly, 534.

When the intercourse was illicit in the beginning, it is presumed to continue.

York v. York, 34 Iowa, 530; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *White v. White*, 82 Cal. 427, 7 L. R. A. 799; *Humphreys v. Humphreys*, 49 How. Pr. 140; *Hopper v. Hopper*, 92 Hun, 415; *Appleton v. Warner*, 51 Barb. 270.

If the defendant held out plaintiff to the world as his wife, he must have done so by open and undisguised acts, which were visible to and observable by their friends, neighbors, and acquaintances.

Hinckley v. Ayres, 105 Cal. 357.

This court has frequently reviewed the action of the trial court when there has been a conflict in the evidence.

Field v. Shorb, 99 Cal. 666; *Wilson v. Cross*, 33 Cal. 60; *Lander v. Beers*, 48 Cal. 546; *Reynolds v. Snow*, 67 Cal. 497; *Tuller v. Arnold*, 93 Cal. 166.

Messrs. Rodgers & Paterson for respondent.

Temple, J., delivered the opinion of the court:

This is an appeal from an order allowing alimony and suit money in an action for a divorce. Plaintiff contents herself in her complaint, so far as her cause of action is concerned, with the averment of her marriage to defendant, and a charge of adultery against him. Defendant denies the marriage, and avers that the person with whom he is charged to have committed adultery is his lawful wife. He also charges that plaintiff, since her alleged marriage to him, has had illicit relations with other men. The order or judgment appealed from was made after notice and a hearing upon which many affidavits were read, as were also depositions of the parties. In addition to the showing as to the lack of means and the faculties of the defendant, the plaintiff states that she will require thirty or forty witnesses, many of them to prove that the parties have cohabited together as husband and wife, and are generally reputed to be such, and that the defendant has frequently so represented. In her deposition she states that the contract consisted simply in this: That the defendant

said to her, "You are my wife;" that no witnesses were present; and that she had refused longer to live with defendant unless he married her. These facts are specifically denied by the defendant. He admits the cohabitation, and that he has supported the plaintiff, but he avers that she is an Indian woman, who had, prior to his relations with her, been kept by many other men, by one of whom (Gibbs) she had a son, Thomas H. Gibbs, who makes an affidavit on her behalf in this case. Defendant also states that since she commenced living with him she has several times left him, living with other men; and that she sometimes went with the Indians to their fandangoes, and returned when she chose. He denies that either ever supposed the relations to be matrimonial, or that he ever called her wife, or represented her to be such. He says that he never even spoke to her upon the subject, but he admits that he supported her and her son. Thomas H. Gibbs, the illegitimate son of the plaintiff, corroborates the statements of his mother, and says he "was always told and led to believe by said John R. Hite that plaintiff was the wife of said John R. Hite." Plaintiff also read the affidavit of one James D. Westfall, who deposed that on one occasion defendant introduced plaintiff as his wife, and also that the parties were generally reputed to be husband and wife. This constitutes the evidence of plaintiff upon the issue of marriage. The defendant, in addition to his specific denial, read the depositions of ten other persons, all of whom depose that they were intimate acquaintances of both parties, and well acquainted in the neighborhood where they lived. They unite in saying that neither party ever claimed to be married to the other, and they were not, at any time, reputed to be husband and wife. Some of them corroborate other statements made by defendant as to illicit relations of plaintiff with others. In addition, the reputation of Gibbs, plaintiff's son and main witness, was attacked.

Appellant contends that the showing was insufficient to justify the action of the court in granting alimony. The testimony of plaintiff in regard to the contract of marriage was in itself quite unsatisfactory, especially when taken in connection with the charge in defendant's affidavits, which she does not deny, that she had, before her cohabitation with defendant, and even since, had improper relations with other men. Under such circumstances it is difficult to believe that an Indian woman would object to further relations except upon condition of marriage. The positive denial of the defendant is certainly sufficient to overcome this testimony under such circumstances. The matter must then depend upon the evidence of common repute, and no one would contend that the plaintiff did show a common, uniform, and undivided repute of marriage. But I think it evident that the court did not determine the question of marriage at the hearing. The judge doubtless adopted the views of plaintiff's counsel upon the subject, and concluded that it was only necessary to

hold that plaintiff had, by her affidavits, made out such a case as would throw the burden of proof upon the husband. To justify alimony, marriage must be admitted or proved. Upon this subject there is no difference in the authorities. Plaintiff's counsel contends that it is proved within the meaning of this rule, when the wife, upon her showing, makes a prima facie case, regardless of the denials or proof produced by the husband. He says it is a novel proposition that on the hearing for temporary alimony plaintiff must produce a preponderance of evidence. He claims this would be equivalent to saying: "Prove your case by a preponderance of evidence, and then you shall have an allowance to enable you to make such proof." He also says: "In this case the plaintiff made a prima facie case, and if the defendant had produced a hundred witnesses in an attempt to overcome her affidavits, the result would be the same. Indeed, it would be only stronger reason for allowing her means sufficient to procure the evidence which she and her counsel, who had talked with the witnesses, say she can produce, if given the means to do so." And this, I think, is really the question in the case: Was it sufficient, to entitle the plaintiff to alimony and suit money, for her to make by her own showing a prima facie case? I believe there is no authority for that position. If the marriage were admitted, then, upon a showing of the wife's necessities and the faculties of the husband, the allowance is almost a matter of course. It is otherwise when the marriage is denied. Then, before alimony can be allowed, the marriage must be proved; and a prima facie showing made by the wife when there is a counter showing is not sufficient. The judge should be satisfied from the entire proof made of the fact of marriage. Unless upon that question the husband has had his day in court, and a hearing, if alimony is allowed, his property is taken without due process of law. This precise question has not been considered, or even suggested, in any case to which my attention has been called, except in *McKenna v. McKenna*, 70 Ill. App. 340. It was there said that in such case—when the marriage is denied—the order cannot properly be made "until a hearing has been had, and the court upon it finds and adjudges that the relation of wife and husband exists." The hardships which might result from either doctrine is there very tersely stated. The learned judge quotes from *Schonwald v. Schonwald*, 62 N. C. (Phil. Eq.) 219, to the effect that it is better when a woman makes oath of the fact of marriage to make an allowance, although the oath may turn out to be false, than that a wife may be in danger of starvation "if a brutal husband makes oath denying the fact of marriage, which may turn out to be false;" to which the Illinois judge replies that "the more accurate statement would be that it is better to compel any man to pay temporary alimony and expenses of suit to any woman who may see fit to make oath that he is her husband, however strongly he may deny the accusation, rather than

allow her to be in want of money which he has." Whatever hardships may result, the court cannot lawfully take by final decree money from A and give it to B, whatever may be the necessities of B, when A disputes the facts upon which his liability is made to depend, without a trial and a determination of the issues made. The hardship to B cannot modify the imperative rule of law and the absolute constitutional guaranty. It is not such a trial, and there can be no such finding, when a man is merely called into court to see whether one claiming to be his wife has in her pleadings and affidavits made a prima facie case. He must be heard, and be allowed to submit evidence, which must be considered in determining as to the fact of marriage. But that opportunity need not be on the trial of the case itself. The application for alimony, though it cannot be considered a separate suit, is a proceeding for a separate judgment, which, when granted, has nothing to do with the final judgment in the case, and will not be affected by it. It is a final judgment, from which an appeal may be taken. *Sharon v. Sharon*, 75 Cal. 1.

To satisfy the requirement of due process of law it is not always necessary that such a trial should be afforded as is had in ordinary suits in courts of justice. The hearing allowed must be such as is practicable and reasonable in the particular case. *Cooley*, Const. Lim. 434. See also *Ex parte Ah Fook*, 49 Cal. 406; *Lent v. Tillson*, 72 Cal. 404. *Cooley* says the opportunity to be heard must be such as "the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs." It has been the practice to determine as to the allowance of temporary alimony, upon motion with notice and upon affidavits. The defendant is thereby afforded an opportunity to be heard. Many cases are cited by respondent's counsel which he contends hold that all that is required on the part of the wife to justify an allowance of alimony is that she, by her showing, shall make such a case as upon a trial of the issue would cast the burden upon the husband. It is not necessary to review all the cases, but the case of *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460, is much relied upon, and concerning it a few remarks may be made. That case has some likeness to this. A contract marriage was alleged, with subsequent cohabitation. The wife alleged that defendant on many specified occasions introduced her as his wife, that they were received as husband and wife by reputable acquaintances, and such was their common reputation. The husband denied the marriage, and that he had by word or act at any time or place given the least foundation for the supposition or charge that plaintiff was his wife. He denied that their cohabitation was matrimonial, but averred that plaintiff was of unchaste character and person, and her relation with defendant was libidinous, and unsanctioned by law. In other words, he admitted the cohabitation, but claimed that it was

meretricious from the beginning. Judge Folger did not say that this was not a denial of a fact essential to constitute marriage, but the contrary. Cohabitation, and holding out to the world that the persons so cohabiting are married, and general reputation, though all admitted, do not of themselves constitute marriage. But they authorize the presumption of the other fact, to wit, that the cohabitation was with matrimonial intent. This last fact was denied by Brinkley. The court did consider the affidavits of defendant, but concluded that they did not overcome the case made by the plaintiff. The judge did say that the question was not whether the evidence would be sufficient to justify a final decree, but whether "the proofs of the parties give reason to apprehend that upon a trial of the issues between them there is the fair probability that the plaintiff will maintain her allegations;" that is, Does the evidence submitted by both show that probably plaintiff will prevail? I do not understand how this could be unless there was upon that hearing a preponderance of evidence in favor of marriage, although, inasmuch as the trial was not as complete nor the evidence of as high a grade as upon the trial of the issues in the case, it would not justify a final decree, or a finding which would be an estoppel. Judge Folger evidently thought that when Brinkley admitted that they had cohabited as husband and wife in the face of the world, and had associated with intimate acquaintances who were reputable people, as though the relation was honorable, it raised a presumption of marriage, not overcome by the general denials of the defendant and his claim that the relation was meretricious. Innocence and morality are to be presumed, rather than the opposite. This is put very strongly by Judge Folger. He says the defendant admits facts and circumstances presumptive of marriage, but says of them "that, though apparently proper and rightful, they were but the cover for a meretricious and libidinous connection begun and continued in impurity," and that the issue was whether the cohabitation was honorable and matrimonial, or "the unsanctioned fornication of a lecher and a wanton." This view was taken of that case in *Collins v. Collins*, 71 N. Y. 209. There the wife made, beyond doubt, a prima facie case, but the husband averred that the *de facto* marriage, which he admitted, was void, and the court held that it was error to allow temporary alimony until that question was settled. The principal difference between this case now in hand and the *Brinkley Case* is that this defendant denies that he ever represented the plaintiff to be his wife, or that they were reputed to be such. In the *Brinkley Case* these facts were admitted. We are not called upon here to say that it is necessary, in order to justify the allowance of temporary alimony, that a marriage *de jure* must be shown. The rule upon this subject is discussed by Mr. Bishop in his work on Marriage, Divorce, and Separation (§§ 922 *et seq.*). All the evidence here tending to show marriage at all tends to prove a marriage *de*

jure, and such was also the fact in the *Brinkley Case*, although counsel seem to have understood that case differently. I think the superior court did not intend to hold upon all the evidence before it,—that of defendant as well as that submitted by plaintiff,—that there was a preponderance in favor of the fact of marriage; and, if it must be held that it did so adjudge, there was a plain abuse of discretion.

Judgment and order reversed.

We concur: **Van Dyke, J.; Henshaw, J.**

Beatty, Ch. J., concurring:

I concur in the judgment of reversal. It is only a wife who can claim alimony (Civil Code, § 137), and, when the fact of marriage is in issue and unproved, there is no one in that position. To allow a woman alimony for the purpose of enabling her to prove that she is a wife seems to me to involve a glaring absurdity, and to allow it every time she makes a prima facie case of marriage by her pleading or affidavit would result in something more serious than an absurdity. If a husband sues for a divorce, alleging a marriage, of course there can be no question of the right to alimony, if he is able to pay and the wife is in need. If he sues to annul a marriage upon the ground that it was void *ab initio* by reason of fraud, precontract, insanity, etc., the granting of alimony *pendente lite* would be proper, because a formal marriage is alleged, and will remain a lawful and established marriage in the absence of affirmative proof by him of the existence of some fact or facts which will invalidate it. In such a case I concede the propriety and justice of allowing the wife (for until the fraud or other invalidating circumstances are established she is the wife) money to make her defense. But when a woman sues for a divorce, and is met at the very threshold of the proceeding by a denial that she ever was a wife, the case is entirely different. She must establish the marriage before she can claim alimony or suit money, and she must establish it at a trial, and by satisfactory evidence. Even if this conclusion involved the inconveniences and hardships which counsel have depicted in their arguments, it would be none the less inevitable, but, in my opinion, such instances of hardship will rarely, if ever, arise. In a case of this aspect the plaintiff is not limited to a bare allegation of marriage in general terms. She may allege the specific facts from which the inference of marriage arises, with all the circumstances of time and place, and the defendant, in order to put the fact of marriage in issue, will be compelled, not only to deny marriage in general terms, but also to make specific denials of the facts which prima facie constitute marriage. To make such denials, he must expose himself to the danger of being convicted of perjury if the facts alleged are true. If it be said that this is not sufficient security to plaintiff, I answer that it is at least equal to any security the defendant or the court can have that the plaintiff's claim

is not wholly fictitious. In this case the defendant makes a complete denial of the facts alleged by plaintiff as constituting a marriage; and until that issue is tried and determined by final judgment the plaintiff has no claim upon him as his wife. Undoubtedly there are numerous cases in this country which can be cited in opposition to this view, but the sounder reason and the more trustworthy authorities sustain it. In my opinion, it is sustained by the reasoning of Judge Folger in the case of *Brinkley v. Brinkley*, cited by Justice Temple, and still more fully sustained by the decisions to which Judge Folger refers. Of course, it has been assumed in what has been here said that there is no serious contention on the part of the respondent that the superior court has tried and finally determined the issue of marriage in her favor. There is, in fact, no such claim. The whole argument in support of the order appealed from is that it required only a prima facie showing by *ex parte* affidavits to sustain it, and that the issue of marriage is still to be tried.

Harrison, J., concurring:

Further consideration upon the rehearing of the question involved herein has led me to the conclusion that the court erred in making the order appealed from. The question involved in the appeal is to be determined by the statutes of this state, irrespective of the decisions thereon by the ecclesiastical and chancery courts of other jurisdictions, however serviceable the opinions of those courts may be in arriving at a proper construction of the statutes. "The Code establishes the law of this state respecting the subjects to which it relates" (Civil Code, § 4), and § 137 of the same Code provides: When an action for divorce is pending the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children or to prosecute or defend the action." As such order can be made only in behalf of the wife, it is essential that the applicant for the order make it appear to the court that she is the wife of the respondent. In an action for divorce by the husband it would appear from his complaint that the defendant is his wife, and no further showing of this fact would be required; but in an action by the wife, if the defendant denies that the plaintiff is his wife, she must establish the relation between them to the satisfaction of the court before she can be entitled to the order. The existence of this relation would be the main issue in the action, and would need to be affirmatively established before any decree of divorce could be rendered; but I do not think that the mere denial by the defendant that the plaintiff is his wife ousts the court of power to make an order requiring him to provide her with means to prosecute the action, or for her support during its pendency. An application for alimony can be made only "while an action for divorce is pending," and to this extent it is dependent upon the issues involved in such action; but the granting or refusal thereof is not dependent upon the

final determination of the issues in the action, or available in the determination of those issues. It is a collateral proceeding or episode within the action, authorized for a particular purpose, but dependent for its maintenance upon the existence of the action. It is to be heard and determined upon a record of its own, and the decision thereon may be made, and may be the subject of an appeal, before the determination of the issues in the action. The evidence offered in its support may or may not be the same as that which will be offered upon the trial of the issues presented by the pleadings. Being authorized for a special purpose, the decision thereon is limited to that purpose, and can be no more available for the determination of the issues in the action than is the preliminary determination upon an order for the publication of a summons that a cause of action is stated in the complaint, or that an order for family allowance to one claiming to be the widow of the decedent is available at the distribution of the estate. If, upon the application, the fact of marriage is denied by the defendant, it is to be determined, like any other question of fact, upon the evidence offered in its support, and should be denied unless the evidence thus offered would be sufficient to justify the court in granting a divorce, if the action were submitted upon that evidence at the final hearing.

Upon the hearing herein the defendant denied that there had ever been any intermarriage between him and the plaintiff, and there was no direct evidence of such marriage. I do not think that the deposition of the plaintiff was entitled to any consideration by the court for the establishment of this fact. The evidence contained therein consisted merely of her assent to statements of fact made by her counsel, and it sufficiently appeared, both by her own statement and by the character of her responses to the questions put to her, that she could neither speak nor understand the English language. The plaintiff sought to establish the marriage between them by evidence of repute, and for that purpose offered the affidavits of two persons to the effect that she was reputed to be his wife. In response thereto the defendant read the affidavits of several persons to the effect that the parties were never reputed to be married in the community in which they lived. Repute of marriage is but hearsay, and the fact of marriage is not established by reputation unless it appears that the reputation is uniform. Hearsay ceases to be entitled to any weight as evidence unless it is uniform, and it is only by reason of its uniformity that it will, in any instance, authorize the presumption of a fact. The court is not at liberty to determine the fact upon a preponderance of the hearsay, but, if it is divided, it must be rejected entirely. "Where reputation is relied on, that reputation, to raise the presumption of marriage, must be founded on general, not divided or singular, opinion: and, where reputation in such case is divided, it amounts to no evidence at all." *Barnum v. Barnum*, 42 Md. 297. Cohabitation of a man and woman

gives rise to reputation of their marriage, because the presumption from one's conduct is in favor of innocence, and their cohabitation is presumed to be consistent with good morals, and therefore matrimonial; but, if their cohabitation is shown to have been illicit in its origin, the presumption of innocence is overcome, and the continuous cohabitation will be presumed to be illicit. If, during its continuance, their cohabitation is changed from an illicit to a matrimonial character, the burden of showing this fact is upon the one who would avail himself of the effect of the change. It clearly appears herein that the intercourse of the plaintiff with the defendant was illicit at its commencement, and so continued for many years, and there was no evidence except that of the plaintiff of any change in its character; but, as above stated, her evidence was not entitled to any consideration. Moreover, presumptions are resorted to for the establishment of facts only in the absence of direct evidence upon the facts sought to be established; and it is a rule in the consideration of evidence that when it is within the power of a party to produce direct evidence of the fact, and instead of doing so he produces evidence of an inferior character, it will be presumed that the direct evidence would be adverse to his claim.

The contention on the part of the respondent that when the fact of marriage is put in issue it is only necessary for the wife to make a *prima facie* showing in order to entitle her to alimony for the prosecution of the suit, as well as the contention by the appellant that if he is compelled to pay alimony to the plaintiff prior to the determination of the action, and while it may be finally determined that she is not his wife, he will be deprived of his property without due process of law, is fully considered in the opinion of Mr. Justice Temple, and I concur in his views thereon. If the fact of marriage is denied by him, he is as much entitled to a hearing, and an opportunity to controvert the showing made by the plaintiff upon her application for alimony, as at the final hearing of the action; and in either case the issue thus presented is to be determined by the court upon a preponderance of the evidence thereon. If, upon her application, he is given such a hearing as is appropriate to the character of the controversy, or, as is usual in such cases, with the opportunity to controvert her claim as fully as he may desire, he receives all the protection to which he is entitled by law.

In view of the principles which should have governed the court in considering the evidence offered at the hearing of the plaintiff's application, I am of the opinion that there was no evidence before it tending to show a marriage between the parties, and that her application should have been denied.

McFarland, J., dissenting:

I dissent, and think that, for the reasons given in the opinion in department, the order appealed from was there properly affirmed, and should be adhered to. It seems to be ad-
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mitted that in a divorce suit, although the marriage be denied, still an allowance for alimony to the wife may be rightfully made before the determination of the issue of marriage at the final hearing of the case. But that would be of little advantage to the plaintiff if at the preliminary hearing "the marriage must be proved" in the sense in which that proposition is meant in the opinion of the majority of the court. In the case at bar the issue of marriage or no marriage is the main issue in the case, and according to the majority opinion she cannot be allowed any aid for the purpose of procuring evidence on that issue unless, without such aid, she had already proved it. Although she may have no means at all, she must still rely entirely upon herself in obtaining evidence and procuring counsel in support of her side of that issue. Whether or not she has made sufficient proof at the preliminary hearing to warrant the court in allowing her aid in preparing herself for the final adjudication of that issue is a question in the first instance for the exercise of the discretion of the trial court, and in passing upon the conclusion of the trial court upon that point this court is estopped, in my opinion, from disturbing that conclusion if there be a fair and material conflict of evidence upon the issue. In the case at bar there is no doubt that the respondent produced evidence tending strongly to establish the fact that there was a marriage. It is true that appellant also produced evidence on the other side of that issue, but I do not think that, under the well-established rule touching conflicting evidence, we are warranted in disturbing the conclusion of the court below. Respondent was clearly entitled, in my opinion, upon the showing made by her, to have aid from the appellant in procuring evidence to be used upon the final determination of that issue.

Appellant seems greatly impressed with the danger of some well-to-do husband being compelled to contribute to the prosecution of a suit brought by some woman who falsely swears that she is his wife; but no fear seems to be entertained that a husband may prevent an injured wife from obtaining means to prosecute a just suit by simply averring that he is not her legal husband.

Appellant seeks to emphasize the fact that the plaintiff is an Indian, but it is entirely immaterial what race she belongs to. Appellant selected and enjoyed her as his chosen companion through the youth and prime of her womanhood. When he discarded her it was evidently not because she was an Indian, but because she was then an old Indian.

Garoutte, J., dissenting:

It is held in the majority opinion in this case that when alimony and suit money *pendente lite* is prayed for in an action for divorce, the marriage being denied, then upon the preliminary hearing the fact of marriage must be established by a preponderance of evidence, or the application should be denied. Upon the final hearing it is only necessary to establish the marriage by a prepon-

derance of evidence. Hence, if the conclusion of the court be sound, the result is that in every case where the marriage becomes an issue of fact there can be no such thing as alimony and suit money; for, if the woman is able to establish the marriage by a preponderance of evidence without the money to assist her, she has no need of the money, and her application should be denied for that reason. If she can establish the fact of marriage upon the preliminary hearing by a preponderance of evidence, without money, she can as readily establish that fact upon the final hearing without money. If she be able to establish the fact of marriage by a preponderance of evidence without money, then she need not go to the trouble of establishing that fact until the final hearing. It is thus made plain that the entire reason of the rule—the principle upon which the rule rests—is all gone when it is held that the fact of marriage upon the preliminary hearing must be established by a preponderance of evidence. It may be admitted that the conclusion declared by Justice Temple is supported by persuasive reasons, yet we find no court in this country sustaining the proposition, unless the decision in *McKenna v. McKenna*, 70 Ill. App. 340, is that case. In the leading case of *Brinkley v. Brinkley*, 50 N. Y. 184, Chief Justice Folger labored hard, but with somewhat indifferent success, to lay down the rule which should guide nisi prius courts in their determination as to when temporary alimony and suit money should be allowed the wife in cases where the marriage is denied. The New York court in that case, speaking by the mouth of the chief justice, says: "It may be said, too, that for the purposes of an application for temporary alimony there will not need that the fact of marriage be so conclusively established as for the purpose of permanent alimony, or any other ultimate purpose of the action." In the same opinion it is also said: "Yet if the matters contained in other papers or shown by legitimate proofs before the court make out, in the judgment of the court, a fair presumption of a fact of marriage, it has the power to grant alimony pending the action, and expenses of the action." It is again said in the same case: "The question now before us, however, is not whether, upon the proofs as shown by the parties, a final judgment should be rendered that there has been an actual valid marriage between the parties, and whether a limited divorce should be adjudged with a permanent separate maintenance for the plaintiff, to be provided by the defendant. The question now is, Do the proofs of the parties give reason to apprehend that upon a trial of the issues between them there is the fair probability that the plaintiff will maintain her allegations?" In *Collins v. Collins*, 71 N. Y. 274, the same court that decided the *Brinkley Case* declares the *Brinkley* decision to be "that it was not necessary that the marriage be established as conclusively as would be required for the ultimate purposes of the action, but that the plaintiff must make out a reasonably plain case of the existence of the

marital relation, and she would then be furnished with the means of temporary support, and of conducting the suit until the truth or falsity of her allegations could be ascertained." In the *Collins Case* the rule is thus declared: "The plaintiff is bound to present a case to the court showing that she has a fair prospect of success in the action, and that she controverts and intends to litigate the matter set up by the defendant, and has reasonable grounds for doing so." In *Vincent v. Vincent*, 16 Daly, 534, the court said: "But, as in other preliminary contestations, the fact is not to be established with the clearness and conclusiveness exacted of proof as the basis of a final adjudication upon the rights of the litigant parties; but it suffices if on an application for alimony the putative wife makes out 'a reasonably plain case of the existence of the marital relation,'"—citing *Brinkley v. Brinkley*. In *Sharon v. Sharon*, 75 Cal. 43, it is said: "In a suit for divorce, when the marriage is denied by the defendant's answer, three things must be made to appear on application for temporary alimony: the marriage,—by satisfactory evidence showing, at least prima facie, a marriage in fact." I cite the foregoing authorities to show that the rule of law declared by the majority opinion as to the quantum of evidence necessary to be produced by the wife at the preliminary hearing to support the fact of marriage is opposed to the great weight of authority. Yet I am free to say the true solution of the question presents difficulties of no small proportions,—difficulties that I am not willing to meet unless necessity demands it, and here I find no such necessity; for, even conceding the rule of law to be as stated by the learned writer of the majority opinion, namely, the marriage must be established by a preponderance of evidence, then, under such rule, this order should be affirmed.

The reasons for the affirmance of this order are these: Upon the trial of any issue of fact in a civil action it is not for this court to say, upon appeal, that the evidence preponderates in favor of the plaintiff, or that the evidence preponderates in favor of the defendant. This court has nothing to do with the preponderance of evidence. It has so decided times innumerable. It is even a rule universally invoked by this court against the defendant in criminal cases. Under all authority in this state it is for the trial court to say which way the evidence preponderates; and, when that court has so declared, the matter of preponderance of evidence is forever foreclosed from investigation by this court. Treating this proceeding for alimony and suit money with all the dignity of a civil action, conceding that it is to be tried and decided exactly by the same rules of law as any civil action, then the only question here is, Does this record present a substantial conflict in the evidence as to the fact of marriage? And this question is not to be determined by the great number of witnesses upon the one side and the limited number upon the other, for it is often the case that the weaker side in number and in money

is the stronger in right. Hence the fact that the plaintiff is an Indian woman, and her son an illegitimate son, furnishes no reason why this court may cast aside their evidence. Either as matter of law or matter of fact it cannot be said that an Indian woman or an illegitimate son is not to be believed under oath.

Let us pause a moment to look at the evidence. A great portion of it is without substantial conflict, as follows: Hite lived with this woman for twenty-five years. During that time he furnished her with all the necessities of life. He gave her a house in which to live. He was the father of her child. His sister visited her at this house, and slept with her. His nephews visited her at this house, and addressed her as "Aunt Lucy." He sent her illegitimate son to school, and paid the expenses of his schooling. He treated this son as his own son, and he was always considered and reputed in the neighborhood to be the stepson of defendant, Hite. In addition to this uncontradicted evidence, we have the testimony of Thomas Gibbs, the illegitimate son, to the effect that the plaintiff is known far and near throughout the southern part of California as the wife of John R. Hite; that defendant has introduced plaintiff as his wife, and held her out to the world as his wife continuously; that defendant's relatives and friends have as-

sociated freely with plaintiff, and visited plaintiff as the wife of defendant. We also have the testimony of one Westfall, to the effect that plaintiff and defendant were known in that neighborhood and adjoining counties as husband and wife; that the plaintiff was everywhere called "Mrs. Hite" and "Lucy Hite, wife of John R. Hite;" and that plaintiff and defendant held themselves out to the world, and were always treated, as husband and wife. From this condensed statement of the showing made by the plaintiff I feel entirely satisfied in saying that she is entitled to alimony and suit money, in order that she may be able to meet the defendant squarely at the trial of the case upon the issue of marriage or no marriage.

I fail to comprehend how it may be said from the record that the trial judge decided this case upon a wrong theory. There is not a word in the record to indicate it. Upon the contrary, the fact that the hearing was had after notice to the other side, and that upon such hearing defendant introduced a great mass of evidence to support his claim of no marriage, indicates convincingly to my mind that the trial judge heard and decided the case upon the right theory, and that his conclusion was based upon all the evidence placed before him by both parties to the litigation. I think the order should be affirmed.

KENTUCKY COURT OF APPEALS.

Martin BRIDGES *et al.*, *Appts.*,
v.

William McALLISTER.

(.....Ky.....)

1. Acts done pursuant to a subsisting judgment which is afterwards reversed cannot be made the basis of an action for damages for tort.
2. A judgment against an employee in favor of a third person whose rights are affected by what is done in the course of the employment is binding on the employer, when he knows of the suit and testifies in it as a witness.

(June 9, 1890.)

NOTE.—Liability for tort in doing acts authorized by subsisting judgment which is afterwards reversed.

This note does not cover the subject of the restitution of property, or its equivalent in case it cannot be restored *in specie*, nor the question whether in the latter event an action in tort will lie to recover its value; but treats only of liability beyond that arising from the duty to restore property or its equivalent.

There are but few cases in point, and they are in substantial harmony with the principal case.

The prevailing doctrine is that the reversal of a judgment which is merely erroneous as distinguished from one that is irregular, void, or voidable merely creates a right, *ex æquo et* 45 L. R. A.

A PPEAL by defendants from a judgment of the Circuit Court for Davies County in favor of plaintiff in an action to recover damages for the closing up of a ditch and throwing water back on plaintiff's land. *Reversed.*

The facts are stated in the opinion.

Messrs. George W. Jolly and Horace Jolly, for appellants:

A judgment, though subsequently reversed for error, furnishes full protection for all acts done under it in enforcing it, prior to its reversal.

Freeman, *Judgm.* §§ 104b, 482; Black, *Judgm.* §§ 170, 355; *Simpson v. Hornbeck*, 3 *Ians.* 53; *Clark v. Pinney*, 6 *Cow.* 297; *Allen v. Huntington*, 2 *Aik. (Vt.)* 249, 16

bono, to have restored what has been lost, and that it does not relate back so as to render wrongful acts done under the judgment which were justified at the time.

Mark v. Hyatt, 135 N. Y. 306, 18 L. R. A. 275, holds that an action of trespass will not lie to recover damages caused by a permanent prohibitory injunction erroneously granted and subsequently reversed, but which was within the jurisdiction of the court, unless the prosecution was malicious. The court says, even if the injunction were void the damages resulting from obedience to it could not be recovered by defendant in the injunction action, since they resulted from his voluntary and needless act. The trespass results, not from the mere granting of the void judgment or process, but from the performance of some affirmative act under

Am. Dec. 702; *Kaye v. Kean*, 18 B. Mon. 847; *Clark v. Rodas*, 12 Bush, 16.

Judgments are conclusive on not only the parties to the record, but also on all who are in privity, and on the master where the servant is sued, and on the principal where the agent is sued, if the master or principal had notice of the pendency of the suit.

Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627; *Hill v. Bain*, 15 R. I. 75; *Herman, Estoppel & Res Adjudicata*, §§ 150, 152; *Freeman, Judgm.* §§ 174, 175; *Schmidt v. Louisville, C. & L. R. Co.* 99 Ky. 143; *Castle v. Noyes*, 14 N. Y. 329; *Alexander v. Taylor*, 4 Denio, 302; *Jackson v. Griswold*, 4 Hill, 522; *Robbins v. Chicago City*, 4 Wall. 672, 18 L. ed. 430; *Blasdale v. Babcock*, 1 Johns. 519; *LeNeve v. LeNeve*, 3 Atk. 646; 2 White & T. Lead. Cas. Eq. 160, note.

A plea that the matters involved in the suit had been, for a valuable consideration, before the suit was commenced, compromised and settled between the parties to the suit, is a good defense to the action.

There was no evidence to support the verdict, and peremptory instruction should have been given, because the plaintiff's own evidence proved he was not in possession of the crops; that the crops belonged to his tenants, none of whom were parties to the suit.

Chicago & W. M. R. Co. v. Linard, 94 Ind.

It by the party from whom the damages are sought.

The question as to the right to recover damages caused by an erroneous or void judgment is discussed in a note to the latter case in 18 L. R. A. 275.

Thompson v. Reasoner, 122 Ind. 454, 7 L. R. A. 495, holds that an action in tort will not lie to recover damages for injury to land from the casting of surface water thereon from a drain constructed in good faith pursuant to a judgment subsequently reversed for error.

Simpson v. Hornbeck, 3 Lans. 53, holds that an arrest under a body execution upon a judgment subsequently reversed for error will not support an action for false imprisonment. The opinion says that an action to recover back money collected under a judgment afterwards reversed is not founded upon any supposed wrong in collecting it, but upon the ground that in equity and good conscience it ought to be paid back.

The same rule and distinction are applied by *Bryan v. Congdon*, 57 U. S. App. 505, 86 Fed. Rep. 221, 29 C. C. A. 670, and *Fisher v. Langbein*, 62 How. Pr. 238, to an order of arrest reversed on appeal.

Chapman v. Dyett, 11 Wend. 81, 25 Am. Dec. 598; *Marks v. Townsend*, 97 N. Y. 590; *Landt v. Hiltz*, 19 Barb. 283; and *Hall v. Munger*, 5 Lans. 100,—hold that an arrest under an erroneous order subsequently set aside by the court granting it will not support an action for false imprisonment, distinguishing between erroneous and irregular orders.

Day v. Bach, 87 N. Y. 56, holds that an action for conversion will not lie against an attachment creditor for property taken under an attachment vacated on appeal where the property was sold as perishable pending the appeal and the attachment creditor received none of the proceeds. The opinion says that it is well settled that a process that is merely erroneous protects a party for acts done under it while 45 L. R. A.

319, 48 Am. Rep. 161; *Bridgers v. Dill*, 97 N. C. 222.

The measure of damages for destruction to growing crops is not the rental value of the land, but the value of the crops at the time of their destruction.

Sedgw. Damages, 18th ed. §§ 434, 435, 927; *Sabine & E. T. R. Co. v. Smith*, 73 Tex. 1; *Byrne v. Minneapolis & St. L. R. Co.* 38 Minn. 212.

Mr. R. G. Hill also for appellants.

Messrs. Sweeney, Ellis, & Sweeney and Walker & Slack for appellee.

Hobson, J., delivered the opinion of the court:

Appellants and appellee own neighboring farms. Between their lands there was a ridge, which prevented the water falling on appellee's land from flowing down naturally over appellants' land. Both farms lie in a very level section, where there is difficulty about drainage. Some years ago the owners of the land above the ridge, and some of those below, united in an undertaking to cut a ditch in a southerly direction, through the ridge, to Panther creek, for the purpose of draining all their land. The ditch was cut through the ridge, but, for want of means to complete it, there stopped. The result of this was that the lands above the ridge were

in force, and that he may justify under it after it has been set aside, distinguishing between an erroneous process and one that is irregular or void.

The same distinction is made by *Lyon v. Yates*, 52 Barb. 243, and *Kerr v. Mount*, 28 N. Y. 666, and cases where the attachment was vacated by the court granting it.

The extent of the protection afforded by an erroneous decree is further illustrated by *Bailey v. Bailey*, 45 Hun, 278, holding that a decree of divorce against a wife, though subsequently reversed for error, stopped her to assert that the husband's cohabitation, pending the appeal, with another woman whom he married after the rendition of the decree and before its reversal, was adulterous.

The English cases also distinguish sharply between erroneous and irregular judgments, holding that the former, though subsequently reversed, afford full protection for acts done under them, while the latter do not.

Williams v. Smith, 14 C. B. N. S. 596, holds that an action for false imprisonment cannot be based upon an arrest under an erroneous attachment for contempt which was subsequently set aside upon appeal, and there is an implied decision to the same effect in *Prentice v. Harrison*, 4 Q. B. 852, 12 L. J. Q. B. N. S. 315, 7 Jur. 580, *Davis & M.* 50, which holds that a replication to a plea justifying an arrest under a ca. sa. on a judgment is bad, where it merely states that the ca. sa. has been set aside, without stating the reasons, upon the ground that it may have been set aside for reasons that might have been ground for error.

Barker v. Braham, 3 Wils. 368, 2 W. Bl. 866, and *Phillips v. Biron*, 1 Strange, 509 (actions for false imprisonment), while holding that a judgment vacated for irregularity does not justify acts done under it, state that the rule is otherwise where the judgment is reversed for error merely, and *Turner v. Felgate*, 1 Lev. 95, makes the same distinction. G. H. P.

drained and the lands below were flooded by water that did not by nature flow upon them. The work upon the ditch was abandoned. It caved in. Trees and other things fell in it, until in many places it was nearly filled up. The owners of the land above the ridge after some years employed William Miller to clean it out, and, he having begun to do so, appellants and others, owning land below the ridge, filed suit against him for the purpose of enjoining him from cleaning out the ditch. On the hearing of this case the circuit court entered a mandatory order requiring the ditch to be filled up so that no water could pass over the ridge that did not flow over it naturally. On appeal from this judgment to this court it was held that the injunction should have prohibited the appellants from cleaning out the ditch, or from reconstructing it in any way so as to increase the flow of water on the land below it, and that it was error to require the ditch to be filled up. See *Miller v. Hayden*, 91 Ky. 215. On the return of the cause a judgment was entered in that action pursuant to the mandate of this court. This was something over two years after the entry of the original judgment requiring the ditch to be filled up. There had been no supersedeas of that judgment, and, in obedience to it, the ditch had been filled up as therein required. By reason of the filling up of the ditch under the judgment, the water which had passed through it from appellee's land could no longer escape in this way, and was thrown back on it. After the ditch had been opened to the extent indicated by the judgment entered in obedience to the opinion of this court, appellee brought this suit for damages to his land from the closing of the ditch for the two years it had remained stopped up under the judgment. Appellants pleaded, in defense of the action, that the ditch had been stopped up in obedience to the order of the court, and relied upon that judgment as a protection to them from damages sustained by reason of what was done in obedience to it, there being no supersedeas. They did not allege, however, that appellee was party or privy to the case in which the judgment was rendered, and the court sustained a demurrer to this plea. There was then a trial, and verdict for defendants, which, on appeal to this court, was set aside. The opinion of this court pointing out that the judgment pleaded was no bar, because it was not averred that appellee was party or privy to that action. *McCalister v. Bridges*, 19 Ky. L. Rep. 107. There was no cross-appeal in that case, and from the nature of the case there could be none; so the only question before the court was whether there had been a fair trial before the jury. Nothing more was considered or decided. On the return of the case the defendant tendered an amended answer in which he set out that Miller, while cleaning out the ditch, was acting as the agent and servant of appellee McAllister; that appellee, with others, employed him to dig the ditch, and knew of the suit, testified in it as a witness, and that Miller

45 L. R. A.

was only their agent in the transaction. The court below refused to allow the amended answer to be filed, holding, in effect, that the judgment was no protection as to acts done under it, though not superseded. There was then another trial, resulting in a verdict for \$1,000 in favor of appellee.

The main question arising on this appeal is as to the effect of the reversed judgment on acts done under it and in obedience to it before its reversal, when it was not superseded. In *Freeman*, Judgm. § 482, it is said: "But a subsisting judgment, though afterward reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal. Thus, if the defendant is taken in execution, the subsequent reversal of the judgment will not render the plaintiff liable to an action for false imprisonment; for the act of imprisonment, when directed by the plaintiff, was sanctioned by a then valid judgment." And in § 104b the same author says: "The case of a judgment set aside for irregularity differs materially from that of one reversed upon appeal. In the latter case the error for which the judgment is ultimately avoided is imputed to the court, and the parties are not left without protection for the acts which they have done, based upon the judgment, and upon their confidence in the correctness of the decision of the court." The same principles are laid down in *Black*, Judgm. §§ 170, 355. In *Kaye v. Kean*, 18 B. Mon. 847, Kean obtained a mandamus against Kaye, which he refused to obey, and, being imprisoned for disobedience, brought suit against Kean, upon a reversal of the judgment awarding the mandamus, for damages for his imprisonment. His petition was dismissed. The court said: "The judgment of the circuit court was not void, but merely erroneous. . . . So long, therefore, as the judgment remained in force, unsuspended and unreversed, it was the duty of the appellant to have rendered obedience to it. His contumacy subjected him to be proceeded against for a contempt, and as, therefore, there was sufficient cause for his imprisonment, he cannot maintain an action therefor against the appellee." In *Clark v. Rodes*, 12 Bush, 16, again this court said: "A judgment is a final and conclusive determination of the rights of the parties to the litigation; and until it shall be reversed, vacated, or modified in some one of the modes provided by law the parties cannot refuse to obey it, nor can they by subsequent litigation, indemnify themselves against its legal consequences." In *Fraser v. Page*, 82 Ky. 73, an executor who had paid out a fund under a judgment which was not superseded, and afterwards reserved, was held protected by it for acts done in obedience to it while in force. The same ruling was made in *McKee v. Smith*, 5 Ky. L. Rep. 224; *Shults v. Beatty*, 6 Ky. L. Rep. 662; *Showalter v. Simmons*, 5 Ky. L. Rep. 423; *Dudley v. Beatty*, 5 Ky. L. Rep. 773. These cases proceed upon the principle that what was lawful when done does not become unlawful by reason of subsequent acts. The chancel-

lor, in entering the judgment in the case referred to, did not act as the agent of either of the parties. The judgment was the act of the law. Neither party could control the court, and neither was responsible for his actions. The law constituted a tribunal to determine the rights of the parties. That determination, proceeding from a power above them, was in no sense their act. A litigant in this court does not procure the judgment entered in any such sense as to render him responsible for the consequence of the judgment, or its reversal by the United States Supreme Court. We have been referred to no case, and can find none, where an action for damages has been sustained upon the reversal of a judgment for acts done pursuant to it, as for a tort. The fact that there are no precedents for such recovery seems at this day conclusive that it has not been recognized as admissible by either the bench or the bar. When a judgment is reversed, restitution must be made of all that has been received under it, but no further liability should in any case be imposed. The case of *Hays v. Griffith*, 85 Ky. 375, is not supported by the weight of authority, and cannot, in our judgment, be maintained on principle, so far as it lays down a greater liability. The quotation from Freeman on Judgments is from a sentence omitted altogether in the last edition. The opinion is supported only by some cases in Illinois and California, and is contrary to the rule followed by the United States Supreme Court and all the other state courts, so far as we have seen. It is also in conflict with the well-settled rule that the court, in ordering or confirming a judicial sale, and the commissioner, in making it, do not act as the agent of the plaintiff. *Bank of United States v. Bank of Washington*, 6 Pet. 9, 8 L. ed. 300; *Rorer*, Judicial Sales, §§ 1-12; *Forman v. Hunt*, 3 Dana, 621. Appeals may be taken from judgments, ordinarily, within two years, but sometimes within five or twenty years; and it often produces intolerable hardship to hold a litigant responsible for the consequences of an erroneous judgment under such circumstances. The object in having trust estates, including those of decedents, or those assigned for the payment of debts, settled in equity under the direction of the chancellor, is to protect the parties in the payment of the money, as well as to secure to everyone his rights. A creditor with a small claim, who moved for a distribution of the fund, would, under the rule referred to, be responsible for the entire fund upon a reversal of the judgment, although he had received only a few dollars of it. Such a rule would destroy all confidence in judgments of courts, and make them the prolific parent, in many cases, of ruinous litigation. Our system of courts and the principles governing them are derived from the common law. But in England the tribunal was called the "curia" or "court," because it was held by the King himself originally. The judgments of the courts read as the judgments of the King, and when he ceased to

hold the court in person, and delegated this function to one of his officers, the character of the judgment was the same. Manifestly, there the subject was not responsible for damages for the act of the King. In this country the power vested in the King vests in the body of the people, and the courts sit as their representative. The law, from principle and policy, requires that full confidence should be given to judgments while in force. It tends to prevent the troubles incident to the settlement of disputes by the act of the parties, often bringing about breaches of the peace or bloodshed. It is the duty of every good citizen to obey the mandates of the law, and no one should incur any responsibility by doing that which it was his duty to do. It is also the duty of every citizen to uphold the authority of the courts, and maintain respect for their judgments; and when, in doing this, he obeys a judgment of the court, it is a sound and safe rule that no liability for damages should arise therefrom. The case of *Hays v. Griffith* is disapproved so far as it may be construed to lay down a different rule.

It remains to determine whether appellee was bound by the original judgment while it was in force. In Freeman, Judgm. § 174, the rule is thus stated: "Neither the benefits of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interest from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among those are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person." In Herman, Estoppel, §§ 150-152, it is said: "One who is benefited by the prosecution of an action of which he has notice is to be regarded as a party in interest, although his name does not appear therein. . . . A master or principal is in privity with his servant or agent when the latter defends an action in the right of the former, and a judgment is an estoppel to a renewal of the controversy by the principal or master in the suit, on the ground that he is considered the real party, and especially when the principal expressly or impliedly authorized or ratified the acts of the agent, virtually rendering him a party to the proceedings instituted by or against the other. . . . In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others." These conclusions are sustained by *Emery v. Fowler* [39 Me. 326] 63 Am. Dec. 627; *Hill v. Rain*, 15 R. I. 75; *Robbins v. Chicago*, 4 Wall. 672, 18 L. ed. 430, where many other authorities are collected. This subject was fully considered by this court in the case of *Schmidt v. Louisville, C. & L. R. Co.* 99 Ky. 143, and un-

der the principles settled in that opinion and in the previous case of *Warfield v. Davis*, 14 B. Mon. 43, appellee was clearly bound by the judgment against his agent, Miller, in the original action. That action was clearly brought to settle the rights of the parties. It has since been recognized by them as settling their rights. Appellee brought no suit for damages for the filling up of the ditch until that judgment was reversed, and it may be safely assumed that he would not have sued at all if that judgment had been affirmed. The action has proceeded upon the assumption of both parties that the judgment in that case finally settled their rights, and that appellant could not relitigate here the right to stop up the ditch entirely, which was determined against him there. But the estoppel of a judgment is always mutual. If it binds one of the parties, so as to prevent him from showing the truth, it also estops the other. If the judgment referred to did not bind appellee until reversed, then it constituted no estoppel upon appellant in this action, and he might have shown all the facts, and had the jury pass on the question of fact determined there. Appellee has not proceeded with his case upon this theory, but both parties have recognized the judgment in the equity case as settling finally their rights in the ditch. This was, we think, a correct view of the law. The judgment finally rendered in that action is conclusive on both parties as to the right to maintain the ditch; and the chancellor's judgment, until reversed, was equally conclusive, and, not having been superseded, neither can maintain an action against the other for acts done in obedience to it while it was in force. This question was not before the court on the last appeal of the case, and what was said then must be taken in reference to what was before the court. There was no plea then of

any facts showing that appellee was party privy to the judgment relied on in bar, or bound thereby in any way. These facts having been pleaded on the return of the case, the question is now before the court for the first time. Then there had been a verdict for the defendant. There was no cross appeal, and could be none, and the only question was whether there had been a fair trial under the issues presented. The rule is well settled that a question not in issue, though passed upon in the opinion on a prior appeal, is not *res judicata* on a subsequent appeal, where the issue was properly made by pleadings filed after the first appeal. See note to *Hastings v. Fowworthy* (Neb.) 34 L. R. A. 344, and cases cited. Thus, in *O'Brian v. Oom*, 6 Bush, 563, it was held that a discharge of a juror after the jury was sworn, without the defendant's consent, did not operate to acquit him. But when this opinion was rendered there had been no plea of former jeopardy. On the return of the cause to the lower court the defendant put in this plea, and, having been again convicted on a second appeal, the former opinion was held not to conclude the question, and the defendant was discharged. 9 Bush, 333, 15 Am. Rep. 715. This rule has the indorsement of the United States Supreme Court, and seems to us sound, and necessary to the proper administration of justice. *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 29 L. ed. 858.

The judgment complained of is therefore reversed, and cause remanded, with directions to the court below to grant appellants a new trial, to allow the amended answer to be filed, and for further proceedings not inconsistent with this opinion.

Petition for rehearing overruled October 7, 1899.

ALABAMA SUPREME COURT.

J. D. HARDY *et al.*, *Appts.*,

v.

J. H. GUNN.

(.....Ala.....)

An execution upon a judgment for use and occupation of real estate withheld under an apparent legal title from one holding a superior equitable title cannot be levied upon other land which defendant had conveyed to his wife as a statutory homestead by a deed recorded prior to the rendition of the judgment.

(November 5, 1898.)

APPEAL by defendants from a judgment of the Circuit Court for Shelby County in favor of plaintiff in an action brought to re-

NOTE.—On the question, What expectant and contingent interests in real property are subject to attachment or levy on execution?—see note to *Young v. Young* (Va.) 23 L. R. A. 642. 45 L. R. A.

cover possession of certain real estate which plaintiff had bought at an execution sale under a judgment against defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. Knox, Bowie, & Pelham, Longshore & Beavers, and W. S. Cary for appellants.

Messrs. Browne & Leeper, for appellee:

Gunn's debt being an existing one at the time of said conveyance by Hardy to his wife, and said conveyance being a voluntary one, it is void as to Gunn's debt, provided the property therein conveyed was liable to the satisfaction of said debt.

This latter question depends solely upon whether or not Gunn's debt was a contract debt or a noncontract debt.

Damages in an ejectment suit at law are not the subject of exemption.

Penton v. Diamond, 92 Ala. 610.

Also as to damages in detinue suits, see—*Stuckey v. McKibbin*, 92 Ala. 622.

See also, as to torts,—

Meredith v. Holmes, 68 Ala. 190.

Also, as to statutory penalties, see—

Williams v. Bowden, 69 Ala. 433.

An equitable title is paramount to a legal title. A mere naked legal title is liable to be defeated in equity, but an equitable title can be defeated nowhere. If it is such a wrong to withhold the possession of land from the holder of a mere naked legal title (whose title is liable to be defeated in equity, even by the withholder) that the damages therefor are not the subject of exemption, how much more so is it a wrong to withhold the same from one who has in good conscience a perfect equitable title which no power can defeat and no forum assail.

Brickell, Ch. J., delivered the opinion of the court:

The sole question presented by this record is whether the damages assessed against one in possession of land under a naked legal title, for the use and detention thereof, as against the holder of a superior equitable title, as determined by a bill to divest the holder of the legal title of his interest therein, and invest the holder of the equitable title with the legal title, and a decree granting such relief, are damages arising from relations in their nature contractual, or are compensation for a tort.

James H. Gunn, the appellee, filed a bill in the chancery court of Shelby on October 29, 1883, against J. D. Hardy and others, seeking the divestiture of legal title to a lot in Calera, and its investiture in the complainant. Complainant acquired his equity through a paper purporting to be a deed, but which was neither witnessed nor acknowledged, dated April 9, 1872; and J. D. Hardy acquired the legal title January 20, 1880. He brought ejectment against Gunn, recovered judgment for the lot in controversy, and on March 15, 1883, was put in possession. A decree was rendered in said cause in accordance with the prayer of the bill; and it appearing that J. D. Hardy had been in possession of the lot for more than three years, and that the value of the use and occupation during the period was \$344, a decree for that sum was rendered in favor of the complainant against Hardy. Execution was issued upon this decree, which was levied upon the house and lot in controversy, and the same was sold by the sheriff on December 18, 1893, purchased at said sale by Gunn, and the sheriff's deed, in ordinary form, was executed and delivered to him. The present action was commenced February 18, 1894, to assert the title thus acquired. That decree settled the title as between the parties, and would of itself have supported an action of ejectment. *Brunson v. Morgan*, 86 Ala. 318. The defendant Hardy, being in possession of the lot on January 30, 1886, conveyed the same to Louisa Hardy on that day; the deed reciting the consideration at "the sum of \$1, and the further consideration that I wish to provide a home for my family," and it was

recorded March 4, 1889. At the execution of the conveyance Hardy was occupying the premises as a homestead. It consisted of 3½ acres, and at the time of the sale, and since, it did not exceed in value \$2,000, and since the conveyance the grantee has been in possession of it. The circuit court gave the affirmative charge at the instance of the plaintiff, and this alone is assigned as error. There were no contractual relations between plaintiff and the grantor, J. D. Hardy. Hardy recovered the lot in controversy of plaintiff in an action testing the legal title to it. He went into possession under a writ issued upon the judgment. He held the possession, not by contract, but by a recovery in the ejectment suit, on a title superior to that which could have been asserted by Gunn in a court of law. This title, however, was burdened with the superior equity residing in the appellee, compelling its divestiture in a court of equity. There is no difference in the relation of parties where one must resort to equity to divest an adverse legal title, and where one sues at law to dispossess one holding an adverse title. In the latter class of cases it has been held by this court that a claim of exemption cannot prevail against a judgment for damages and costs in a statutory action in the nature of ejectment. *Penton v. Diamond*, 92 Ala. 610. As is said in *Stuckey v. McKibbin*, 92 Ala. 622, respecting a judgment rendered in a detinue case: "No element of contract was involved in the case. The right of plaintiff to recover the value of the hire or use of the property resulted from the wrongful and tortious act of the defendant in withholding it, and in no sense from a contract, express or implied, on his part to pay therefor." *Meredith v. Holmes*, 68 Ala. 190; *McLaren v. Anderson*, 81 Ala. 106; *Vincent v. State*, 74 Ala. 274; *Dangaia v. Lunsford*, 112 Ala. 403. The circuit court did not err in giving the charge requested. Let the judgment of the circuit court be affirmed.

A petition for rehearing having been filed, the following response was handed down on February 10, 1899:

Per Curiam:

On a careful examination of the record in this case, it appears that in the former opinion and decision a mistake was made in confounding the lot for which this suit was brought with the lot, the subject of the suit in the chancery case of Gunn against Hardy, wherein a decree was rendered in favor of said Gunn, and divesting Hardy of title and vesting same in Gunn. The two lots are separate and distinct. The sheriff's deed on which the plaintiff relied in the present suit for a recovery of the lot in question was executed six or seven years subsequent to the deed from J. D. Hardy to his wife, Mrs. Louisa Hardy. The sheriff's deed to the plaintiff was under an execution against the defendant J. D. Hardy. Mrs. Louisa Hardy, a codefendant in the present suit, introduced in evidence the deed above mentioned

from her husband, J. D. Hardy, to her. This deed was executed in January, 1886, and was filed in the office of the probate judge of Shelby county in March, 1889. The decree upon which the execution issued was rendered after the execution and filing of the deed from Hardy to his wife. Under this view of the case, which is supported by the

facts as disclosed in the record, the court below erred in giving the general charge requested by the plaintiff. The application for rehearing must be granted.

The judgment of affirmance heretofore rendered is set aside, and for the error pointed out the judgment of the Circuit Court is reversed, and the cause remanded.

DISTRICT OF COLUMBIA COURT OF APPEALS.

Belle ALEXANDER, *Appt.*,

v.

Thomson H. ALEXANDER.

(13 App. D. C. 334.)

1. An exercise of discretion in permitting a plea and demurrer to the whole bill at the same time is not a subject of appeal.
2. The right to award alimony conferred on the courts of the District of Columbia by the act of Congress of June 19, 1860, was subject to the qualifications and limitations inherent in it in the English courts and under the Maryland act of 1777.
3. Failure to reserve the right to subsequently reduce the amount in a decree awarding alimony does not deprive the court of power subsequently to make the reduction, even in cases of absolute divorce.

(November 1, 1898.)

A PPEAL by complainant from a decree of the Supreme Court of the District of Columbia dismissing a bill of review filed to revise a decree reducing the amount of alimony to be paid by defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. D. W. Baker and John C. Gittings, for appellant:

You cannot both demur and plead to the whole bill.

Droop v. Ridenour, 9 App. D. C. 95; *Alexander*, Ch. Pr. 57.

A demurrer is the only proper pleading to a bill of review for error apparent on the face of the record.

Story, Eq. Pl. 6th ed. 729; 3 Enc. Pl. & Pr. 594; 2 Dan. Ch. Pr. 6th ed. 1583; *Enochs v. Harrelson*, 57 Miss. 465; *Carey v. Giles*, 10 Ga. 9.

Before a bill of review can be filed, the decree must be first obeyed and performed, even though it improperly awards cost, by reason of want of jurisdiction, so long as it stands uncorrected.

Livingston v. Hubbs, 3 Johns. Ch. Pr. 125; 1 Foster, Fed. Pr. 488; *Shelton v. Van Kleeck*, 106 U. S. 532, 27 L. ed. 269.

Alimony is "an allowance which, by order of court, the husband, or former husband, is compelled to pay to his wife, or former wife, from whom he has been legally

separated or divorced, for her support and maintenance."

2 Am. & Eng. Enc. Law, 2d ed. p. 92.

There was error in the decree of March 3, 1898.

Fries v. Fries, 1 MacArth. 291; *Alexander v. Alexander*, 9 Mackey, 552; *Smith v. Smith*, 45 Ala. 264; *Shepherd v. Shepherd*, 58 N. Y. 644; *Mitchell v. Mitchell*, 20 Kan. 665; *Petersine v. Thomas*, 28 Ohio St. 596; *Kamp v. Kamp*, 59 N. Y. 212; *Sammis v. Medbury*, 14 R. I. 215; *Sampson v. Sampson*, 16 R. I. 456, 3 L. R. A. 349; *Stewart, Marriage & Divorce*, § 376.

The first decree granted to the complainant a divorce *a vinculo matrimonii*, with alimony at the rate of \$125 per month for a certain period, and thereafter at the rate of \$50 per month, but giving the complainant the right to apply any time after a certain date for an increase. This decree was absolutely final so far as the defendant's rights to apply for a decrease were concerned, as he failed to appeal therefrom.

Fries v. Fries, 1 MacArth. 291; *Smith v. Smith*, 45 Ala. 264; *Shepherd v. Shepherd*, 58 N. Y. 644; *Mitchell v. Mitchell*, 20 Kan. 665; *Petersine v. Thomas*, 28 Ohio St. 596; *Kamp v. Kamp*, 59 N. Y. 212; *Sammis v. Medbury*, 14 R. I. 215; *Sampson v. Sampson*, 16 R. I. 456, 3 L. R. A. 349; *Stewart, Marriage & Divorce*, § 376; 2 Am. & Eng. Enc. Law, 2d ed. p. 136; *Henderson v. Henderson*, 64 Me. 419; *Stratton v. Stratton*, 73 Me. 481.

Mr. William J. Miller, for appellee:

No bill of review will lie after the twenty days allowed from the date of the decree, where a party had the right of appeal and did not avail herself of that right.

A bill of review is an independent suit, and must be filed as such, and the defendant be served with process, and is to appear as to an original suit.

3 Dan. Ch. Pr. 3d Am. ed. 1729; *Cole v. Miller*, 32 Miss. 91; 2 Hoffm. Ch. Pr. 12.

A bill of review must contain the original bill, answers, and proceedings had (except the evidence), the decree and the points in which the party conceives herself aggrieved, and the ground of law or new matter discovered upon which she seeks to impeach the decree.

Shelton v. Van Kleeck, 106 U. S. 532, 27 L. ed. 269.

The decree does not prevent the appellee from applying for a modification of it.

NOTE.—For power of the court over the subject of alimony after a divorce decree has become final, see also *McKay v. San Francisco City & County Super. Ct. (Cal.)* 40 L. R. A. 585. 45 L. R. A.

Appellee had a right at any time to show he was unable to perform the decree and ask for a modification of it.

Sheafe v. Sheafe, 36 N. H. 155; *Coad v. Coad*, 41 Wis. 23.

Morris, J., delivered the opinion of the court:

This cause comes to us on appeal from a decree of the supreme court of the District of Columbia dismissing a bill of review.

It appears from the record that on May 25, 1877, the appellant, Belle Alexander, as complainant, instituted proceedings in the supreme court of the District of Columbia for a divorce from the bond of matrimony then subsisting between herself and the appellee, Thomson H. Alexander; and that such proceedings were thereafter had as resulted in a decree of that court adjudging that the marriage should be dissolved, and that alimony at the rate of \$50 a month should be allowed to the complainant. This decree was rendered on July 11, 1877. It contained this clause in reference to the alimony: "The allowance thus made being without prejudice to the right of the complainant to apply for the increase thereof after the said 1st day of January, 1878." There was no reservation of right to the defendant to apply for a reduction of the alimony at any time.

On February 15, 1878, it would appear that the alimony was in arrears and unpaid; and the complainant petitioned the court for an order to compel its payment. This order the court made.

On May 19, 1878, the defendant petitioned for a suspension of the alimony; and on November 10, 1878, an order of the court was entered by consent for the suspension of payment until it should be shown to the satisfaction of the court that the defendant's pecuniary circumstances had so far improved as to justify the resumption of payment.

On March 10, 1885, the complainant petitioned for a renewal of the payment of the alimony, and that the amount should be increased to the sum of \$200 a month; whereupon the defendant came in with an answer and a counter-petition praying for a revocation of so much of the original decree of July 11, 1877, as allowed alimony. Under these petitions testimony was taken, and there was finally an order or decree made merely denying the complainant's petition. And apparently there was no action on the defendant's application. Upon appeal taken by the complainant from this order to the general term of the court, the order was reversed, and a decree was rendered by the general term on May 20, 1892, to the effect that the suspended alimony should be paid by the defendant at the rate of \$50 a month from and after April 15, 1890; and, beginning with the date of the decree, alimony thereafter at the rate of \$50 a month. The decree contained the following clause: "This decree is without prejudice to any right the said defendant may have in law to

apply for a suspension or reduction of alimony for any causes that may arise after the date of this decree."

Availing himself of the benefit of this last clause, the defendant, on October 17, 1892, petitioned the court to reduce the alimony from \$50 to \$25 a month, on the ground of his alleged inability to pay the former amount. After answer by the complainant, the court, on December 3, 1892, entered an order for the reduction as prayed. From this order no appeal was taken; and no further proceedings seem to have been had for about five years.

On December 17, 1897, the defendant filed a petition stating that through misapprehension, resulting from apparent ignorance that there had been a reduction of the alimony at his own solicitation, he had overpaid the amount due the complainant to the extent of \$650, and asking for a suspension of the alimony for two years and two months, which would serve to rectify the alleged mistake. There was then, on motion by the complainant, a rule issued on the defendant to show cause why he should not be required to pay arrears; and the complainant also filed a petition for an increase of the alimony. After answers to these several petitions the whole matter was referred to the auditor of the court. That officer made a report, and there were exceptions to the report. Finally, on March 3, 1898, a decree was made adjudging that the defendant should pay to the complainant the alimony allowed by the order or decree of December 3, 1892, from the date of the last payment to March 20, 1898, at the rate of \$25 a month, and from and after the last-mentioned day, alimony at the rate of \$30 a month. The defendant appealed from the decree to this court; but how far the appeal has been prosecuted does not appear. The complainant, apparently, did not appeal.

In this condition of things, the complainant, on April 7, 1898, filed the present bill of review, in which the foregoing facts are stated. The complaint of this bill is that all the orders and decrees passed in the cause subsequent to the original decree of July 11, 1877, which in any way alter or affect such original decree, especially in as far as these orders or decrees reduce the alimony allowed by the original decree, are utterly null and void, on the ground, as claimed, that the original decree had become an absolute finality beyond the power of the court to change in any manner, except, upon the petition of the complainant, to increase the amount of the alimony. And it is charged especially that the last order or decree in the case, that of March 3, 1898, is erroneous in so far as it fails to conform to the original decree in the matter of alimony. The prayer of the bill is, that the decree of March 3, 1898, be reviewed and canceled as to this matter of alimony, and that the decree of July 11, 1877, be renewed.

The defendant, on May 3, 1898, demurred to the bill of review on the general ground of want of equity; and also, on June 1, 1898,

by leave of the court had on that day, without waiving his demurrer, filed two pleas to the bill, which were to the effect that he had paid to the complainant under the decree of March 3, 1898, all the alimony which had become due and payable, both before and after the filing of the bill of review. The apparent purpose of these pleas was to show that the complainant had acquiesced in the decree of March 3, 1898; and that by such acquiescence he was now estopped from repudiating that decree.

The complainant excepted to the pleas, and moved to strike them from the record, but the exceptions and the motion were both overruled on June 7, 1898. Then, on June 9, 1898, a final decree was entered, which is in the following terms:

"The above-entitled cause came on for hearing on the bill of review filed by the complainant and the demurrer of the defendant filed thereto, and also upon the pleas of the defendant filed thereto with leave of the court, and the same having been duly argued by counsel of the respective parties and duly submitted to and considered by the court, it is, this 9th day of June, A. D. 1898, adjudged, ordered, and decreed that said bill of review be, and the same is hereby, dismissed with costs against said complainant, for which defendant have executions as at law."

From this decree, and also from the order overruling the exceptions to the pleas, and denying the motion to strike the pleas from the record, the complainant has now appealed to this court, and has presented six assignments of error, four of which have reference to the action taken by the court in regard to the defendant's pleas, and two to the dismissal of the bill of review and the sustaining of the defendant's demurrer thereto.

1. With reference to the pleas, it is urged that the court below should not have allowed them to be filed while the demurrer was pending undisposed of; that it was error to dispose of the appellant's exceptions to the pleas before the demurrer was disposed of; that the exceptions to the pleas should have been sustained; that the cause should not have been heard on the bill of review, demurrer, and pleas. Most of this contention, as is apparent, is addressed to a question of practice with which the court below should be left free to deal as it deems best in its discretion; and that discretion cannot well be reviewed in this court. It is very true, as claimed on behalf of the appellant, it is an elementary rule of equity pleading and practice, that a defendant in equity cannot at the same time demur and plead to the whole bill; for it is well settled that, if he does so plead and demur, his plea will overrule the demurrer and eliminate it from further consideration. But it is equally well settled that the court, in its discretion, may grant leave to make joinder of such defenses; and the discretion so exercised is not a subject of appeal. It is quite a frequent practice, the propriety of which has never 45 L. R. A.

been questioned, that a court, after a demurrer has been filed, will require the party to answer, and order the demurrer to stand over until the final hearing, and then perhaps sustain the demurrer. And if the court can order such proceeding, certainly it can allow it by special leave.

After all, under the circumstances of the present case, it is not apparent that the appellant has been prejudiced by the action of the court in this regard. For, if the defendant, instead of demurring and filing pleas, had simply answered admitting the facts stated in the bill of review to be true, which he now does by his demurrer, and should in such answer set up in addition the facts stated in the pleas, which the appellant by her exceptions admits to be true, and the cause should then be set down for hearing on the bill and answer, as it undoubtedly would have been, it is not apparent how the appellant could be in any better position with respect to the pleadings than she is now. The same precise facts would be before the court; and the only substantial question then as now would be whether there was sufficient in the bill of review to justify its being sustained. We may, therefore, proceed to the consideration of this main question.

2. Of course the bill of review comes too late to affect directly any of the proceedings had prior to the filing of the defendant's petition of December 17, 1897, upon which the decree of March 3, 1898, was based, as more than two years had then elapsed since the rendition of the last preceding decree; and the bill of review does not seek in express terms to invalidate anything but the decree of March 3, 1898. The previous proceedings we understand to have been recited merely for the purpose of leading up to this last decree, although they are all equally characterized as null and void in so far as they depart from the original decree of 1877. It may, however, be a question whether the appellant, having so long submitted to the jurisdiction without protest, and having acquiesced in some, at least, of the proceedings, she should now be heard to say that they are all or any of them null and void for the want of jurisdiction. See *Fisher v. Shropshire*, 147 U. S. 133, 37 L. ed. 109. And it may also be a question whether, under the circumstances of this case, the decree of March 3, 1898, if the contention of the appellant be well founded, was not erroneous merely and to be reviewed, if at all, only by way of appeal, and not by way of a bill of review for supposed want of jurisdiction to render the decree. For the decree was rendered, not only upon the appellee's petition, but likewise upon the counter-petition of the appellant and after plenary proceedings upon both petitions had before the auditor. And if it be conceded, as it must be, that the court had the right at that time to render a decree regulating the alimony to be paid by the appellee to the appellant, and a decree fixing the amount at \$60 or at \$100 a month would have been entirely proper, according

to the contention of the appellant, it is not apparent how a decree fixing the amount of \$30 a month can be anything more than a merely erroneous decree, to be corrected, if at all, by way of appeal, even if the contention be correct that the original decree of 1877 fixed a limit for the alimony below which the court was never thereafter at liberty to reduce the amount.

3. But, however this may be, and we are not to be understood as expressing any definite opinion on these points, it seems to be proper that we should determine, as far as we may, the substantial question of law involved in the issues between the parties, and that is, whether, when a decree has been rendered for a divorce from the bond of matrimony, and in the decree alimony has been allowed at a certain fixed sum per month to the complainant wife as against the defendant husband, with reservation to the former to apply at any time for an increase, but without any reservation to the latter to apply at any time or under any circumstances for a reduction or suspension of the alimony, for any cause supervening thereafter, the court which rendered the decree has any lawful authority to entertain an application on the part of the husband for a reduction of the amount, and to render a decree for such reduction. The determination of this question, which seems never to have been definitely decided in this District, and to have been somewhat variously decided in other localities, involves an inquiry into the jurisdiction of our courts with reference to the laws governing divorce and alimony.

Proceedings for divorce in this District are entirely the creation of statute law. As is well understood, divorce, whether from the bond of matrimony, or from bed and board, was unknown to the common law, both in England and in our own country. But the ecclesiastical courts have long claimed and exercised the authority to grant limited divorces; that is, from bed and board, or judicial separations, as they have sometimes perhaps more appropriately been called. The Parliament of England, we believe, sometimes, although very rarely, assumed the authority to grant absolute divorces from the bond of matrimony; and in our colonial days in Maryland, as in other colonies, the colonial legislatures occasionally granted divorces of both kinds, there never having been any ecclesiastical courts in the American colonies. In one at least of the states of our Union that authority is yet claimed and exercised by the state legislature. Now, however, both in England and in most of the states of our Union, and in the District of Columbia, under legislation by the Congress of the United States, the authority to grant divorces is vested in the courts of general jurisdiction, generally in the courts of equity to the ordinary proceedings of which proceedings for divorce are usually assimilated.

The legislation of the Congress of the United States on the subject for the District of Columbia is contained in sections numbered

from 731 to 749, both inclusive, of the Revised Statutes for this District, derived mainly from an act of June 19, 1860, slightly modified by an act of June 1, 1870. In these sections the causes are specified for which divorces from the bond of matrimony and from bed and board may be granted; and jurisdiction was conferred on the supreme court of the District to hear and determine all application for divorce of either kind. As specifically applicable to the question now under consideration, some of these sections may be cited.

Section 732 provides that "the proceedings upon a petition for divorce shall be the same as had in other cases, except so far as otherwise provided in this chapter."

Section 745 provides that "in all cases where a divorce is granted, the court allowing the same shall have power, if it see fit, to award alimony to the wife, and to retain her right of dower."

Section 746 provides that "the court may also award alimony to the wife for her maintenance during the pendency of a petition for divorce filed for any of the causes mentioned in this chapter."

Section 747 provides that "the court shall also have power to order and direct, in every case of divorce, who shall have the guardianship and custody of the children of the marriage so divorced, and who shall be charged with their maintenance."

Section 749 provides that "in case of adultery committed by the wife after judgment or sentence of divorce from bed and board, the court may, on the petition of the husband setting forth and accompanied by legal proof of such adultery, deprive the wife of alimony from the date of her said criminal act, and rescind her right of dower, as well as dispossess her, if the court judge fit, of the care, custody, and guardianship of any child which, under the original judgment of the court in granting the divorce, may have been assigned to her."

These, we believe, are all of the provisions of the statute which apply, directly or indirectly, to the subject of alimony; and from them it is apparent that we are remitted to the pre-existing law for a definition of alimony, its purposes and incidents. These were well known in the ecclesiastical law of England so far as that law was administered by the ecclesiastical courts of that country; and they were recognized and were well known in the courts of the state of Maryland, and to some extent in the judicial procedure of the District of Columbia as derived to us from that state.

Alimony has been defined to be "the allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance. Bishop, Marr. & Div. § 549." Bouvier, Law Dictionary, title, *Alimony*. It is therefore, and it has always been held to be, apart from the express provisions of statutes authorizing divorce, an incident merely of separation by judicial decree from bed and board, and never of divorce from the bond of matrimony. See

Crane v. Meginnis, 1 Gill & J. 463, 19 Am. Dec. 237. For at common law, and by the dictates of reason, in the absence of statutory enactment, to justify the allowance of alimony, the relation of husband and wife must continue to subsist, although the parties are separated from each other.

In the case just cited of *Crane v. Meginnis*, 1 Gill & J. 463, 19 Am. Dec. 237, the court of appeals of Maryland said: "Divorces in this state from the earliest times have emanated from the general assembly, and can now be viewed in no other light than as regular exertions of legislative power. . . . On the other hand, the suit for alimony in this state, as in Great Britain, is a distinct remedy from the proceedings to obtain a divorce, and for a series of years the wife's maintenance has been recoverable through the intervention of our judicial tribunals. So early as the year 1689, in the case of *Galwith v. Galwith*, 4 Harr. & M'H. 477, it was asserted in the supreme court of the Province, that alimony is only recoverable in chancery, or the court of the ordinary; and in the year 1777, the act of assembly was passed which expressly authorized the chancellor to hear and determine all causes for alimony, in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there. Since this last period, such causes have been continually acted upon by the chancellor, and in some instances appeals have been taken to the appellate courts, and decided on by them."

And in the case of *Tolman v. Tolman*, 1 App. D. C. 299, where it was held by this court that the chancery courts of Maryland and the District of Columbia "have had and exercised full and complete jurisdiction to decree alimony against a delinquent or offending husband, who had deserted or maltreated his wife, and refused to provide her reasonable maintenance," and that the jurisdiction was not limited to cases in which the ecclesiastical courts of England had jurisdiction to grant divorces from bed and board; yet it appears plainly throughout the whole opinion, as announced for the court by Mr. Chief Justice Alvey, that apart from the statute alimony could only be allowed where the relation of husband and wife continued to subsist. In fact, the whole theory of the allowance of alimony is based upon the ground that the relation of husband and wife continues in full force, and that the moral and legal obligation of the husband to provide for the support and maintenance of his wife remains unimpaired; and alimony is only a commutation of the support and maintenance provided under normal conditions.

But when Congress, by the act of June 19, 1860, conferred upon the supreme court of the District the legal authority to grant divorces of both kinds, and provided that, in all cases, both those of divorce from the bond of matrimony and those of divorce from bed and board, the court should have power, if it saw fit, to award alimony to the wife, it 45 L. R. A.

not only empowered the court to exercise the jurisdiction which the ecclesiastical courts of England had been accustomed to exercise, but added to it a new jurisdiction unknown to the courts of England, that of granting divorces from the bond of matrimony; and, moreover, it annexed to both the incident which theretofore had appertained only to the ecclesiastical courts and the judicial separations allowed by them, that of the allowance of alimony. In granting this latter authority however, it must be presumed to have done so as it was then judicially understood and with all the qualifications and limitations that were then inherent in it. The authority was to grant alimony, if the court saw fit to do so, and no distinction was made in this regard between the two classes of divorce. It is very plain, therefore, that the allowance of such alimony in all cases was to be in accordance with the rules and methods then prevailing in the ecclesiastical courts or in the courts of chancery exercising the ecclesiastical jurisdiction or the jurisdiction conferred by the act of Maryland of 1777.

Illustration of the subject may be had by reference to the provision of the Federal Constitution for trial by jury. The provision is that "the right of trial by jury shall be preserved;" but there is no attempt to define what is meant by the expression "trial by jury." But the courts have long since held, and it is well-settled law, that it means trial by jury such as that institution existed at the time of the formation of the Constitution, with all its substantial incidents of the introduction of testimony under the direction and control of a court, of its receiving the law in each case from the court, of secret deliberation, and the requirement of unanimity in decision, as well as that the jury should always be composed of twelve men, no more and no less. And numerous other similar illustrations might be adduced. So, with reference to the subject of alimony now under consideration; when the legislative authority provides for the allowance of alimony in all cases, without otherwise explaining or qualifying the jurisdiction, it is very clear to us that it was meant that the courts should proceed in that regard in accordance with the usages and customs of the ecclesiastical courts and of the courts of chancery at the time of the passage of the act.

Now, what were the usages and customs, and what was the jurisdiction of the ecclesiastical courts, and of the courts of chancery in the matter of alimony at and before the time of the passage of the act of Congress of 1860? Beyond all question, the jurisdiction of these courts was not exhausted by the rendition of the original decree. The decree for a separation was final; the adjudication that alimony to some extent was payable may have been final; but it was never contended or maintained that the amount of alimony then fixed was absolutely final and conclusive for all time, and could not afterwards be modified; on the contrary, the au-

thorities appear to be unanimous to the effect that the adjudication was a continuing one, and that the courts retained the whole subject under their control, increasing or diminishing the amount of alimony from time to time, as might seem just under changed or changing circumstances; and this without reference to the fact that the original decree might have been entirely silent in regard to the reservation of the right to the parties, or either of them, thereafter to apply to the court for a modification. Bishop, Marr. & Div. § 593; 1 Am. & Eng. Enc. Law, title, *Alimony*, where numerous cases on the subject are collected.

This position, it is presumed, will not be impugned or contravened even now with reference to divorces from bed and board, under the statute. We presume that, as to these the rule will apply which applied to judicial separations in the ecclesiastical courts, and which gave those courts continuous jurisdiction over the matter of alimony. The argument seems to be that a different rule must govern in cases of divorce from the bond of matrimony, and it is very true that in these cases the result of the adjudication is in some respects radically different from that of the adjudication in the cases of limited divorce. For, by a decree dissolving the bond of matrimony, the parties are in law absolutely and irrevocably separated from each other, and they become to each other as total strangers. The relation of husband and wife is at an end; and the legal liability of the husband to provide for his wife is definitely terminated. Apart from the statute no suit for alimony could be maintained in such a case; and the allowance of alimony would be radically inconsistent with the changed relations of the parties. But the statute, for obvious reasons of public policy and upon equitable grounds, authorizes the allowance of alimony even in these cases; and the question is, whether in the allowance of alimony in cases of divorce from the bond of matrimony the character of the decree is of more rigid and absolute finality than that of the decree in cases of divorce from bed and board.

The statute contains no intimation of any difference. On the contrary, the intimation is quite the reverse. The implication is that alimony in cases of divorce from the bond of matrimony is placed precisely on the same basis as alimony in cases of divorce from bed and board. Nor is there any good ground in reason for the application of a different rule in the different classes of cases. The argument would seem to be that, because a decree dissolving the bond of matrimony is, or may become, absolutely final and conclusive, therefore the added provision for alimony must be equally final and conclusive. But this argument is wholly untenable. It is nothing unusual in equity for a decree in equity to be absolutely final in some respects or with regard to some matters, and to be interlocutory and subject to modification in other respects; nor is there any inconsistency in combining an interloc-

utory order for further proceedings with a final decree. This is in common practice in equity.

Now, there is very much greater reason why, in divorce cases, more than in any other class of cases, the interlocutory or incidental portion of the decrees should continue to remain indefinitely under the control of the court. Decrees of divorce from the bond of matrimony adjudicate only one permanent right—the right of the complainant to have the bond of marriage dissolved and to be in law placed in the position of an unmarried person. But there is no right of property involved, and none is adjudicated. The decrees affect the status of the parties, not necessarily their financial affairs. There is but one contract in controversy,—the contract upon which the matrimonial relation is based; and if the courts assume, as they may do, under the statute, to set apart a portion of the husband's property for the use of the divorced wife or to require him to contribute a certain sum periodically for her support, which is called alimony, it is not in pursuance of any such specific right or contract as obtains in other cases, but upon broad grounds of public policy, because the husband has failed to perform the legal and moral obligation which he assumed when he entered into the matrimonial state, of providing suitably for his wife in accordance with his resources and their station in life. The decree for alimony is based upon the conditions existing at the time at which it is rendered; but these conditions are subject to change. The faculties of the husband at and before the time of the adjudication to discharge his legal and moral duties may have been ample. Through circumstances beyond his control, and by no fault of his, they may have afterwards become greatly impaired. Assuredly it would not be just, even towards a greatly injured wife, who has been compelled to seek the protection of the law against his misconduct to hold him to the same rigid liability in the days of his poverty as in the days of his prosperity, and to punish him, as for contempt of court, for not doing that which it has become impossible for him to do. The injustice that might thus be done by a rigid and inflexible decree for the payment of alimony might even be greater in the case of divorce from the bond of matrimony than in that of divorce from bed and board. In the latter case the wife remains a wife; the matrimonial relation continues to subsist; the moral obligation of the husband to support his wife remains; and they may at any time reconcile their differences, and become one again in fact, as they remain in law. But, in contemplation of the statute, a husband and wife divorced from the bond of matrimony become strangers to each other, and there is no possibility of reconciliation. The divorced wife is free under the law to contract other matrimonial alliances. She is free to act for herself, to retain her own earnings, to control her own property. And yet it is claimed that, no matter how much her financial condition

may have been improved, no matter how much her circumstances may have changed, no matter how much her divorced husband's circumstances may have been impaired, and even if he has, through no fault of his own, been reduced to absolute poverty and penury, he still remains legally and morally liable to pay alimony for the support of his divorced wife, living perhaps in luxury, and subject to imprisonment if he fails in such payment. This would be so grossly unjust as to shock the conscience. And yet to this injustice the courts would necessarily be led in many cases, if the cast-iron rule prevailed of absolute finality in the matter of the allowance of alimony. We do not think that the statute contemplated anything of that kind.

It is conceded on the part of the appellant, that upon good cause shown of inability on the part of the husband to pay the alimony, the court might order a suspension of payment, and would not, or rather should not, punish him as for contempt of court. But it seems to us that this concession virtually concedes the whole case. If the decree for the allowance of alimony is of the rigid, inflexible, and unchangeable character claimed for it in the bill of review now before us, it is not apparent how it can be suspended any more than it can be modified by a reduction of the amount. Suspension is just as much an alteration of the decree as is reduction of the amount, and it would seem to be an absurdity for a court to hold that it could indefinitely suspend the payment of alimony to the amount of \$50 a month, because it was shown that the divorced husband could not pay the amount, but that it could not modify the decree so far as to authorize the substitution of \$30 for \$50 when it appeared that the husband could pay the \$30, but could not pay the \$50. We fail to see wherein this would serve the interest of the divorced wife, or the requirement of public policy. If there is a power in the court to suspend the payment of the alimony, there is undoubtedly a power to reduce the amount. The one can be inferred from the statute as well as the other. And if it be argued that the power to suspend is only indirectly exercised by the refusal of the court to punish the party as for a contempt during the continuance of his inability, this position is also untenable; since no one should be required to wait until he is in a position of apparent contempt of court. And moreover, if the court may decline to punish for contempt, and thus virtually suspend the payment of alimony, it may base its action or refusal upon a condition that the party will pay the lesser amount, which it is shown that he can pay; and thus by a subterfuge the same result would be reached.

We believe that it is also conceded that if there is a reservation to the husband in a decree for the allowance of alimony that he may apply to the court at any time for a reduction, the court would then have the authority to make such reduction. And it is claimed that as there was no such reservation in the original decree in this case, the

court is now powerless in the premises. Undoubtedly it would have been better in the original decree to have included a reservation to both parties to move at any proper time thereafter for a modification in the matter of alimony upon good cause shown for such modification. And yet it is not quite apparent how the court could have well reserved to itself the authority to modify a decree if that authority was not already vested in it by law. If parties are entitled to a final decree it is the duty of the courts to render such a decree, and not to hold the parties or their cause indefinitely by means of interlocutory or continuing orders. And such undoubtedly would be the duty of the courts in ordinary cases. The maxim of the law is: *Interest reipublice ut finis sit litium*. But this maxim does not apply with the same force to proceedings for divorce as to other cases. In proceedings for divorce the jurisdiction of the courts is in some things necessarily continuous. In the case of the custody and maintenance of the children of the unhappy marriage the court must necessarily retain a continuous jurisdiction. The enforcement of the payment of alimony implies a continuous jurisdiction. And the express provision of § 749 of the Revised Statutes for the District that, after a decree of divorce from bed and board, a divorced wife committing adultery might be deprived of alimony, also implies the exercise of continuous jurisdiction. Nor is this last provision a denial by implication of the authority which we have sought here to show as existing, as it might possibly be claimed to be. That provision seems to have been intended to obviate the force of some decisions which had held that a wife divorced from bed and board, who thereafter committed adultery, should not on that ground alone be deprived of alimony. The case is not where the assertion of one thing implies the exclusion of all other things.

Undoubtedly decrees for the allowance of alimony are in a certain sense to be regarded as final. They are final and conclusive until for good cause accruing thereafter they are changed or modified; and, in general, it is only for after-accruing cause that they may be modified; and the modification usually takes effect only from the date of the accrual of such cause, and does not go back of it. Instalments of alimony, when they have become due and are in arrears, may be enforced extraterritorially as foreign judgments ordinarily are enforced. *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Tolman v. Leonard*, 6 App. D. C. 224. And in various other respects a decree for the payment of alimony, with reference to the instalments that have become due, may be regarded as a finality. And yet that they are not merely money debts in the full sense of those words, and that a decree for the payment of alimony is not a decree for the payment of money, with the conclusiveness incident to an adjudication of right, is very clear

from the fact that the court which awards the alimony may enforce its payment by imprisonment of the delinquent husband, which it could not lawfully do in the face of the statute abolishing imprisonment for debt, if the decree were a money decree with the finality incident to such decrees. *Tolman v. Leonard*, 6 App. D. C. 224.

In this last-cited case this court said: "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction." And while this was said rather by way of illustration and argument than because the question now before us was distinctly involved in that case, yet it expresses what we believe to be the well-founded law and the well-established practice in all such cases.

Apparently opposed to the views here expressed are certain decisions cited from the courts of Maine, Rhode Island, New York, Ohio, Alabama, and Kansas, and one also from the supreme court of this District. But as all these decisions except the last rest upon provisions of local law, they afford no safe criterion for our action. In most of them, as will be seen by examination of the cases, the so-called alimony allowed was not alimony in the proper sense of the term, as we understand it, but was an arrangement of property interests between the parties. It was said in one of them, for instance, the case of *Smith v. Smith*, 45 Ala. 264: "This 'allowance' to the wife is not, in fact, alimony in the sense of the ecclesiastical law of England; but it is more strictly an arrangement in lieu of a division of the estate of the parties, so as to return to the wife her just portion of that property which mutually belonged to both during the marriage, and which the labor and care of both may have equally contributed to procure and preserve."

In the case of *Sammis v. Medbury*, 14 R. I. 215, a portion of the husband's estate consisting of one half of the rents of the realty for life, and one half of the personal property absolutely, was set apart as the property of the wife upon the rendition of a decree in her favor for divorce from the bond of matrimony. Of course, this was not alimony in our sense of the term, or in the sense of the ecclesiastical law of England; and the decree for the allowance was properly held absolute and final, and not to be modified on subsequent application by the husband.

So, likewise, in the case of *Petersine v. Thomas*, 28 Ohio St. 596, and in the case of *Mitchell v. Mitchell*, 20 Kan. 665, there was an allowance to the wife of a sum in gross out of the husband's property, payable, it is true, in instalments, but still a sum in gross to be paid within a definite time; and it was held that the decree for such allowance was a final and irrevocable decree.

And such also was the case of *Fries v. Fries*, 1 MacArth. 291, in the supreme court 45 L. R. A.

of this District. There, in a decree for the dissolution of the bond of matrimony between the parties, there was a provision inserted by agreement between the parties, that the husband should convey to his wife a certain house and lot in the city of Washington, upon her payment to him of the sum of \$500 within ninety days. After the lapse of two terms of the court, it was sought to have this period of time extended, upon the theory that the matter of alimony was always within the control of the court; and it was held that the decree was final and absolute, and could not be changed as desired. But that was plainly not alimony in the proper sense of the term, but an arrangement of the property between the parties. It is true that in the opinion of the court in that case it was said: "It was suggested on the argument that the modification of this decree was in reference to alimony, and that that matter was always under the control of a court of equity. This doubtless is so during the pendency of the suit; but after a final decree it is no longer subject to alteration or revision on petition or *ex parte* affidavits any more than is the divorce itself, unless, as is often provided in the final decree, either party be at liberty thereafter to apply to the court for a modification of such decree in respect to alimony."

This undoubtedly was a correct statement of the law as applicable to the case under consideration; but it is very clear that the generality of the language used would have to be restricted in its application to other and different cases.

In only two of the cases on behalf of the appellant, that of *Sampson v. Sampson*, 16 R. I. 456, 3 L. R. A. 349, and that of *Smith v. Smith*, 45 Ala. 264, was there alimony decreed of monthly payments of indefinite continuance, such as we have in the case under consideration; and in both cases the courts are careful to base their decisions upon the rigid requirements of their several statutes, while admitting that the rule under the ecclesiastical law of England would be entirely different.

Now, we think that Congress, in the enactment of the statute of 1860, intended to incorporate, and did in fact incorporate, into it, the provisions of the ecclesiastical courts of England and of the courts of chancery of Maryland and this District in regard to alimony; and that it intended to make, and did in fact make, the allowance of alimony in accordance with the rules and usages of those courts an incident in the granting of divorces both from the bond of matrimony and from bed and board, however inconsistent in theory the allowance of continuing alimony may be to the new relation created between the parties in the former class of cases. While it is competent for the court that grants a divorce from the bond of matrimony to commute the alimony and to assign a sum in gross or a specific portion of the husband's property to the wife for her support and maintenance, and thereby to make the decree for such allowance final in

every respect, yet, under the statute, which in this regard seems studiously to make no difference between the two classes of divorce, if the court in fact allows to the wife divorced from the bond of matrimony the same kind of alimony which it would allow to a wife divorced merely from bed and board, it is not apparent why it should lose control of the one when it does not lose control of the other. Certainly there is no warrant for any such distinction in the statute, and we find none in reason. The fact that in the one case the parties become strangers to each other in law, while in the other case they remain husband and wife, although separated, would seem to be irrelevant and immaterial, when the question is merely a collateral one of a provision for the subsistence thereafter of the wife. That provision,

under the statute, may be made equally well by the adjudication of an allotment once for all to the wife, when the adjudication in its very nature becomes final, or by the award of periodical allowances, payable from time to time indefinitely, under the control and supervision of the court.

We think that a decree for the payment in payments periodical and of indefinite continuance was necessarily a decree for continuing superintendence by the courts, and which, therefore, for good cause accruing afterwards, the court might properly modify so far as concerned its future execution. And being of this opinion, we are necessarily led to the conclusion that *the decree appealed from should be affirmed, with costs; and it is so ordered.*

FLORIDA SUPREME COURT.

William P. STACKPOLE *et al.*

v.

William S. HANCOCK *et al.*

(.....Fla.....)

- *1. Where the parties to a chancery suit, after a plea is filed and set down for argument, fail to bring it on for hearing, but proceed to take testimony as to the merits of the plea, and further bring the case on for final hearing, the decree rendered will not be reversed unless there is error on the merits.
2. Ordinarily, the mere expression of an opinion as to value, or a statement as to the uses for which real estate is wanted, will not, unless used as part of fraudulent means to mislead and prevent an examination of the property, suffice to set aside a deed thereto on the ground of fraud.
3. By the rule of the common law, a vendee who has information of a mine on the land of another, of which the latter is ignorant, is under no legal obligation to disclose such fact in making the purchase. Under such circumstances, the vendee may remain silent, and not disclose facts in his knowledge, or answer inquiries as to such facts, but, if he undertakes to do so, he must disclose the whole truth, without concealment of material facts, and without doing anything calculated to prevent an investigation on the part of the vendor, especially if he does not reside near the land and the vendee does.
4. While a vendee, under the circumstances stated in the preceding headnote, may remain silent and purchase, yet a very little is sufficient to affect the application of this principle, and statements ordinarily regarded as an expression of an opinion may be considered as sufficient when calculated to mislead and prevent an examination of the property on the part of the vendor.

*Headnotes by HOCKER, J.

NOTE.—For expression of opinion as fraud, see *note to Hedlin v. Minneapolis Medical & Surgical Inst.* (Minn.) 35 L. R. A. 417; also *note to Fargo Gaslight & Coke Co. v. Fargo Gas* 45 L. R. A.

5. Where an answer in chancery contains the usual general denial found in such a pleading, it is sufficient to make an issue on material allegations in the bill not admitted, and to which no direct response is made; and as to them there must be, at least, a preponderance of sustaining proof.
6. The separate answer of one defendant cannot be used as proof against the others, in the absence of showing that he occupied such a relation to them as to bind them by his representations.
7. A bill charging an agreement and combination on the part of several defendants to fraudulently obtain a deed to them to real estate will be sustained by proof of the fraudulent representations of one in securing the deed, if in fact he was acting for the others, though they did not authorize such representations, and did not know of them when the deed was made to them.
8. Where some of the representations made by a vendee in procuring a deed to land are true, and some are false and sufficient to set aside the sale, and it appears that the latter might and did influence the vendor in the disposition of the land, the sale should be canceled.
9. Under chapter 3681, Acts 1887, when land is returned to the assessor by an owner, and the assessor acts upon the return in assessing the property, it must be assessed to the party making the return. Under such circumstances, an assessment to a party not the owner, and not the one making the return, is void.

(December 3, 1898.)

CROSS-APPEALS from a decree of the Circuit Court for Hernando County in a suit brought to cancel certain deeds to real estate; defendants appealing from so much of the decree as set aside the deed of W. P. Stackpole, and plaintiffs appealing

& Electric Co. (N. D.) 37 L. R. A. on page 604; *Andrews v. Jackson* (Mass.) 37 L. R. A. 402; and *Gustafson v. Rustemeyer* (Conn.) 39 L. R. A. 644.

from so much as refused to set aside the other deeds. *Reversed except as to the interest of W. J. Connor, as to whom, affirmed.*

Statement by the Court:

The amended bill, filed by appellees, W. P. Stackpole, James Connor, Rosanna Connor, Eugene Connor and wife, Johanna, and W. J. Connor, against W. S. Hancock, John J. Hale, John M. Taylor, C. C. Keathley, and George T. Ross, alleges that complainants were, on and before the 1st day of June, 1890, seised in fee and possessed of the W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 12, township 22 S., range 20 E., situated in Hernando county; the said W. P. Stackpole being the owner of an undivided half interest in said land, and the other complainants being the owners of the other undivided interest as heirs at law of one John Connor, deceased. The object of the bill is to cancel certain quitclaim conveyances made by complainants to defendant W. S. Hancock, a quitclaim deed from the latter to the defendants Hale, Taylor, and Keathley, and certain tax deeds acquired and held by the defendants. The grounds upon which the cancellations are sought are stated by the bill as follows: "Your orators and oratrixes, being so seised and possessed of said lands, were approached by the defendant, William S. Hancock, on or about the 1st day of June, 1890, and solicited by him to sell him their respective interests therein, which your orators and oratrixes were willing to do, provided that the sum offered by the said Hancock was as much as said lands were then worth in the market, but, not knowing the then market value of said lands, they relied entirely upon the representations of him, the said Hancock, for a truthful statement of the market value thereof. That thereupon the said Hancock represented and asserted to them that said lands were utterly valueless, except for the small amount of pine timber standing thereon. That there was an English syndicate which intended to erect a mill in the neighborhood of said lands, but would not do so unless it could purchase at least 1,000 acres. That he (Hancock) owned some adjacent lands, and, by obtaining the lands of your orators and oratrixes, he could make up the 1,000 acres, and thus effect a sale of his own lands to the said syndicate. That there were no deposits of phosphate, then recently discovered in Florida, or other valuable deposits of minerals, on said lands, and that, save for the timber aforesaid, they would command no price, and were utterly unsalable in the market. That said lands had been sold again and again for taxes, and tax deeds unnumbered clouded their title, and that the sums aggregating \$1,000, which he then offered them, were really more than said land was then worth or would sell for in the market. That upon these representations of said Hancock, on which your orators and oratrixes relied as being truthful and free from deception, and by which alone they were induced to sell said lands to him, your orators and

oratrixes did, for the aggregate sum of \$1,000, so offered as aforesaid, execute to the said Hancock quitclaim deeds to the said lands, viz., your orator William P. Stackpole, on the 2d day of June, A. D. 1890, executed a quitclaim deed to said Hancock for his interest in said lands for the sum of \$200; and in order to obtain the signature to said deed of your orator for said nominal consideration, the said Hancock first induced your orator to drink freely with him (Hancock) of spirituous liquors, and your said orator thereby became intoxicated, and in that condition was made to execute said deed. That said deed was afterwards recorded in Book 6, page 107, in the records of the clerk of the circuit court for Hernando county, Florida.

"That on the 26th day of September, A. D. 1890, your orator, and oratrixes, James Connor, Rosanna Connor, Eugene Connor, and Johanna Connor, wife of the said Eugene Connor, executed their quitclaim deed for their interest in said lands to said Hancock, for the consideration of \$600, said deed being recorded in said clerk's office in Book 6, on page 108. That your orator W. J. Connor executed to said defendant Hancock a quitclaim for his interest in said lands on the 5th day of December, A. D. 1890, for the sum of \$200, which said deed is recorded in said clerk's office in Book 6, on page 282." The bill further alleges that complainants afterwards discovered, and so allege, that all of said representations and assurances made by Hancock were utterly false in every particular, and were made by him solely to circumvent, cheat, defraud, and swindle complainants, and obtain from them the aforesaid deeds. That, in truth and fact, no such English syndicate existed, and the lands were not solely valuable for the pine timber standing thereon, but there did exist large and valuable deposits of phosphate on said lands, and said deposits rendered them exceedingly valuable, which fact was well known to Hancock and his codefendants and coconspirators, as hereinafter charged, but was entirely unknown to complainants, and studiously concealed from them by said Hancock. That said lands, at the time of the execution of said deeds, were worth at least the sum of \$30,000. It further alleged that the defendants, well knowing the great value of complainants' land, and their ignorance thereof by reason of their residence in a distant state, conspired and confederated together to oppress, injure, and defraud said complainants out of said land, and for this purpose said defendants deputed and sent Hancock, as agent, to complainants, to obtain, by the false and fraudulent statements and representations aforesaid, the said deeds from them. That, after Hancock had fraudulently thus obtained from complainants said quitclaim deeds, he, on the, to wit, 20th day of February, 1891, executed to his said coconspirators a quitclaim deed for an undivided three-fourths interest in said land, and said deed was recorded in the office of the clerk of

the circuit court of Hernando county, in Book 6, page 388.

In reference to tax deeds, it is alleged that complainant Stackpole and one John Connor, deceased, and whose heirs are cocomplainants in this suit, purchased the land in controversy in October, 1882, and obtained a deed therefor from the board of education of the state of Florida, and that said purchasers were the sole owners of said land during the whole of the years 1888 and 1889, and that said land was not returned for taxation for said years by either of the then owners, or by any authorized agent for them. That said land was wild forest land, and not in the actual possession of anyone during said years 1888 and 1889, nor at any time from that date to the filing of this bill. That the assessor of revenue for Hernando county, for the purposes of taxation, assessed for each of said years said land as the property of W. L. Connor, a person unknown to complainants. That said land was placed on page 48 of assessment roll of 1888, and in valuation column the figures "200," in the column for total taxes for state purposes, the figures "80," and in the column for total taxes for county purposes, the figures "200," occur, with no marks or other writings to show for what these figures stand. That said land was placed on page 42 of assessment roll of 1889, and in its valuation column the figures "160," in the column for total taxes for state purposes the figures "90," and in the column for total taxes for county purposes the figures "136," occur, but with no \$ mark or other writing to show what these figures mean, and that under such illegal and void assessments the lands were sold for taxes to certain parties, from whom defendants obtained quitclaim deeds. The bill asks that said tax deeds be canceled and surrendered.

It is also alleged that defendant John M. Taylor, on the 23d of March, 1892, executed a mortgage on his one-fourth interest in said land to the defendant George T. Rose, to secure the sum of \$3,500, which said mortgage was recorded in Book 8, p. 115, in the Hernando county records, April 13, 1892.

The prayer of the bill is that the quitclaim deeds from complainants to Hancock, and the quitclaim deed from him to defendants Hale, Taylor, and Keathley, be canceled and surrendered upon the payment by complainants of the \$1,000 and interest thereon received by them from Hancock, which is tendered.

Keathley died, and the suit was revived against his wife, heirs at law, and legal representatives. It appears that the wife was of unsound mind and she was represented by guardian. The minor children were represented by guardian.

Demurrers were filed and overruled, but, as no argument is made on this ruling, no notice need be taken of it.

Hancock filed a separate answer. In his answer Hancock admits the purchase by him of the land in question at the times and for the several sums set forth in the bill, but avers that the sum of \$800, paid to James, Rosanna, Eugene, and William Connor, for 45 L. R. A.

their respective shares, was the price fixed by them without any suggestion or representations whatever from him as to the value of the land. He further avers that, at the time he began negotiations with complainants for the purchase of the land, he had never examined it with the view of ascertaining whether it contained deposits of phosphate or other minerals, and that complainant Stackpole and one John Connor, under whom the other complainants derive title, were in actual possession of the land, and resided thereon, for about six months, and had every opportunity to examine the same, and ascertain what deposits, if any, were contained therein. All the allegations of the bill in reference to the false and fraudulent statements and misrepresentations as to the value of the land, and that it had no phosphate deposits, are denied *in toto* and in detail, and defendant avers that no such statements and misrepresentations were made by him. In reference to the tax deeds to the land, it is averred that defendant, together with others, had purchased two tax deeds as herein more fully shown, and that he had said tax deeds in his possession at the time he was negotiating with complainants, and exhibited the same to them. The answer also denies the allegations of the bill in reference to inducing complainant Stackpole to drink intoxicating liquors while defendant was negotiating with him in regard to the purchase of his interest in the land. The answer further avers as follows: "This defendant, further answering, denies that in any way whatever did he make any false or fraudulent representations to the complainants, or either of them, concerning the land in question, or that any false, deceitful, or fraudulent representation was made by him, either in his individual capacity or as agent of his codefendants, but says that he, together with the defendants John M. Taylor, John J. Hale, and C. C. Keathley, now deceased, but whose heirs and representatives are parties defendant hereto, concluded to negotiate for the purchase of said land, and that this defendant, in negotiating and concluding said purchase, acted honestly, and without any endeavor to cheat, defraud, or otherwise injure complainants, or either of them, and that, after agreeing upon a price, the complainants executed deeds for their respective interests, and the defendant paid them the purchase price so agreed upon, and took said deeds, as of right he could do. This defendant, further answering, says that, immediately upon the execution and delivery of said deeds by complainants, he, with the said Hale, Taylor, and Keathley, took actual possession of the land in controversy, and had erected and constructed a small house upon the same, which was subsequently destroyed by fire; that, from the time of so entering into possession of said land, they have been in the continued occupation thereof, having had the same surveyed, worked upon, and a portion thereof inclosed with a good substantial fence. This defendant, further answering, says that, prior to the execution and delivery

of the deeds from the complainants to himself, he, with the said Hale, Keathley, and Taylor, had obtained a quitclaim deed to said land from Chauncey S. Wilson and William E. Law, who held a tax deed for the same, and had at the same time obtained from the said Wilson and Law a transfer of a tax certificate which they held for said land, the same having been sold for the nonpayment of taxes for the years 1888 and 1889, all of which will more fully appear by reference to said certificate and deeds, copies of which have been filed with the separate answer of this defendant to the original bill herein, said copies being marked, respectively, 'A,' 'B,' 'C,' 'D,' and 'E,' and prayed to be taken as a part of this answer. And this defendant avers that the complainants, nor either of them, were at the time of the institution of this suit, or at any time since then, in the possession of said land, or any portion thereof, nor is said land wild forest land, and unoccupied, as is alleged in the complainants' said bill of complaint."

It is also alleged that the assessment and sale of said land for nonpayment of taxes for the years 1888 and 1889 were, so far as defendant knew, perfectly legal, and as to such alleged illegality strict proof was required. There is also contained in the answer a demurrer to the bill as not making a case entitling complainants to any relief.

The joint answer of the other defendants, except Ross, after the usual reservation of benefit on account of uncertainties and imperfections in the bill, admits the purchase by W. S. Hancock, their codefendant, from complainants, of the land in question, for the price alleged, and at the time stated therein; but they aver that they did not know, of their own knowledge, what, if any, representations were made by said Hancock to complainants in reference to said land, and they emphatically deny that, if any fraud or deceit was practised by Hancock, or if any false, deceitful, or fraudulent representations were made by him to the complainants, or either of them, to induce them to sell said land, the same were made with their authority, knowledge, consent, or approval, and they, according to the best of their several and respective knowledge, information, and belief, deny that Hancock made any false or fraudulent representations to complainants in reference to the deposits of phosphate or other minerals upon said land, or that Hancock represented and asserted to complainants that the said lands were valueless save for the small amount of timber thereon, and that his object in purchasing said land was for the purpose of selling it, together with lands of his own, to an English syndicate. They also deny, upon information, that Stackpole was intoxicated when he executed his deed to Hancock.

In reference to the allegation in the bill about tax deeds, these defendants aver that they did not know, of their own knowledge, what representations, if any, were made by Hancock; but they say that, in fact and in truth, said land had been twice sold for the

nonpayment of state and county taxes levied and assessed thereon for the years 1888 and 1889, as would more fully appear by the exhibits attached to the answer of Hancock. Further answering, defendants say, in reference to the charge in the bill of the voidness of the assessment and sale of the land and of the tax deeds issued in pursuance thereof, and purchased by Hancock, Hale, Taylor, and Keathley, that they are uninformed, save from the allegations in the amended bill, and, for aught they know, said assessments and sale may be perfectly good. It is denied that the land is wild forest land, and unoccupied, at the time of the institution of the suit or the filing of the amended bill; but, on the contrary, they aver that, immediately after the execution and delivery of the deeds by complainants to Hancock, he, Hale, Taylor, and Keathley went into the actual possession of said land, and have so remained up to the time of the filing of this answer. The answers reserve the question of the sufficiency of the bill to entitle complainants to any relief, as matter of law, and conclude as follows: "These defendants deny all and all manner of unlawful combination and confederacy wherewith they are by said amended bill charged, without this that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, traversed, confessed, and avoided or denied, is true to the best knowledge and belief of these defendants,—all which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct."

G. T. Ross filed a plea alleging that he loaned the sum of \$3,500 to defendant John M. Taylor, and that, as security for said loan, he took from him (Taylor) a mortgage on his interest in said land, and that said loan was made, and mortgage taken, in good faith, and without any knowledge on his part that the title of Taylor to said land was defective, or that the same had been obtained by fraud or deceit, if such was the case, as alleged in the bill.

Replications were filed to the answers, and the plea of Ross was set down for argument.

Testimony was taken covering the entire case, including the matters embraced in said plea, and, on final hearing, the court decreed that the equities of the case as to W. P. Stackpole were with him, and as to the other complainants, the equities were with defendants. The quitclaim deed from complainant Stackpole to W. S. Hancock, and the tax title to the land in question, were ordered to be canceled, upon said complainant paying to defendants the moneys which might thereafter be adjudged to be due from him for taxes, improvements made upon, and encumbrances discharged from, the land, and a reference was made to a matter to state an account of what was due for taxes paid and for money expended in improving the property.

Appeals were entered by both complain-

ants and defendants, as styled in the beginning of this statement, from the decrees adverse to them, respectively.

The other facts are stated in the opinion.

Mr. T. S. Coogler, Sr., for appellants:

Complainants' title is solely equitable, and it is not necessary for them to allege or prove possession of the land, and, in fact, possession might be conceded to the defendants so far as the jurisdiction of the court is concerned.

Sloan v. Sloan, 25 Fla. 53; *Patton v. Crumpler*, 29 Fla. 577.

The land at the time of its assessment was owned jointly by William P. Stackpole and John L. Connor, yet, without any return having been made by either of them or their agent, the assessor assumed to assess it in the name of W. L. Connor, an unknown person.

This assessment is contrary to the statute, and void.

The assessment being void, all proceedings under it, including the tax deed, are also void.

L'Engle v. Florida C. & W. R. Co. 21 Fla. 353; *L'Engle v. Wilson*, 21 Fla. 461; *Brown v. Castellaw*, 33 Fla. 204; *Daniel v. Taylor*, 33 Fla. 636; *Sloan v. Sloan*, 25 Fla. 53; *McKeown v. Collins*, 38 Fla. 276.

At the time that the quitclaim deeds were executed the land was worth the sum of at least \$30,000, and complainants were paid only \$1,000 for them.

This requires a decree for the cancellation upon the ground of constructive fraud.

2 Pom. Eq. Jur. § 873; *Tiedeman, Eq. § 226*; *Chesterfield v. Janssen*, 2 Ves. Sr. 125; *Wilson v. Lott*, 5 Fla. 305.

These deeds were obtained by false representation made by the defendants.

This makes a case of actual and manifest fraud, and the court will decree a cancellation on this ground.

Story, Eq. Jur. 201; 2 Kent, Com. 484; *Adams, Eq. 176*.

If there be an intentional concealment or suppression of material facts in the making of a contract, in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract—*et sequitur*.

2 Kent, Com. 482.

The codefendants in this suit can derive no benefit from Hancock's fraud, however innocent they may be.

1 *Story, Eq. Jur. § 193*; *Stephens v. Orman*, 10 Fla. 9; *Chaires v. Brady*, 10 Fla. 133; *Griffin v. Orman*, 9 Fla. 22; *Cofer v. Moore*, 87 Ala. 705.

Messrs. G. C. Martin, J. A. Bowen, and **Angus Paterson** also for appellants.

Messrs. Sparkman & Sparkman, **John P. Wall,** and **George P. Raney** for appellees.

Per Curiam:

Both complainants and defendants entered appeals in this case, and separate transcripts 45 L. R. A.

of the record have been filed on the appeals. No objection is urged to any of the appellate proceedings in this court, nor is any objection made to the procedure in the circuit court, except a suggestion in brief of counsel for Hancock and others that the record fails to show a disposition of the plea filed by George T. Ross and set down for argument. Ross was made a party to the bill, but no relief was specially prayed against him, nor does the decree appealed from expressly adjudicate anything as to his rights. After the filing of a plea by him, setting up an interest as mortgagee in the undivided interest of the defendant John M. Taylor, it was set down for argument, and there is no showing that any hearing was had thereon. The record does show that the parties went into proof on the matter of the plea, and that the case was brought on for final hearing without any objection as to the condition of the pleadings. Ross, though joining in the appeal, has filed no assignment of errors here, nor is there any error assigned by any appellant on the condition of the record as to said plea.

Where the parties, after a plea is filed and set down, fail to bring it on for hearing, and proceed to take testimony as to the matters of the plea, and further bring the case on for hearing, this court, in accordance with the principle announced in *Crump v. Perkins*, 13 Fla. 353, should not reverse the decree, unless there is error on the merits.

Both of the appeals in the present case are presented together, and, in view of the rule that an appeal in chancery opens up the entire case for appellees, as well as appellants, the case will be disposed of on its merits, so far as disclosed by the record, without reference to the strict requirements as to assigning and considering errors in the appellate court. The bill of complaint has a double object: It seeks the cancellation of certain quitclaim deeds from complainants to defendant Hancock, and a similar deed from the latter to the other original defendants, and also certain tax titles acquired by all of said defendants. In reference to the quitclaim deeds, the testimony discloses three separate transactions in the purchase of the land by Hancock from complainants. On and prior to June, 1890, the land in question was jointly owned by W. P. Stackpole and John L. Connor, and about the 2d day of that month Hancock purchased the interest of Stackpole in the land. Connor died, and about the 26th of September, 1890, three of his heirs, James, Eugene, and Rosanna Connor, deeded their interests in the land to Hancock. The purchase by Hancock from the parties named was made by him in person in the state of Connecticut, where they resided. In December of the same year, Hancock purchased, through one J. T. Lynch, the interest of W. J. Connor, the only other heir at law of John L. Connor, deceased. Stackpole and John L. Connor, deceased, purchased the land in 1882, and for a short time resided upon it, but soon left the state, and never again returned. Phosphate had not been discovered

in Florida when they were here, and no interest in Florida lands had arisen on account of phosphate. This discovery had been made a short time before Hancock purchased from Stackpole, and the latter knew nothing of it when he sold his interest. Hancock had long resided in Florida, and near the land, and it is abundantly shown that he knew of a valuable deposit of phosphate on the land before he went to Connecticut to purchase. The proof shows without contradiction that he visited the land the day before he started to go to Connecticut, and saw a pit dug into the rock on the land that disclosed what was stated to him to be phosphate. At that time there was great excitement in the country over the discovery of phosphate and its supposed great value. Hancock did not disclose to Stackpole the fact that phosphate had been discovered on the land. The testimony tends to show that Hancock represented, in making the purchase, that he wanted the land to add to land of his own in order to complete a body of timbered land that he expected to sell to an English syndicate, and that the land was valuable only for the timber that was on it. He also stated that the land had been sold for taxes, and that a tax deed had been issued, and this statement was true. There was some testimony tending to show that Hancock had induced Stackpole to drink freely at the time of the purchase, but it did not go to the extent of showing incapacity on his part to make a contract of sale. The testimony is of a character to warrant the chancellor's conclusion, and to forbid a disturbance of it, that Hancock represented to Stackpole, as an inducement for him to sell, that the land was valuable only for the timber that was on it, and also that the special reason of the former in desiring to buy it was to augment a body of his own land that was necessary to complete a sale to an English syndicate. It has been decided in this state, in accordance with the prevailing rule, that statements amounting to an estimate or opinion of the value, condition, character, or adaptability to certain uses of real estate are not actionable unless the party resorts to some fraudulent means to prevent an examination of the property. *Williams v. McFadden*, 23 Fla. 143; *West Florida Land Co. v. Studebaker*, 37 Fla. 28. In proceedings in chancery to cancel a deed to real estate on the ground of fraud, the mere expression of an opinion as to value, or a statement as to the uses for which the land is wanted, will not ordinarily suffice. A fraud may, however, under some circumstances, be perpetrated by a *suppressio veri* as well as a *suggestio falsi*. According to the rule of the common law, a vendee who has information of a mine on the land of another, of which he is ignorant, is under no legal obligation to disclose such fact in making a purchase. Under such circumstances, the vendee may remain silent as to the real facts, and purchase, but such situation places him under legal obligation to do no act or make any representation calculated to mislead the owner into the belief

that there was no mine on the land. If the vendee undertakes to speak under such circumstances, he must utter the truth. The principle stated in the English case of *Turner v. Harvey*, Jac. 169, is that the purchaser is not bound to give the vendor information as to the value of the property, but a very little is sufficient to affect the application of this principle. This doctrine is illustrated by the case of *Livingston v. Peru Iron Co.* 2 Paige, 390, where the vendee, knowing the existence of a valuable spring on the land, represented that the land was of no value except as a sheep pasture, for which purpose it was wanted. The authorities sustain the view that while a purchaser situated as Hancock was, is not bound to disclose facts in his knowledge, or to answer inquiries as to such facts, yet, if he undertakes to do so, he must disclose the whole truth, without concealment of material facts, and without doing anything calculated to prevent an investigation on the part of the seller, especially if he does not reside near the land, and the purchaser does. *Caples v. Steel*, 7 Or. 491; *Walters v. Morgan*, 3 De G. F. & J. 718; *Dolman v. Nokes*, 22 Beav. 402; *Smith v. Countryman*, 30 N. Y. 655; *Smith v. Beatty*, 37 N. C. (2 Ired. Eq.) 456, 40 Am. Dec. 435; *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661; *Kohl v. Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Swimm v. Bush*, 23 Mich. 99; *Morgan v. Dinges*, 23 Neb. 271; *Bowman v. Bates*, 2 Bibb, 47, 4 Am. Dec. 677; *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. ed. 214; 2 Pom. Eq. Jur. § 902, and note.

The statement made by Hancock, that the land was valuable only for the timber that was on it, would ordinarily be regarded as an expression of an opinion; but under all the circumstances of this transaction, as disclosed by the testimony, it was calculated to mislead Stackpole, and to prevent him from making any inquiry in reference to the land, and constituted a part of the scheme to conceal the real facts as to the discovery of phosphate on the land, and which, if known to Stackpole, would have prevented the sale at the price accepted. The conclusion is reached by the chancellor that the sale by Stackpole to Hancock, so far as he is concerned, is sustained by testimony of such a character as to preclude, under the established rule on the subject, a reversal. The decree, however, goes further, and cancels the deed from Hancock to Hale, Taylor, and Keathley as to Stackpole's interest in the land. The bill alleges that Hancock, Hale, Taylor, and Keathley conspired and confederated together to buy the land, and that Hancock was deputed as agent to go and make the purchase. The case made by the bill, as to Hale, Taylor, and Keathley, is that they originally united with Hancock, and participated with him in the entire purchase, and upon this case relief must be had, if at all. Under the allegations of the bill the decree against all the defendants as to Stackpole's interest would be correct on proof of the fraudulent representations of Hancock, if he in fact was acting for the other defendants, though they did not au-

thorize such representations, and did not know of them when the deed from Hancock was executed to them. But the proof does not show such a state of facts. It is established beyond question that Hale, Taylor, and Keathley never say any of the complainants at the time of the purchase of the land, and did not make any representations of any kind to them. It is also clearly shown by the testimony that they did not have any agreement or understanding with Hancock in reference to the purchase of the land at the time the deed from Stackpole was obtained. They subsequently obtained a deed from Hancock for valuable consideration, and there is no basis in the testimony for a conclusion that they had any information of the representations made by Hancock when he purchased the property.

Counsel for Stackpole have assumed that the combination of the defendants and agency of Hancock to purchase the land is established by the pleadings, and required no proof. In this they are mistaken. Hancock filed a separate answer, and therein admitted the allegation of agency, but his answer cannot be used against the other defendants, in the absence of proof that he occupied such a relation to them as to bind them by his representations. The defendants, other than Hancock, deny positively that they authorized Hancock to make any of the fraudulent representations alleged, and upon information they deny that any such representations were made. They do not, however, directly respond to the allegation that they agreed with Hancock to buy the land, and authorized him to make the purchase from the complainants, and it is assumed that, by their failure to make such response, the allegation of the bill is admitted to be true. It will be seen from the statement that the answer of said defendants concludes with the usual general denial found in answers in chancery, and this is sufficient to make an issue on material allegations not admitted, and to which no direct response is made. There is no statute in Florida regulating the effect of answers in chancery in this respect, and the general rule prevails that where there is no direct response to a material statement in the bill, no exceptions filed, and the case is brought to hearing on the replication to the answer, such statement cannot be taken as admitted, but must be proved. It need not be proved by the amount of testimony required to overcome a sworn responsive answer, but it must be shown by at least a preponderance of evidence. 1 Enc. Pl. & Pr. p. 930, and authorities cited; *Smith v. St. Louis Mut. L. Ins. Co.* 2 Tenn. Ch. 599.

The testimony in this case is clear and positive that defendants Hale, Taylor, and Keathley had no connection whatever with Hancock in the purchase of the land when Stackpole sold his interest; and on the proof, under the state of the pleadings, the chancellor should not have decreed against said defendants as to the interest acquired by them in the half interest of W. P. Stackpole. The complainants completely failed to es-

tablish the case made against said defendants as to said interest, and the latter were not compelled to specially set up the defense of a bona fide purchaser without notice, but could meet the particular case made against them in the bill, and thereby defeat a recovery.

As to the purchase from James, Eugene, and Rosanna Connor, the case is different. When this purchase was made, Hancock is shown to have acted for and represented the other defendants. It is true that there is no testimony tending to show that defendants Hale, Taylor, and Keathley authorized any false representations, or knowingly ratified any; but it is true that Hancock was then acting for them, and they must be bound by his acts and doings. *Cofer v. Moore*, 87 Ala. 705. The decided weight of the testimony shows that Hancock represented to James, Eugene, and Rosanna Connor, at the time he purchased from them, that the land did not contain phosphate. All three of them testify that, in response to a direct question as to whether there was any phosphate on the land, Hancock stated there was none. It also appears from the testimony of two other witnesses, not connected with the litigation, that Hancock stated to them, in Willimantic, Connecticut, where the purchase was made, that no phosphate existed on the land. One of the witnesses had advised the Connors not to sell, and Hancock obtained an interview with him for the purpose of convincing him that his advice was wrong, and to get him to advise the Connors differently. It is true that the witness mentioned had been informed that Hancock held a tax title to the land, and on this information he advised the Connors not to sell. Hancock then held two tax titles to the land, and it appears that he impressed the witness with the idea that the land might be lost to the owners on account of the tax titles. But the witness states that, before consenting to advise the Connors to sell under the showing of tax titles, he asked Hancock about phosphate on the land, and was assured by him in the most positive manner that none existed. After this, the witness advised the Connors to sell. The other witness was foreman of a mill where some of the Connors worked, and, meeting with some difficulty in engaging the Connors in a negotiation of sale, Hancock approached the foreman, and procured him to arrange an interview with the Connors. Hancock stated to the witness his object in seeing the Connors, and the witness says Hancock offered to pay him \$50 gratuitously if the trade was consummated. In the conversation on the subject the witness says Hancock stated that there was no foundation for any report that phosphate existed on the land. There was some conflict in the evidence, and Hancock denied all the statements imputed to him in reference to false statements about the land, but a careful consideration of the entire testimony makes it clear that the decided weight of it is in favor of the charge that a false statement was made to the three Connors in ref-

erence to the existence of phosphate on the land. The full extent of the phosphate existing is not definitely shown, nor is the full value of the land made to appear; but it is sufficiently established that a valuable mine of phosphate existed on the land, which greatly enhanced its value.

It may be that the decree against the Connors was influenced by the view that they were induced to sell solely on account of tax titles which Hancock held. Counsel take this position here. It does appear that Hancock exhibited two tax titles at the time of purchase, and brought their existence prominently to view in all the negotiations, but, in connection with the tax titles and as an additional inducement to bring about the sale, the representation was made that the land had no phosphate on it. It was made to owners who had never seen the land, and who resided in a distant state, and under such circumstances as authorized them to rely upon it as being true. It was material, and, when Hancock undertook to speak in reference to the matter, he should have disclosed the entire facts. Complainants testify that they relied upon the statement that there was no phosphate on the land as being true, and it cannot be safely affirmed, on the evidence, that it did not operate to some extent in inducing the sale. If so, complainants can avail themselves of it in having a cancellation of the sale. The decree is erroneous as to James, Eugene, and Rosanna Connor, but as to W. J. Connor it must be affirmed, on the ground of an entire absence of proof showing any improper representations whatever made to him in obtaining the conveyance of his interest in the land.

There is some contention that complainants were barred by laches in not earlier instituting proceedings to cancel the sales. No such defense was made in the answers, but, conceding that it may be insisted on without specially pleading it, the record here affords no sufficient support for the contention.

The amended bill seeks the cancellation of two tax deeds which defendants sought to interpose as evidence of a superior title in themselves. One of the deeds is based upon an assessment of the land in question for the year 1888; and this is the only one that demands any consideration, as the other does not embrace the land, and can therefore, have no bearing on the case. The land in question is the W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 12, township 22 S., range 20 E., and the deed put in evidence, based upon the assessment of 1889, describes the land as the W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 12, township 22, range 20 E.; which is an entirely distinct parcel of land from that owned and sold by the complainants.

Complainants put in evidence page 48 of the assessment roll of Hernando county for the year 1888, showing an assessment of the land for that year as the property of W. L. Connor. Proof was then made by the clerk of the circuit court that the tax returns, after the completion of the assessment rolls, were deposited in his office, and he was the

custodian of them, and that, upon an examination of the returns for the year 1888, he found one for the land in controversy. The return was produced in evidence, and showed a proper description of the land listed to J. L. Connor. The witness further stated that, from his knowledge of his handwriting, he would say the return was in the handwriting of the tax assessor for the year 1888. It was shown that W. P. Stackpole and John L. Connor were the owners of the land during the year 1888, and no one was in the actual occupancy of it. The assessment in question was made under Acts 1887, chap. 3681, the 22d section of which reads as follows: "The assessor shall ascertain by personal inspection, when not already sufficiently acquainted therewith, the value of the lands, and assess them at their full cash value, and set down in the assessment rolls following and opposite the description of the lands, the name of the owner, or person in whose name the return is made; and when land has not been returned, the assessor shall enter the word 'Unknown' in the column of the assessment roll provided for the name of owners or person making return. A failure to give the name of the owner or person making the return shall not invalidate the assessment. When the owner or person making the return of any real estate is dissatisfied with the valuation fixed thereon by the assessor, and shall make complaint thereof to him, the same shall be so noted and reported by the assessor to the county commissioners, to be reviewed and equalized by them." This act prescribed the form of tax deed, and made it prima facie evidence of the regularity of the proceedings, from the valuation of the land by the assessor to the date of the deed, inclusive. The validity of the act in reference to the evidentiary force of the deed, has been affirmed in this state. *Sams v. King*, 18 Fla. 557; *Florida Sav. Bank v. Brittain*, 20 Fla. 507; *Mundee v. Freeman*, 23 Fla. 529. In *Sams v. King* it is said that the presumption of regularity which attaches to a tax deed must prevail in its favor until evidence is given of facts which show irregularity. It is not enough to prove facts from which irregularity may be inferred. The presumption must prevail until facts inconsistent with it are shown. The evidence introduced by the complainants was sufficient to prove, in the absence of a countershewing, that the land was returned to the assessor for the year 1888 in the name of J. L. Connor, who was an owner to the extent of an undivided half interest, and that the assessor undertook to base his action in assessing the property upon this return. It was his duty to make the assessment to the owner or person making the return, but this was not done. The assessment was to a person not the owner, nor to one making the return, and in this respect it was clearly in violation of the statute. To what extent the clause in the section quoted, that a failure to give the name of the owner or person making the return shall not invalidate the assessment, was intended to

cure defective assessments, is not entirely clear; but it applies only to the failure to give the name of the owner or person making the return, and not to the case where an entirely improper and unauthorized name is given. Giving the statute the strict construction which is applied to such legislation, the assessment was void, and consequently the deed based upon it was overthrown. The decree, so far as this tax deed is concerned, was correct.

It appears that the decree made no provision for a refunding of the purchase money and interest by the succeeding complainant,

W. P. Stackpole. The cancelation should be conditioned upon the refunding of the proper amount of purchase money and interest by those of the complainants in whose favor the decree is made.

The decree, so far as W. J. Connor is concerned, is affirmed, and in all other respects it is reversed, with directions to enter a decree in accordance with the views expressed.

Maxwell, J., of the first judicial circuit, sat in the place of Taylor, Ch. J., who was disqualified.

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

Lorenzo J. LAMSON *et al.*, *Plffs. in Err.*,
v.

Robert R. BEARD, Receiver of First National Bank of Pella, Iowa.

[No. 526.]

C. B. CONGDON & COMPANY, *Plff. in Err.*,
v.

SAME.

[No. 555.]

Elliott H. PHELPS *et al.*, *Plffs. in Err.*,
v.

SAME.

[No. 561.]

(84 Fed. Rep. 80.)

1. Error in admitting evidence to establish immaterial facts incorporated in special findings does not require reversal.
2. Brokers who receive drafts drawn in their favor by the president of a bank upon its funds in settlement of his transactions upon the board of trade are bound to communicate that fact to the bank directors, and inquire as to his authority to execute the paper.
3. A finding of fact that the president of a bank made a wrongful and unauthorized appropriation of its funds for payment of his own debts cannot be overcome in favor of persons who received them, by the fact that entries exist in the bank's books which tend to show the contrary, since their liability to refund depends, not upon the fraudulent bookkeeping, but upon the misappropriation of the money to which they were parties, in regard to which they were bound to inquire of the directors, and not look to the books.

NOTE.—As to equities in negotiable note of a corporation taken from its president as collateral security for a loan to him, see Cheever v. Pittsburg, C. & L. E. R. Co. (N. Y.) 34 L. R. A. 69.

As to rights in note of firm discounted by 45 L. R. A.

4. That bank officers have possession of facts in books purposely kept in a manner to conceal the truth does not in law charge them with knowledge of the facts.
5. Knowledge by a bank president of his own frauds on the bank perpetrated for his individual purposes is not attributable to the bank.
6. Whether or not a bank has by permitting its president to use drafts drawn by himself upon its funds in payment of his own obligations established a course of dealing which will estop it from denying his authority to do so is a question of fact depending upon the circumstances.
7. Brokers who take from its president drafts of a bank payable to them and signed by him in payment of his individual debt to them are not bona fide purchasers so as to be able to hold the proceeds against the bank in case he had no authority to draw the drafts.
8. Interest may be allowed upon the amount required to be refunded to a bank by persons who took its drafts from its president in payment of his individual debt to them when he had no authority to use the drafts for that purpose.

(May 10, 1899.)

WRITS OF ERROR to the Circuit Court of the United States for the Northern District of Illinois, Northern Division, to review judgments in favor of plaintiff in an action brought to recover the proceeds of drafts which were alleged to be the property of the bank and to have been delivered to defendants by the bank's president in discharge of his individual liabilities. *Affirmed.*

Before Woods and Jenkins, Circuit Judges, and Bunn, District Judge.

Statement by Woods, Circuit Judge:

These are actions of assumpsit, brought by Robert R. Beard, as receiver of the First

partner for his own credit, see Brown v. Pettit (Pa.) 34 L. R. A. 723.

As to equities in note transferred by trustee, see Tradesmen's Nat. Bank v. Looney (Tenn.) 38 L. R. A. 837.

National Bank of Pella, Iowa, to recover of the respective plaintiffs in error, who are commission merchants at Chicago, the proceeds of drafts of the bank, drawn in their favor and delivered to them by E. R. Cassatt, then president of the bank, in discharge of individual liabilities incurred in transactions conducted by them for him on the board of trade at Chicago.

The plaintiffs in error in the first case are copartners under the name of Lamson Bros. & Co.; in the third case, under the name of Milmine, Bodman, & Co.; and in the second case C. B. Congdon & Co. is the name of a corporation. The declaration in each case contains the customary common counts, and also special counts, to which the drafts there-in sued upon are made exhibits. Plea in each case, *non assumpsit*; and in the first case a trial by jury. The errors assigned in that case have reference to the giving and refusing of instructions. The evidence is in the record, and is without substantial conflict. The drafts, of which there were ten, were all drawn upon a lithographed or printed form, and, excepting dates and amounts, are like the first, which reads as follows:

First National Bank.
Pella, June 27, 1892.

Pay to the order of Lamson Bros. & Co.
\$400, four hundred dollars.

E. R. Cassatt, Pt.
To National Bank of Illinois. Cashier.

The word "Cashier" is in print, and the letters "Pt.," opposite the name of Cassatt, were written by him to indicate his office as president of the bank. He sent the drafts by mail to Lamson Bros. & Co., in response to their demands, in order to maintain his margins, and in each instance they acknowledged receipt by a letter addressed to Cassatt individually. In their letter of December 20, 1893, they say, "Your a/c has credit for \$200, received from First National Bank of your city," and in that of January 22, 1894, they say: "We received to-day from the First National Bank of your city their favor of the 20th instant, containing draft for \$400, which we have credited to your account."

Under the court's charge, which upon the main question in the case followed the opinion of Judge Wallace in *Anderson v. Kissam*, 35 Fed. Rep. 699, the jury returned a verdict, upon which judgment was entered in favor of the plaintiff for the sum of \$3,588, of which it is conceded the sum of \$688 was for interest. In support of the court's charge there have been cited (in addition to *Anderson v. Kissam*, 35 Fed. Rep. 699); *Chrystie v. Foster*, 26 U. S. App. 67, 61 Fed. Rep. 551, 9 C. C. A. 606; *Moores v. Citizens' Nat. Bank*, 15 Fed. Rep. 141, 111 U. S. 156, 28 L. ed. 385; *Clafin v. Farmers' & C. Bank*, 25 N. Y. 293; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234; *Wilson v. Metropolitan Elev. R. Co.* 120 N. Y. 145; *Shaw v. Spencer*, 100 Mass. 384, 1 Am. Rep. 115, 97 45 L. R. A.

Am. Dec. 107; *First Nat. Bank v. Wagner*, 93 Ky. 525. *Per contra*, the plaintiffs in error have cited *Goshen Nat. Bank v. State*, 141 N. Y. 379; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 143 N. Y. 564; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612; *Kissam v. Anderson*, 145 U. S. 435, 36 L. ed. 765. This case was argued at the October session, 1898, Judge Showalter with the other circuit judges composing the court. In each of the other cases a trial by jury was waived by written stipulation, and the court made a special finding of facts, based in the main upon an agreed statement of the parties, and gave judgment for the plaintiff.

The findings in No. 555 are as follows:

"First. The plaintiff was before and at the time of the commencement of this suit, and is now, the receiver, duly appointed by the comptroller of the currency, of the First National Bank of Pella. The plaintiff was at the time of the commencement of this suit, and is, a citizen of the state of Iowa.

"Second. The defendant C. B. Congdon & Co. is a corporation organized under the laws of the state of Illinois, having its principal place of business in Chicago, in the northern division of the northern district of said state. Said corporation is a resident and citizen of the state of Illinois, and of the northern division of the northern district thereof, and was so organized and incorporated and was such resident and citizen, at the time of the commencement of this suit.

"Third. The said First National Bank of Pella is situated at Pella, a town of about 3,000 inhabitants, in the midst of a farming community, and was organized in 1871, under the banking laws of the United States, with a capital stock of \$50,000. E. R. Cassatt was the principal person engaged in its organization, and after the year 1883, together with his relatives, owned a majority of the stock, all of which was controlled by Cassatt. From the time of the organization of the bank to its failure Cassatt was president and the principal executive officer of the bank, and enjoyed in a high degree the confidence of its stockholders and of the people of Pella and of the surrounding country. Subsequent to 1881 the management of the bank was entirely under the control of E. R. Cassatt. The board of directors performed their duties largely in a perfunctory manner, and their knowledge as to the affairs of the bank was derived almost exclusively from the statements made to them by Cassatt. Cassatt dictated the persons to whom loans should be made, and had the entire discretion as to the acceptance of all bills receivable which became part of the assets of the bank. The method by which the affairs of the bank were conducted, the duties which the clerks performed, the manner of selling exchange, and the other executive methods of the bank were devised by said Cassatt, and carried on under his directions, without interference from the directors. The board of directors reposed im-

placit confidence in Cassatt, and accepted his statements as true in regard to all the affairs of the bank, and made no examination of the bills receivable to ascertain whether they were spurious or not. Cassatt had charge of the bills receivable of the bank and of the cash chest. Cassatt was accustomed, from the organization of the bank down to the time of its failure, to draw drafts on the funds of said bank on deposit in other banks, signing such drafts in the name of himself as president. The affairs of the bank were examined twice a year by the examiner appointed by the comptroller of the currency of the United States. At the time of such examinations Cassatt was accustomed to exhibit to the examiner the bills receivable and the cash on hand, and then return them to the safe. At such times the proper amount of cash was on hand and such bills receivable as the books of the bank showed to be on hand. The balance of the stock of the bank, outside of Cassatt's holdings, were held in small amounts, the average being about \$2,000 of stock (at its par value).

"Fourth. The said First National Bank of Pella went into the hands of a receiver June 25, 1895. At the time of its failure it was for the first time ascertained by its stockholders and by the other officers, that said Cassatt was a defaulter to the bank in the sum of about \$65,000. Such sum had been taken by Cassatt from time to time, from the moneys of the bank, and had been concealed by means of forged, spurious, and other fictitious notes; other evidences of loans having been put into the bank by Cassatt. The forged and fictitious notes were so adroitly executed that there was nothing that would suggest to the ordinary observer that the notes were not genuine as they purported to be. The said Cassatt has since that time been duly indicted, tried, and convicted for the embezzlement of said \$65,000, and is now serving his sentence on account of such conviction.

"Fifth. The said Cassatt began to have business dealings with C. B. Congdon & Co., a firm consisting of C. B. Congdon and A. C. Davis, commission merchants on the Board of Trade in the city of Chicago, in 1894, continuing to have such transactions down to and including a portion of September, 1894. On or about September 24, 1894, the defendant corporation of C. B. Congdon & Co. was duly organized under the laws of the state of Illinois and authorized to begin business. On said September 29, 1894, said corporation duly purchased the goodwill and property of the said firm of C. B. Congdon & Co. and of the firm of A. C. Davis & Co., said A. C. Davis being a member of both firms. The stockholders of said corporation were, and at the time of said transaction continued to be, and still are, the same men who constituted the firm of C. B. Congdon & Co. and the firm of A. C. Davis & Co. The officers of said corporation, at the time of its organization and at the time the drafts were made in the suit here, were C. B. Congdon, presi-

dent; A. C. Davis, vice president; William S. Warren, secretary; Charles H. Hulburd, treasurer—the said C. B. Congdon being the same C. B. Congdon who belonged to the previous firm of C. B. Congdon & Co., and the said A. C. Davis being the same A. C. Davis who belonged to the firm of C. B. Congdon & Co. The directors of said corporation were at the beginning, and have ever since continued to be, C. B. Congdon, A. C. Davis, C. H. Hulburd, William S. Warren, and E. A. Lancaster. From the time said corporation of C. B. Congdon & Co. was organized the said Cassatt continued his dealings, formerly had with C. B. Congdon & Co., with the said corporation. The said dealings with the said corporation and its predecessors, C. B. Congdon & Co., were substantially as follows: The said Cassatt would, either personally or by wire, direct the said corporation or firm to purchase or sell certain futures in either wheat, oats, or provisions, which said direction would be executed by the corporation on the Chicago Board of Trade by buying of or selling to some other broker on such board the futures stipulated. Such purchases or sales would thereupon be carried by said corporation or firm in the name of and for the benefit of said Cassatt until another order was received by Cassatt closing out the same, either by purchase or sale, as the case might be. Under the rules of the Board of Trade the corporation or firm would have been obliged to have delivered, in case of sales, or accepted, in case of purchases, from the brokers with whom they had transactions, the cereals or provisions in question when the deals matured, and the said Cassatt would have been obliged to have taken or delivered to the corporation or firm the cereals or provisions called for in such deals at the time they would have matured. As a matter of fact, however, none of the sales made by the corporation or firm on account of Cassatt ever resulted in the delivery of any grain or provisions, and none of any of the purchases made on his account ever resulted in obtaining, or the acceptance of, any grain or provisions. The deals were, in nearly every instance, closed before the future to which they related had arrived, and without the passing or intention to pass of any actual grain or provisions. All the transactions of Cassatt with the said corporation or firm were intended by him to be purely speculative transactions in futures on the Board of Trade, and were so understood by the said corporation or firm, and none of the said transactions contemplated the purchase or sale of grain or provisions with any other purpose than the subsequent disposal of the same without the actual delivery or acceptance of the grain or provisions involved. The purchases and sales were numerous, and represented, in the aggregate, a large amount of dealing. The defendants and the firm were protected from losses by margins put up from time to time with them by said Cassatt for that purpose. The general course of said speculation was unfavorable to Cassatt. He occasionally had some profits,

but more frequently suffered losses. The whole course of the transactions would have disclosed to an ordinary observer, fully informed of the facts, that Cassatt was gradually losing, and that some funds owned or controlled by him must have been gradually eaten into by the losses from time to time incurred and the margins put up. The defendants themselves must have known this prior to and at the time they received the drafts sued upon, unless they willingly suffered themselves to be deceived.

"Sixth. The said Cassatt, in order to carry on his deal with the said firm and defendants, kept two accounts in the said First National Bank of Pella, one in his own name, and the other in the name of E. R. Cassatt & Co. During the period of said deals Cassatt remitted to the said firm, on account of the margins aforesaid, from time to time, drafts similar to the drafts sued on in these cases, including the drafts sued upon; that is to say, the drafts signed by the First National Bank of Pella, by E. R. Cassatt, president, drawn upon the National Bank of Illinois, and payable to the firm. These drafts drawn in favor of the firm of C. B. Congdon & Co. bore the dates, and were for the amounts, as follows: 1894: January 10th, \$400; January 24th, \$200; February 10th, \$500; February 16th, \$600; April 25th, \$500; May 12th, \$500; May 15th, \$500; May 17th, \$1,100; July 18th, \$600; July 20th, \$400. Also, there were sent to the defendant the corporation of C. B. Congdon & Co., drafts as follows: 1894: October 3d, \$2,000; 1895: January 23d, \$2,000. Said drafts, having been received by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., and credited to the said Cassatt on their books, respectively, were indorsed on the back by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., respectively, and deposited to the credit of their account in their bank of deposit in Chicago, the Corn Exchange Bank, by which bank they were passed to the National Bank of Illinois, and charged by said last-named bank to the first National Bank of Pella. Such drafts were, at a date subsequent to their issue, duly credited to said National Bank of Illinois, and charged to some account on the books of said Pella Bank having a credit balance appearing upon said books of sufficient amount to pay or offset such charges, except, however, in so far as the facts stipulated in this paragraph may be modified by the following statement, to wit, that at the time of the failure of the Pella Bank the books of said National Bank of Illinois showed that drafts to the amount of \$3,000 had been drawn by said Pella Bank upon said National Bank of Illinois and not credited to it upon the books of said Pella Bank.

"Seventh. None of said drafts were used or intended to be used to pay off any debt or obligation of said bank, but all were used to supply the margins in the private transactions of the said Cassatt with the said firm of C. B. Congdon & Co. and said corporation 45 L. R. A.

of C. B. Congdon & Co., as aforesaid. Said transactions were all kept secret from the bank by said Cassatt.

"Eighth. There is no evidence from either side, other than the foregoing, tending to show that the said Cassatt was or was not a man of means, independently of his holdings in the said First National Bank of Pella. Both the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co. knew that Cassatt was president of the bank, and had access to its funds, but made no inquiry as to whether said Cassatt had means, independently of his holdings in said bank, and made no inquiry of said Cassatt, the other officers of the bank, or anyone else likely to know, whether said Cassatt was using his own means in the speculative transactions aforesaid, and no inquiry looking in that direction.

"Ninth. The court finds that the avails of the drafts sued upon in this case through the means already described, were taken purposely by the said Cassatt, without authority of law, but as an act of theft and embezzlement from the funds of said bank, and that the defendants, in receiving the avails of said drafts, were in fact receiving the moneys stolen by said Cassatt from said bank. The court further finds that reasonable and prudent men, having no selfish interests to subserve, would have been led, by the facts in possession of the firm of C. B. Congdon & Co. and of the defendant, to suspect that said Cassatt might be unlawfully using the funds of said bank to supply the margins transmitted to the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co., respectively.

"Wherefore, the court finds the issues for the plaintiff and against the defendants, and assesses the plaintiff's damage at the sum of \$2,323.61, of which \$2,000 is principal and \$323.61 interest. P. S. Grosscup, Judge."

In No. 561 the findings, with a change of the names of the defendants, are the same, with the following exceptions:

The fifth commences with this statement: "Fifth. The said Cassatt began to have business dealings with the defendants, commission merchants on the Board of Trade, in the city of Chicago, in 1884, continuing to have such transactions down to and including a portion of the year 1894,"—and also contains the following: "The money which was sent to Milmine, Bodman, & Co. to pay the losses aforesaid was in turn paid out by Milmine, Bodman, & Co., for the purpose of discharging the contracts made in behalf of Cassatt by them, upon which the losses occurred, and no profit resulted to Milmine, Bodman, & Co. by reason of any of the dealings with Cassatt, except the commissions which they earned as brokers in negotiating the transactions for him."

The sixth, after the first sentence, proceeds as follows: "During the period of said deals, Cassatt remitted to the defendants, on account of margins aforesaid, from time to time prior to the drafts sued on in this case, twenty-seven drafts, each of which was ex-

actly similar to the drafts sued on in this case; that is to say, each was signed, 'First National Bank of Pella, by E. R. Cassatt, President.' All of these drafts were collected by the defendants in the same way as the drafts in the suit. The earliest of the series of drafts, prior to the drafts in suit, was August 21, 1884, and the latest was April 6, 1891. Of these drafts, there were five in 1884, eight in 1885, six in 1886, two in 1887, one in 1888, one in 1890, and two in 1891, and were for the amounts and bore the dates as follows: 1884: August 21st, \$500; October 11th, \$300; November 19th, \$300; December 1st, \$500; December 9th, \$300. 1885: January 5th, \$200; February 19th, \$250; March 25th, \$500; April 27th, \$500; July 27th, \$425; October 5th, \$300; October 10th, \$1,500; October 15th, \$1,000. 1886: April 12th, \$1,000; April 17th, \$1,000; September 11th, \$300; September 25th, \$300; October 11th, \$300. 1887: February 19th, \$300; July 8th, \$300. 1888: December 3d, \$1,000. 1889: March 18th, \$800; April 13th, \$500. 1890: February 13th, \$500. 1891: January 6th, \$500; April 6th, \$1,000. Each of said drafts was charged by the National Bank of Illinois to the First National Bank of Pella, and monthly statements were sent by the National Bank of Illinois to the First National Bank of Pella, which were checked up by the clerks in the latter bank; but during the two years immediately preceding the failure the checking was done by Cassatt himself. Most of the drafts sent by E. R. Cassatt, as aforesaid, both those prior to the ones in suit, as well as the drafts sued upon in this case, except as hereinafter noted, were charged upon the books of the First National Bank of Pella, either to the account of E. R. Cassatt or to the account of E. R. Cassatt & Co., which account, at the time of such charging, had an apparent credit balance sufficient to pay or offset the charge so made against it. Such of said drafts as were not charged to E. R. Cassatt or to E. R. Cassatt & Co., were charged to some other account upon the books of said bank, which account, at the time of said charges, had an apparent credit balance sufficient to pay or offset the charges so made against it. Said drafts were all signed by E. R. Cassatt as president. The drafts sued on in this case were all drawn upon the National Bank of Illinois, payable to Milmine, Bodman, & Co., and signed 'First National Bank of Pella, by E. R. Cassatt, President,' and were of dates and amounts as follows: 1891: August 20th, \$1,400; August 31st, \$800; September 19th, \$500. 1892: June 13th, \$2,000; August 27th, \$1,000; September 5th, \$1,000; October 22d, \$1,000; October 28th, \$1,000. 1893: January 30th, \$1,000; February 14th, \$600; February 18th, \$1,500; March 13th, \$600; June 21st, \$2,500; November 23d, \$300; December 21st, \$500. 1894: January 24th, \$300; February 10th, \$500; February 12th, \$600."

And the seventh contains the following additional statement: "The telegraphic

correspondence between said Cassatt and the defendants was carried on in cipher. On one occasion the defendants failed to observe this cipher, and on a protest from said Cassatt promised that such oversight should not occur again. It is not unusual, however, for Board of Trade commission men to communicate with their customers in cipher. The cipher used in this case was the so-called 'Robinson Cipher.' Nearly every dealer in the country has a copy of this. The telegrams were neither signed nor addressed in cipher, but were addressed and signed by the correct names of the respective parties."

In No. 555 the following propositions and the authorities cited are relied upon:

(1) "There was nothing in the form of the draft sued on to create a suspicion that Cassatt was using the funds of the bank in the payment of his individual indebtedness. *Goshen Nat. Bank v. State*, 141 N. Y. 379; *Claflin v. Farmers' & C. Bank*, 25 N. Y. 297; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 143 N. Y. 504; *Huie v. Allen*, 87 Hun, 516; *Dike v. Drexel*, 11 App. Div. 77; *Goodman v. Simonds*, 20 How. 364, 15 L. ed. 940; *Bank of Edgefield v. Farmers' Co-op. Mfg. Co.* 2 U. S. App. 282, 52 Fed. Rep. 98-103, 2 C. C. A. 637, 18 L. R. A. 201; *Atlas Nat. Bank v. Holm*, 34 U. S. App. 472, 71 Fed. Rep. 489, 19 C. C. A. 94; *Kaiser v. First Nat. Bank*, 41 U. S. App. 637, 78 Fed. Rep. 281, 24 C. C. A. 88; *Anderson v. Kissam*, 35 Fed. Rep. 699; *Kissam v. Anderson*, 145 U. S. 435, 36 L. ed. 765."

(2) "The directors of the Pella Bank were guilty of culpable negligence, which far outweighed any slight negligence of defendant."

(3) "The course of dealing between the bank and the defendant, and its predecessor firm of the same name, created a presumption, upon which defendant could rely, that the draft sued on was properly obtained by Cassatt, and that the defendant was entitled to receive its avails in payment of a debt due from Cassatt. There was implied authority for his act. *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612."

(4) "Cassatt paid for the draft by the use of the credits the bank had given him. He defrauded the bank in his obtention of the credits, but that was another transaction. So long as the credits subsisted, they could, as between the bank and the defendant, be used as they were used. *Wilson v. Metropolitan Elev. R. Co.* 120 N. Y. 145."

(5) "Assuming, *arguendo*, that the form of the draft was such as ought to have created suspicion that Cassatt might be improperly using the funds of the bank in payment of his individual debt, and that the defendant was charged with the duty of inquiry, and made none, it is only chargeable with a knowledge of such facts as it would have learned by the exercise of ordinary diligence. *Birdsall v. Russell*, 29 N. Y. 220; *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140; *Knapp v. Bailey*, 79 Me. 195."

In No. 561 the following:

(1) "The defendants were under no duty to inquire into the facts of transactions anterior to, and entirely separate and distinct from, the transactions to which they were parties."

(2) "The court erred in entering judgment against the defendants, when the findings showed that Cassatt had paid the bank for every one of the drafts. *Goshen Nat. Bank v. State*, 141 N. Y. 379; *Wilson v. Metropolitan Elev. R. Co.* 120 N. Y. 145; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612; *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70; *Indiana & I. C. R. Co. v. Sprague*, 103 U. S. 756, 26 L. ed. 554."

(3) "The fact that the bank had allowed Cassatt, for a period of seven years prior to the dates of the drafts in suit, to draw drafts in a manner exactly like the manner in which he drew the drafts sued on, established a course of dealing which estops the bank to deny that Cassatt had a right to act according to this established course. *Bronson v. Chappell*, 12 Wall. 681, 20 L. ed. 436; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; *Hooe v. Oxley*, 1 Wash. (Va.) 19, 1 Am. Dec. 425; *McDonnell v. Branch Bank*, 20 Ala. 313; *Martin v. Great Falls Mfg. Co.* 9 N. H. 51; *Weaver v. Ogletree*, 39 Ga. 586; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612."

(4) "One who receives a bank draft, fair on its face, signed by the officer duly authorized to sign drafts, may take it as currency, even though he receives it from the officer who signs it, and in payment of the latter's debt. *Goshen Nat. Bank v. State*, 141 N. Y. 379; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Bank of Edgefield v. Farmers' Co-op. Mfg. Co.* 2 U. S. App. 282, 52 Fed. Rep. 98, 2 C. C. A. 637, 18 L. R. A. 201; *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193."

(5) "Even if Milmine & Co. had inquired, they could not possibly have found out the secret reasons existing between Cassatt and the bank why it was improper for Cassatt to draw these drafts."

Per contra, for the defendant in error the following:

(1-3) Questions of practice.

(4) "The receipt by the plaintiff in error of the drafts of the Pella National Bank, signed by Cassatt in his official capacity, to be used as margins for his personal trades, put the plaintiffs in error upon notice that Cassatt was using the bank's funds without authority, and plaintiffs in error took such drafts at their peril, and are accountable to the receiver for the avails thereof. (a) The distinction asserted in counsel's brief as to this point does not exist. *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612; *Moores v. Citizens' Nat. Bank*, 15 Fed. Rep. 141, 111 U. S. 156, 28 L. ed. 385; *Germania Safety Vault & T. Co. v. Boynton*, 37 45 L. R. A.

U. S. App. 602, 71 Fed. Rep. 797, 19 C. C. A. 118; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234; *Anderson v. Kissam*, 35 Fed. Rep. 699, 703. (b) The form of these drafts put plaintiffs in error upon notice. *Anderson v. Kissam*, 35 Fed. Rep. 699, 703; *Chrystie v. Foster*, 26 U. S. App. 67, 61 Fed. Rep. 551, 9 C. C. A. 606; *Moores v. Citizens' Nat. Bank*, 15 Fed. Rep. 141, 111 U. S. 156, 28 L. ed. 385; *Clafin v. Farmers' & C. Bank*, 25 N. Y. 293; *Gerard v. McCormick*, 130 N. Y. 261, 14 L. R. A. 234; *Wilson v. Metropolitan Elev. R. Co.* 120 N. Y. 145; *Shaw v. Spencer*, 100 Mass. 382, 384, 1 Am. Rep. 115, 97 Am. Dec. 107; *First Nat. Bank v. Wagner*, 93 Ky. 325; *Germania Safety Vault & T. Co. v. Boynton*, 37 U. S. App. 602, 71 Fed. Rep. 797, 19 C. C. A. 118. (c) The defect appearing upon the face of the drafts, the doctrine of *Bank of Edgefield v. Farmers' Co-op. Mfg. Co.* and *Goodman v. Simonds*, cited by plaintiffs in error, does not apply. (d) The circumstances of the case of *Goshen Nat. Bank v. State* were radically different from that at bar. (e) The fact that by common usage bank drafts are treated as cash, if that be a fact, cannot be availed of by one who receives the bank's draft, signed by the president, in payment of the president's debt, to relieve the recipient from the operation of the rule that he who knowingly receives from an agent, and on the agent's account, that which belongs to the principal, does so at his peril. *Anderson v. Kissam*, 35 Fed. Rep. 699, 703; *Shaw v. Spencer*, 100 Mass. 384, 1 Am. Rep. 115, 97 Am. Dec. 107; *Moores v. Citizens' Nat. Bank*, 15 Fed. Rep. 141, 111 U. S. 156, 28 L. ed. 385."

(5) "Having failed to make inquiry, the plaintiffs in error are bound by the actual facts as they existed, and will not be heard to contend that inquiry would have been unavailing. *Shaw v. Spencer*, 100 Mass. 384, 1 Am. Rep. 115, 97 Am. Dec. 107; *Germania Safety Vault & T. Co. v. Boynton*, 37 U. S. App. 602, 71 Fed. Rep. 797, 19 C. C. A. 118; *Jonathan Mills Mfg. Co. v. Whitehurst*, 37 U. S. App. 664, 72 Fed. Rep. 502, 19 C. C. A. 130."

(6) "The course of dealing between the bank and plaintiffs in error did not create a presumption, upon which plaintiffs in error could rely, that the draft sued upon was properly obtained by Cassatt, and that the plaintiffs in error were entitled to receive its avails in payment of a debt due from Cassatt. There was no implied authority for his act. *Chrystie v. Foster*, 26 U. S. App. 67, 61 Fed. Rep. 551, 9 C. C. A. 606; *Anderson v. Kissam*, 35 Fed. Rep. 699, 703; *Wright's Appeal*, 99 Pa. 425; *Hill v. C. F. Jewett Pub. Co.* 154 Mass. 172, 13 L. R. A. 193; *Powell v. Rogers*, 105 Ill. 318; *Berwind v. Schultz*, 25 Fed. Rep. 912; *Clews v. Bardon*, 36 Fed. Rep. 617; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662; *Percy v. Millaudon*, 8 Mart. N. S. 68, 74, 75."

(7) "The court found, in effect, that the transactions on account of which these drafts were forwarded were gambling deals. Therefore the avails of the drafts could be

recovered by the receiver, whether the brokers were or were not put on notice. (a) The finding is that neither party intended actual sales or purchases, but purely speculative transactions in "futures." The intent governs. *Irvin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Boyd v. Hanson*, 41 Fed. Rep. 174; *Mutual L. Ins. Co. v. Watson*, 30 Fed. Rep. 653; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287; *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172; 2 Benjamin, Sales, 6th Am. ed. 828. (b) The broker is *particeps criminis*. *Irvin v. Williar*, 110 U. S. 499, 510, 28 L. ed. 225, 230. (c) The intent is a question for the jury (in this case for the court to find, as a question of fact). *Kirkpatrick v. Adams*, 20 Fed. Rep. 287. (d) A principal may recover moneys gambled away by his agent. *McAllister v. Oberne*, 42 Ill. App. 287; *Smith v. Ray*, 89 Ga. 838; *Mason v. Waite*, 17 Mass. 560; *Corner v. Pendleton*, 8 Md. 337; *Caussidiere v. Beers*, 510, 2 Keyes, 198, 1 Abb. App. Dec. 333; *Burnham v. Fisher*, 25 Vt. 514; *Pierson v. Fuhrmann*, 1 Colo. App. 187."

Messrs. Dupee, Judah, Willard, & Wolf, for plaintiff in error in No. 555:

There was nothing in the form of the draft sued on to create a suspicion that Cassatt was using the funds of the bank in the payment of his individual indebtedness.

Goshen Nat. Bank v. State, 141 N. Y. 379; *Clafflin v. Farmers' & C. Bank*, 25 N. Y. 293; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 143 N. Y. 564; *Huie v. Allen*, 87 Hun, 516; *Dike v. Drexel*, 11 App. Div. 77; *Goodman v. Simonds*, 20 How. 364, 15 L. ed. 940; *Bank of Edgefield v. Farmers' Co-op. Mfg. Co.* 2 U. S. App. 282, 52 Fed. Rep. 98, 2 C. C. A. 637, 18 L. R. A. 201; *Atlas Nat. Bank v. Holm*, 34 U. S. App. 472, 71 Fed. Rep. 489, 19 C. C. A. 94; *Kaiser v. First Nat. Bank*, 41 U. S. App. 637, 78 Fed. Rep. 283, 24 C. C. A. 88; *Anderson v. Kissam*, 35 Fed. Rep. 699; *Kissam v. Anderson*, 145 U. S. 435, 36 L. ed. 765.

The directors of the Pella bank were guilty of culpable negligence, which far outweighed any slight negligence of defendant.

The course of dealing between the bank and the defendant and its predecessor firm of the same name created a presumption upon which defendant could rely, that the draft sued on was properly obtained by Cassatt, and that the defendant was entitled to receive its avails in payment of a debt due from Cassatt. There was implied authority for his act.

Martin v. Webb, 110 U. S. 7, 28 L. ed. 49; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612.

Cassatt paid for the draft by the use of the credits the bank had given him. He defrauded the bank in his obtention of the credits, but that was another transaction. So long as the credits subsisted they could, as between the bank and the defendant, be used as they were used.

Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145.
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Assuming, *arguendo*, that the form of the draft was such as ought to have created suspicion that Cassatt might be improperly using the funds of the bank in payment of his individual debt, and that defendant was charged with the duty of inquiry, and made none, it is only chargeable with a knowledge of such facts as it would have learned by the exercise of ordinary diligence.

Birdsall v. Russell, 29 N. Y. 220; *Cleceland Woolen Mills v. Sibert*, 81 Ala. 140; *Knapp v. Bailey*, 79 Me. 195.

Mr. D. M. Kirton for plaintiffs in error in No. 526.

Messrs. Green, Honore, & Peters and John P. Wilson for plaintiffs in error in No. 561.

Messrs. John H. Hamline, Frank H. Scott, and Frank E. Lord for defendant in error.

Woods, Circuit Judge, delivered the opinion of the court:

It is not important to inquire whether the court erred in admitting evidence of immaterial facts stated in the special findings. The one question upon a special finding or verdict is "of the sufficiency of the facts found to support the judgment." In determining that question, of course, every relevant and material fact found must be considered, and every irrelevant or immaterial fact rejected; and when the fact has been excluded from consideration there can remain no harm from the error of admitting the evidence by which it was established. The special findings recite many facts and circumstances which, though not irrelevant, are of an evidentiary character only. The ultimate facts on which the rights of the respective parties must be determined are few. They are comprehended in the statement that Cassatt, being president and practically in sole control of the bank, without authority, and without the knowledge of any other officer or stockholder, discharged his individual liabilities to the plaintiffs in error, respectively, by sending them drafts of the bank, payable to their order, and drawn upon the bank's correspondent in Chicago, with which it had sufficient moneys out of which the drafts, after indorsement by the payees, were duly paid. Much discussion has been expended upon the effect of the form of the drafts, in connection with the use to which they were put, as notice to the payees that they were drawn without authority; but, before entering upon that inquiry, it will be well to dispose of minor contentions.

Assuming that the plaintiffs in error, when the drafts were tendered them, were put upon inquiry, it is asked, What would have been the subject of inquiry? and what facts would have been developed? It is not accurate to say that the inquiry would have been, "Did Cassatt pay the bank for the drafts?" Payment for the drafts, doubtless, would have been important evidence, but not necessarily conclusive upon the true point of inquiry, which was, "Did Cassatt

have authority to draw the drafts?" He might have had money in the bank, or have put it there at the time of drawing the drafts, and yet have been without authority to draw them; and without money on deposit, and without present payment, his authority to draw in the form and for the purpose proved might have been beyond dispute. If, trusting to his integrity and individual responsibility, the directors authorized him to use the drafts of the bank for his individual purposes, whether paid for at the time or not, any loss resulting from a misuse of that authority ought, of course, to fall upon the bank, rather than upon a third person, who in good faith had paid value for the paper; and the question of good faith would be determined by the ordinary rules applicable to the transfer of mercantile paper. The fallacy or inapplicability of the supposed case of John Doe, living at Pella, and procuring of the bank a draft payable to the order of a distant creditor, and forwarding the draft to the creditor in discharge of the debt, is evident. It is, doubtless, a not unusual practice for debtors to obtain and send to their creditors bank drafts, drawn payable to the creditors, and, of course, in every such case the creditor knows that the money of the bank is being used to pay to him the debt of another,—in the case supposed, the debt of John Doe. But in such cases the creditor may accept the draft without inquiry, not, as counsel have said, because of a presumption that the debtor had paid for the draft, but because the draft had been drawn by the authorized officer of the bank in the usual course of business, acting without apparent or known personal interest in the transaction. The receiver of such a draft, though named as payee, and on the face of the paper apparently a party to the original execution thereof, is not so in fact, but, as against the drawer, is in effect an indorsee, affected only by vices or infirmities of which he had notice before he accepted it. He might know that the draft had not been paid for, and yet take it on the assumption of regular and proper execution upon some other consideration than payment. The inquiry, therefore, which these plaintiffs in error should have made was whether Cassatt had authority to draw drafts of the bank upon funds of the bank in possession of its correspondents for use in his individual transactions. Such an inquiry involved no difficulty beyond communicating to the directors of the bank, other than Cassatt, the fact that such a draft or drafts had been tendered in discharge of liabilities incurred in dealings upon the Board of Trade in Chicago, and asking whether the execution of the paper had been authorized. There can be little doubt what would have been the result of such an inquiry, accompanied with a frank and full statement of the facts as they were known to the payees of any of the drafts in suit at the time of execution. It would not have needed a discovery of Cassatt's fraudulent bookkeeping to enable the directors to say whether the execution of such paper had

been theretofore authorized; or then had their approval. As contended, it was clearly no duty of the plaintiffs in error to undertake an examination of the books, which, once they commenced inquiry into the management of the bank, they would have learned had been wholly in the keeping of Cassatt, and of clerks who could not be expected to testify against him. Inquiry of Cassatt, too, it is to be presumed, would have been useless, and therefore, if made, would not have met the requirement of the law. The one thing necessary to be known was whether Cassatt had authority to make the proposed use of the bank's paper. The authority could have come only from the directors, by direct resolution or by acquiescence or implied assent, and the plain, unmistakable course was to push the inquiry, wherever begun, to the source of authority.

It is a perversion of speech to say that "the findings showed that Cassatt had paid the bank for every one of the drafts," or that if the defendants had gone to Pella, and had ascertained the facts, they would have found that Cassatt was a depositor in the bank, that he had charged each draft to his account, that he had on deposit ample funds to meet the charge, that he gave due credit on the books of the bank to its Chicago correspondent for the amount of each draft, and that no step in the transaction was hidden from the bank, but was known to it and recorded in its books, and that a statement of the transactions to the bank could have caused no surprise, because the bank knew of each as it occurred during the whole period of twelve years. The entries on the books, it may be said, tended to show the facts as stated; but the entire finding shows that Cassatt was not a depositor, and in no way made good to the bank the moneys taken from it by means of the drafts, which takings, it is expressly found, were acts of theft or embezzlement. That finding of the ultimate fact of wrongful and unauthorized appropriation cannot be overcome by proof of book entries, which, even if honestly made, would amount only to evidence tending to show the contrary. False entries took no money out of, and put none into, the bank; and it was not for the fraudulent bookkeeping, or forgeries, or any other wrong or series of wrongs which preceded the execution of the drafts, that the plaintiffs in error were held responsible. On the contrary, we agree that, if they are to be compelled to make restitution, it is because the particular sums which they received were wrongfully taken by Cassatt from the bank, and they were parties to the wrong. This proposition does not depend upon, and cannot be refuted by, the bookkeeping disclosed in the special finding. It embraces the three propositions contended for by counsel, namely:

"(1) The person from whom restitution is sought must have been a party to the particular transaction in which the wrong was accomplished. (2) The particular transaction to which such person was a party must have been hidden from the wronged party.

(3) A mere statement to the wronged party of the facts of such particular transaction would have at once disclosed the fraud."

While the transactions appeared upon the books, as stated in the findings, it is a misuse of words, and inconsistent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts. Cassatt alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank.

The foregoing considerations dispose of the proposition that the bank, by allowing Cassatt to make a like prior use of drafts drawn by himself, had established a course of dealing which estops the bank to deny his authority. Of course, an estoppel may arise out of such a course of dealing, but whether, in a particular case, it has arisen is a question of fact depending upon the circumstances. It is hardly credible that in the facts here disclosed a jury or a right-minded court, could find an estoppel; but it is enough to say that it has not been found, and that the facts supposed to point that way which are stated in the finding do not overcome the ultimate fact stated that the sums for which these drafts were drawn were wrongfully taken by Cassatt. That is equivalent to a direct finding that he had no authority to draw and use the drafts in that way. For the same reasons the proposition that the directors of the bank were guilty of culpable negligence is unavailing. There is no finding that there was such negligence, nor, if there were, that the plaintiffs in error were influenced by it to accept the drafts, of which, on the facts known to them, Cassatt was making an improper use.

These considerations of bookkeeping, course of dealing, negligence of directors, and estoppel aside, the main question is simplified: When Cassatt tendered these drafts,—each one of them to the payee named in it in payment of an individual obligation, in which the bank was not interested,—was the taker; accepting the paper in discharge of the debt, a purchaser in good faith, or was he put upon notice of Cassatt's lack of authority to draw upon the funds of his bank for his individual purposes? Upon that question our conclusion is that the opinion in *Anderson v. Kissam*, 35 Fed. Rep. 699, is sound in principle and in accord with the weight of authority. The judgment rendered in that case, it is true, was reversed, but upon a minor point, unconnected with the main question, which there, as here, was fundamental; and the fair inference would seem to be that if the supreme court, with the question before it, had doubted the ruling and opinion below in that respect, it would not have left the question undetermined.

The case of *Goshen Nat. Bank v. State*, upon which the plaintiffs in error chiefly rely, is distinguishable. The drafts in that 45 L. R. A.

case were drawn by the cashier, and were used to pay his individual debt; but, as the opinion is careful to state, it was "proved on the trial that the cashier had the custody and possession of the blank drafts for the claimant [the bank], and that he had the right to sign drafts drawn by the claimant on its corresponding banks, and that he had the right to draw a draft on the corresponding bank of the claimant for himself, upon the same terms that he had to draw a draft for a stranger, . . . which means," as the court assumed, "upon payment to the bank of the amount of the draft." That this proof of special authority to draw a draft for his own use was the distinguishing point of the decision is declared in the later case of *Bank of New York Nat. Bkg. Assn. v. American Dock & T. Co.* 143 N. Y. 564, where it was held that a by-law of a warehouse company, authorizing an officer of the company to sign warehouse receipts, did not authorize him to sign a receipt for his own goods. "It is an acknowledged principle of the law of agency," it was there said, "that a general power or authority given to the agent to do an act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested on the other side. If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it; for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." See also *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612.

It is urged, however, "that there is a clearly-defined distinction between the acts of a cashier or president of a bank, in issuing its paper, and that of any ordinary agent." There are dicta in some of the opinions cited which, without attempting to define it, assert in general terms that there is a distinction. For instance, in *Bank of New York Nat. Bkg. Assn. v. American Dock & T. Co.* 143 N. Y. 564, in addition to what we have already quoted in reference to the case of *Goshen Nat. Bank v. State*, the court said: "And we also held, for the reason therein stated, that there was a difference in the case of bank or cashier's drafts from most other cases of agency." There is a plain difference in the fact that such drafts, once they have been issued, are commercial paper, and may be accepted in trade and commerce without inquiry into the consideration for their issue. No other basis for a distinction is suggested in *Goshen Nat. Bank v. State*, and that difference, it is to be observed, is not in the character or extent of the agent's authority, but in the nature of the subject on which it is exercised. It is true, as there said, that "bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts, and in other commercial transactions, that they have almost acquired the characteristics of money." An officer of a bank, however, has no right to ap-

propriate the money of the bank to his individual uses, and, though a creditor, when offered money by his debtor, ordinarily may accept it without inquiry, yet if, at the time he receives it, he is told or knows that it belongs to another, for whom his debtor is an agent or trustee, on the plainest principles he acquires no title as against the true owner. If, for instance, Cassatt had sent to the plaintiffs in error money of the bank, instead of drafts, advising them that it belonged to the bank, there could be no question of their liability to make restitution; and in what respect is their position better as presented than it would be on the facts supposed, even conceding that the drafts sent them were the same, or "almost the same," as money? The drafts bore proof on their face that they were drawn upon the funds of the bank; and that they were not drawn in the course of the bank's business, but in discharge of individual liabilities of the president of the bank to themselves, they, of course, understood. They therefore knew that, unless there had been conferred upon Cassatt an unusual and special authority, like that given the cashier in *Goshen Nat. Bank v. State*, 141 N. Y. 379, to sign and issue drafts of the bank in his private transactions, the paper sent them was unauthorized, and that for the proceeds thereof they would be liable to the bank or its representatives.

It is evident, however, that the drafts in question, when offered the plaintiffs in error, were not commercial paper, capable of treatment as money, and that the considerations of public policy on which the bona fide holder of such paper is protected, even though the rights of an antecedent holder be questionable, have no application or relevancy to the case. The drafts were drawn in favor of plaintiffs in error, and until accepted by them, they were not contracts, and by accepting them they did not become assignees or purchasers of existing obligations, but simply parties to the original execution thereof, in whose rights the way to full inquiry is open, unless closed by some estoppel outside of the paper itself, whatever its form. A primary party to the execution of instruments originated as these were cannot be a "bona fide purchaser," in the sense of the law merchant; and to hold the payee of such paper responsible for the proceeds received upon his own negotiation of it to a third party, who will be presumed to be an innocent purchaser, no more tends to discredit the paper, as an agency of business, than it tends to impair the value of money as a medium of exchange to hold one who receives it wrongfully accountable to the rightful owner. If a bank president or cashier, because possessed of a general power to sign drafts, may draw drafts of the bank in favor of his individual creditor, and it is to be said that "there is nothing unusual or suspicious in this way of making the draft payable to the creditor of the cashier or president who draws it," then in *Claffin v. Farmers' & C. Bank*, 25 N. Y. 293, for all we can

see, it might just as well have been said that there was nothing unusual or suspicious in the acceptance or certification by the president of the bank of a check or draft drawn by himself. The power of such an officer to draw drafts of his bank upon others is no greater than his authority to accept the checks or drafts of others upon his bank; yet in that case it was held that the general authority of the president of the bank to certify checks drawn upon it did not extend to checks drawn by himself; and it was declared not to be necessary for the principal in such a case to show that the agent had acted unfairly or that he himself had sustained an injury, but that the act of the agent is deemed to be unauthorized, and the contracts void. We agree with counsel for the defendant in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care, by relaxing this salutary rule, through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended, where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officers be rigidly held to the ordinary and well-understood rule. There is, we believe, no good reason to the contrary.

In the first case, where there was a trial by jury and a general verdict, reference is made to Cassatt's own testimony for proof that he "had authority to draw drafts to his own or his creditor's order, upon payments by him to the bank for the same," and on this assumption, it is contended, on the authority of *Hanover Nat. Bank v. American Dock & T. Co.*, and like cases, that the fact of drawing the drafts was a representation, on which the plaintiffs in error had a right to rely, that such payments had been made. Whether he had such authority was a question of fact, of which the verdict is conclusive, unless material error of law occurred at the trial. The testimony referred to is quite indefinite and uncertain, but, if it affords ground for an inference that Cassatt did in fact draw drafts to his own order, or in favor of his creditors, it shows no basis whatever for a belief that he did so with the knowledge of other officers of the bank. In the case last referred to there was proof that the president of the warehouse company had issued receipts to himself before the one in question; and there was evidence of facts and circumstances, sufficient to go to the jury, tending to show that he had authority to do so. It being apparent on the face of the drafts here in question that they were drawn upon the funds of the bank, it was impossible for the plaintiffs in error to receive them in discharge of Cassatt's individual obligations to themselves without being put upon inquiry whether the president had in fact the authority which he assumed to exercise; and it was not enough to make inquiry of him, nor permissible to rely upon the implied representation deducible from

the execution of the drafts. That the execution of the drafts by the president of the bank in his own interest was without authority, and that the plaintiffs in error were not, and could not have been, innocent holders, the evidence was without conflict, and so clear that the court might have directed a verdict in favor of the plaintiff; and on this view of the case the other questions discussed, which in themselves are of minor importance, lose all significance. It is said that "the question of gambling was an issue in the case," and the refusal of a special request for instruction on the subject, it is urged, was material error. No such issue appears in the pleadings, and no mention of the subject is found in the court's charge to the jury. In fact, however, by necessary implication, the question was excluded from consideration when the jury was told that

the plaintiff could recover only upon proof that Cassatt, without the authority, knowledge, consent, or acquiescence of the board of directors of the bank, misapplied the moneys of the bank in question to his own use, and that the defendants had knowledge or were aware of such facts as would amount to knowledge on their part, that he was so misapplying the money of the bank; and the statement that the defendants must have had such knowledge was repeated in substantially the same words and with equal clearness in a separate charge. In short the controlling question was fairly submitted to the jury, and, it is clear, was rightly decided. The allowance of interest was proper.

The judgment in each of the cases is affirmed.

IDAHO SUPREME COURT.

Re William BOYLE.

(.....Idaho.....)

- *1. In case of insurrection or rebellion, the governor or military officer in command, for the purpose of suppressing the same, may suspend the writ of habeas corpus, or disregard such writ, if issued.
2. The truth of recitals of alleged facts in a proclamation issued by the governor, proclaiming a certain county of the state to be in a state of insurrection and rebellion, will not be inquired into or reviewed on application for a writ of habeas corpus.
3. The proclamation of the governor declaring Shoshone county to be in a state of rebellion, and his action in calling to his aid the military forces of the

*Headnotes by HUSTON, Ch. J.

NOTE.—*Suspension of writ of habeas corpus.*

- I. Power to suspend; who may suspend.
- II. Extent and effect of suspension.

I. Power to suspend; who may suspend.

The Federal Constitution, art. 1, § 9, provides that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public service may require it."

President Lincoln during the early part of the war, before issuing a formal proclamation, authorized officers in the military service to suspend the privilege of the writ in certain cases, and on September 24, 1862, after the decision in *Ex parte Merryman*, Taney, 246, *infra*, and before the act of Congress authorizing him to suspend the privilege of the writ, he issued a formal proclamation declaring martial law and suspending the writ in respect of all persons arrested, or who "are now, or hereafter during the rebellion shall be, imprisoned in any fort . . . by any military authority or by the sentence of any court martial or military commission." This proclamation was followed on March 3, 1863, by an act of Congress authorizing the President during the rebellion

United States for the purpose of restoring good order and the supremacy of the law, had the effect to put into force, to a limited extent, martial law in said county, and such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of the government and in its necessary self-defense.

(June 16, 1899.)

PETITION for a writ of habeas corpus to obtain the release of petitioner from custody to which he had been committed in proceedings in accordance with a proclamation by the governor declaring martial law in a certain county in the state. *Denied.*

The facts are stated in the opinion.

Messrs. F. C. Robertson, Patrick Reddy, and Platt B. Elderkin for petitioner.

whenever in his judgment the public safety required it to suspend the privilege of the writ in "any" case throughout the United States.

The act was followed by a second proclamation issued September 15, 1863, declaring that in the President's judgment the public safety required that the privilege of the writ be suspended throughout the United States in cases where by the authority of the President, or any military, naval, or civil officer of the United States, persons were held under their command or in their custody, either as prisoners of war, spies, or aiders or abettors of the enemy, or officers, soldiers, or seamen enrolled, drafted, mustered, or enlisted in or belonging to the land or naval force of the United States or as deserters therefrom.

Chief Justice Taney decided in *Ex parte Merryman*, Taney, 246, that the President could not, in any emergency or state of things, suspend the privilege of the writ of habeas corpus, or authorize a military officer to do so, holding that the provision of the Constitution quoted above confided to Congress the exclusive power to suspend the privilege of the writ.

The question arose in that case upon a petition for a writ of habeas corpus for the re-

Mr. Samuel H. Hays, Attorney General, for the State:

The Constitution of this state does not confer upon the executive power or authority to suspend the privilege of the writ of habeas corpus. That power is vested in the legislature alone.

U. S. Const. art. 1, § 9, subdiv. 2; Winthrop, Military Law & Precedents, 1292, 1293, note, 1294; Church, Habeas Corpus, § 51.

A proclamation of martial law does not, under the Constitution of this state, suspend the privilege of the writ of habeas corpus.

The facts and circumstances authorizing such declaration by the governor do not appear in the proclamation issued in this case, and are therefore presumed in law not to exist.

If the county of Shoshone had been lawfully proclaimed to be in a state of insur-

rection, such proclamation would not establish martial law nor suspend the writ of habeas corpus.

Winthrop, Military Law & Precedents, 1291.

The governor had no authority to appoint Bartlett Sinclair his representative, to act in his name to enforce order.

The governor of this state cannot delegate the important trust imposed upon him to execute the laws, or place the life or liberty of any citizen of the state in the hands of any representative; nor can he appoint any representative to perform any of the duties of the governor of the character in question.

If the appointment of Mr. Sinclair was void, then Mr. Sinclair does not represent the people of this state or anybody but himself, and has no right to arrest, imprison, or interfere in any manner with the liberty of any citizen.

lease of a private citizen confined in a military prison in Maryland upon a charge of treason. The writ was directed to the United States army officer in charge of the district who refused to obey it, and made a return to the effect that he had been authorized by the President to suspend the writ in such cases. The return was held insufficient for the reason above stated.

To the same effect are *McCall v. McDowell*, 1 Abb. (U. S.) 212; *People ex rel. Starkweather v. Gaul*, 44 Barb. 98; *Griffin v. Wilcox*, 21 Ind. 370, and *Warren v. Paul*, 22 Ind. 276. The decision in the latter case, however, seems to be *obiter* on this point.

Re Kemp, 16 Wis. 360, also holds that the power to suspend the privilege of the writ in the sense contemplated by the constitutional provision is confined exclusively to Congress, and cannot be exercised by the President, but the majority of the court distinguish between the suspension of the privilege of the writ in a constitutional sense and the right of a military commander to refuse obedience to such a writ when justified by the exigencies of war, or the *ipso facto* suspension which takes place whenever martial law exists. They held, however, that the latter kind of suspension applies only to cases where the demands upon the officer's time and service are such that he cannot with his superior military duty yield obedience to the mandates of the civil authorities, and to cases arising within districts that are properly subjected to martial law.

Griffin v. Wilcox, 21 Ind. 370, seems also to recognize the distinction pointed out in *Re Kemp*, 16 Wis. 360, *supra*, as the opinion says that "the war power of the President is limited to the simple right of exercising martial law simply as a military chief, locally and temporarily where actual or immediately impending force renders it a military necessity."

The power of the President to proclaim martial law, and, as a necessary consequence, to suspend the privilege of the writ of habeas corpus, even in a place which is not the theatre of military operations, is affirmed by Smalley, J., in *Ex parte Field*, 5 Blatchf. 63. The question arose upon an application in Vermont for a writ of habeas corpus for the release of a person detained by the military authorities for attempting to avoid the draft. The justice relies upon the opinions of Story, J., in *Luther v. Borden*, 7 How. 1. 12 L. ed. 581, and Chief Jus-

tice Taney in *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537, which hold that the President is the exclusive judge of the existence of the exigencies authorizing him to call forth the militia and declare martial law, in pursuance of the power conferred upon him by act of Congress of 1795, chap. 101, in case of insurrection or rebellion, and that the judiciary will not question his decision.

Justice Story, however, in his Commentaries on the Constitution, expresses his opinion that the Constitution confides the power to suspend the privilege of the writ solely to Congress.

The opinion in *Ex parte Field* anticipated the argument that Vermont was a loyal state, and that there was nothing to justify martial law there, by the statement that that was a question for the President, and not for the court.

The opinion characterizes as a *dictum* the statement of Chief Justice Marshall in *Ex parte Bollman*, 4 Cranch, 75, 2 L. ed. 554, that Congress alone can suspend the privilege of the writ, and says that *Ex parte Merryman*, Taney, 246, *supra*, and *Ex parte Benedict*, 4 Western Law Monthly, 449, came up on an entirely different state of facts; that the President had not, at the time those cases were decided, proclaimed martial law, as he had at the time of the opinion in the case at bar, and that the act of 1795 was not referred to in either of those cases.

This case was decided after the President's proclamation of September 24, 1862, but before the act of Congress of 1863, authorizing the President to suspend the privilege of the writ. *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281, though not involving the power of the President without an act of Congress to suspend the privilege of the writ, seems to oppose the principles controlling the decision in *Ex parte Field*, since it confines the right to apply martial law to the locality of actual war. See also *Re Kemp*, 16 Wis. 360, *supra*, on this point.

Ex parte Moore, 64 N. C. 802, held that the power conferred upon the governor by art. 12, § 3, of the Constitution of that state, to declare a county to be in a state of insurrection, to order the arrest of all suspected persons, and to do all things necessary to suppress the insurrection, did not authorize him to suspend or disobey the writ of habeas corpus.

The Constitution of North Carolina, however, provided (art. 1, § 21) that "the privilege

Ex parte Merryman, Fed. Cas. No. 9,487; *Re Kemp*, 16 Wis. 385; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *McCall v. McDowell*, 1 Abb. (U. S.) 212.

The power to proclaim a county or district in insurrection is vested in the governor, both by the Constitution and the statute, and an antecedent request by a county officer need not be made.

Chapin v. Ferry, 3 Wash. 386, 15 L. R. A. 116; *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Luther v. Borden*, 7 How. 1, 43, 12 L. ed. 581, 599.

The official duty of suppressing insurrection by means of the military forces being given to the governor, it necessarily follows that he not only may, but must, use sufficient power to accomplish the result demanded.

Who is to judge of the amount of power required, and apply it? Necessarily the governor or his representative engaged in the work. Prompt and effective action is re-

quired, and this is the only way it can be secured.

of the writ of habeas corpus shall not be suspended." It was held that such express provision could not be abrogated and made of no force by an implication from any other provision.

With the exception of the latter case the authorities seem to proceed on the assumption that the power to declare martial law implies the power to suspend the privilege of the writ. *Ex parte Field*, 5 Blatchf. 63, expressly states that martial law and the privilege of the writ are incompatible.

The supreme court of Wisconsin, after the passage of act of Congress of March 3, 1863, authorizing the suspension of the privilege of the writ and the President's proclamation thereunder of September 23, 1863, held in *Re Oliver*, 17 Wln. 681, that the privilege of the writ was suspended in the case at bar. An objection was made to the act on the ground that instead of suspending the privilege of the writ it only attempted to confer power upon the President to do so. The court expressed serious doubts whether the objection was not good, but upheld the act upon the theory that although it professed to confer authority on the President to suspend the privilege of the writ whenever in his judgment the public safety should require it during the rebellion, yet that it was itself an expression of the legislative judgment that the time had already arrived when the public safety required the legislature to provide for a suspension, and that the act provided for the suspension, not absolutely, but to take effect according to the judgment of the President whether the authority conferred should be exercised in particular cases or not.

Griffin v. Wilcox, 21 Ind. 370, holds that neither the President nor Congress has power to suspend the privilege of the writ issued by a state court. The opinion says that to prevent the release of persons on habeas corpus from a state court, it must appear that he is held by authority of the United States, and in such case the withholding of relief is due, not to the suspension of the writ, but to the fact that state courts cannot extend their writs into the domain of the general government.

Partial suspension.

Macready v. Wilcox, 33 Conn. 321, holds that the restriction of the Federal Constitution upon the suspension of the writ applies solely 45 L. R. A.

quired, and this is the only way it can be secured.

Luther v. Borden, 7 How. 1, 12 L. ed. 581; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *Griffin v. Wilcox*, 21 Ind. 381.

The writ of habeas corpus perishes with other civil process from the very nature of things.

Re Kemp, 16 Wis. 360; *Hurd, Habeas Corpus*, 127, note.

Huston, Ch. J., delivered the opinion of the court:

This is an application for a writ of habeas corpus. To the petition a general demurrer is filed. The only question presented for our determination is, Does the petition state facts entitling the petitioner to the writ? The petition alleges the illegal detention of the petitioner, and sets forth the alleged cause of, and authority for, such detention: and it is upon the alleged illegality or want of authority therefor that petitioner bases

to the absolute denial of the writ, and has no reference to the delay involved in a review by a higher court of the judgment of a lower one, in a habeas corpus proceeding.

The Oklahoma supreme court in *Re Patswald*, 5 Okla. 789, holds that if a certain statute were to be construed to take away the right to inquire on habeas corpus into illegalities which render void a judgment in a criminal action, no matter by what court rendered, it would be unconstitutional, since the right cannot be abrogated, nor its sufficiency curtailed, by legislative action.

II. Extent and effect of suspension.

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281, held that the suspension of the privilege of the writ by the act of Congress and the President's proclamation thereunder did not suspend the writ itself, but that the writ issues as a matter of course, and on the return made to it the court decides whether the applicant is denied the right of proceeding any further with it.

Re Fagan, 2 Sprague, 91, also held that the President's proclamation suspended, not the process, but the proceeding thereon, and hence applied to cases in which the writ had been issued and returned, but had not been fully determined before the proclamation. *Re Dunn*, 25 How. Fr. 467, is to the same effect.

Re Roseman, 1 Winst. L. (60 N. C.) 443, held that the act of the Confederate Congress suspending the privilege of the writ contemplated that the writ should issue, but that a military officer to whom the writ was directed was not bound to make a return according to its exigencies, but in lieu thereof was to file the certificate provided by the act, and that thereupon the proceeding should cease.

State v. Sparks, 27 Tex. 705, was to the same effect, holding that unless it appeared from the application for the writ that relief could not be granted the writ should be issued by the court, and that it was "in all cases" the duty of the party to whom it was directed to answer it.

Effect of suspension as authorizing an arrest otherwise illegal.

McCall v. McDowell, 1 Abb. (U. S.) 212 (an action for false imprisonment), holds that the suspension of the privilege of the writ virtually authorized arrests without ordinary legal cause.

his right to the writ. As to the facts set up in the petition, so far as not contradictory or conflicting, for the purposes of this decision, in so far as they are assumed to be true, do they constitute sufficient ground for the issuance of the writ? It appears from the petition: That on the 4th day of May, 1899, the governor of the state of Idaho issued the following proclamation:

State of Idaho, Executive Office.

Whereas, it appearing to my satisfaction that the execution of process is frustrated and defied in Shoshone county, state of Idaho, by bodies of men and others, and that combinations of armed men to resist the execution of processes and to commit deeds of violence exist in said county of Shoshone; and whereas, the civil authorities of said county of Shoshone do not appear to be able to control such bodies of men, or prevent the destruction of property and other acts of violence; and whereas, on Saturday, the 29th

day of April, 1899, at or near the town of Wardner Junction, in said county of Shoshone, state of Idaho, an armed mob did then and there wantonly destroy property of great value, with attendant loss of life; and whereas, said destruction of property, with attendant loss of life, by mob violence, as above set forth, is but one and a repetition of a series of similar outrages covering a period of six years or more just passed, the perpetrators of said outrages seeming to enjoy immunity from arrest and punishment through subserviency of peace officers of said county of Shoshone, or through fear on the part of said officers to such bodies of lawless and armed men; and whereas, I have reason to believe that similar outrages may occur at any time, and believing the civil authorities of said county of Shoshone are entirely unable to preserve order and protect property: Now, therefore, I, Frank Steunenberg, governor of the state of Idaho, by virtue of authority in me vested, do hereby pro-

or warrant, and hence such arrests pending the suspension, and when made in obedience to the order or authority of the officer to whom that power was committed, were practically legal.

The opinion says that § 4 of the act of March 3, 1863, providing that any order of the President, or under his authority, made during the rebellion, shall be a defense in all courts to any action, civil or criminal, based on such acts, is merely declaratory of the law as it resulted from the passage of the act and the suspension of the privilege of the writ.

But *Griffin v. Wilcox*, 21 Ind. 370, an action of a similar character, holds that the suspension of the writ does not legalize a wrongful arrest and imprisonment, but only deprives the party arrested of the means of procuring his liberty, and holds that § 4 is unconstitutional on the ground that it deprives one of his property without due process of law.

Who are denied the privilege of the writ.

The persons whose release was sought in *Re Fagan*, 2 Sprague, 91, *supra*, were soldiers, but it was claimed that they were not legally held because two who were drafted were not liable to enrollment, and the three who enlisted were minors whose parents did not consent. It was contended that the description in the proclamation of the persons as to whom the privilege was suspended only covered those "legally" held as soldiers or prisoners. This position was held untenable, the court arguing that under such construction the proclamation would have no effect, since there was no need of suspension if the detention were legal.

People ex rel. Starkweather v. Gall, 44 Barb. 98, holds that the act suspending the privilege of the writ was designed to enable the President to arrest and detain as prisoners persons charged with, or suspected of, some offense against the government, and to suspend the privilege of the writ as to all such persons, and that the suspension did not apply to a petition for a writ to secure the release of a minor under seventeen alleged to have been fraudulently enlisted as a soldier.

The opinion holds that the broad authority given to the President by the first clause of § 1 to suspend the privilege of the writ in "any" case throughout the United States or any part thereof is qualified by the subsequent clause to the effect that no military or other officer

shall be compelled, in answer to any writ of habeas corpus, to return the body of any person detained by him by the authority of the President, but upon his oath that the person is detained by him as a "prisoner" under the authority of the President further proceedings under the writ shall be suspended.

The position is further supported by the argument, drawn from the 2d section, which provides for the discharge of persons so detained where the grand jury has failed to indict them.

Re Fagan, however, holds that even if the subsequent clause of the 1st section is, itself, limited to persons detained as prisoners under the authority of the President, yet it does not restrict the suspension, but merely makes an additional provision with reference to such special class.

Re Cain, 2 Winst. L. (60 N. C.) 141, held that the suspension of the writ by the act of the Confederate Congress only applied to a case where a person was charged with a criminal offense, and did not apply to a petition for a writ to test the question as to one's liability to military service.

The opinion says that the clause of the Confederate Constitution with reference to the suspension of the writ (which is the same as that of the Federal Constitution) refers only to the writ of habeas corpus *ad subjiciendum* to secure the release of a person who stands committed or detained as a prisoner for a crime.

Re Spivey, 2 Winst. L. (60 N. C.) 156, however, holds that the return to a writ showing that the petitioner was detained as a prisoner for an attempt to avoid military service, and was thus within the scope of the Confederate statute suspending the privilege of the writ, was conclusive, and that the court could not know judicially what the act was which was considered to be such an attempt. In that case it was asserted that the petition was simply to test the constitutionality of the act subjecting principals of substitutes to military service. *Re Long*, 2 Winst. L. (60 N. C.) 260, is to the same effect.

Continuance of suspension.

Com. ex rel. Cozzens v. Frink (Pa.) 4 Am. L. Reg. N. S. 700, held that the right of the President to continue the suspension under the act of Congress ceased with the rebellion.

G. H. P.

claim and declare the said county of Shoshone, in the state of Idaho, to be in a state of insurrection and rebellion. In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the state. Done at the city of Boise, the capital of the state of Idaho, this 4th day of May, A. D. 1899, and of the independence of the United States of America, the one hundred and twenty-third.

Frank Steunenberg,
By the Governor.
M. Patrie,
Secretary of State.

That thereafter, upon the call of the governor, a military force was sent into said Shoshone county by the President of the United States, which proceeded at once to secure the arrest of the parties engaged in, and who committed, the outrages of the 29th of April, for the purpose of bringing such parties before the proper tribunal for trial. Among the parties who were arrested as being implicated in the murders and other crimes resulting from the insurrection, riot, or rebellion of the 29th of April, was the petitioner, and he bases his claim to be discharged from such arrest upon various grounds: "(1) No insurrection, riot, or rebellion now exists in Shoshone county. (2) The governor has no authority to proclaim martial law, or suspend the writ of habeas corpus. (3) That martial law does not exist in Shoshone county, and has not been proclaimed in said Shoshone county by anyone having authority to make such proclamation. (4) That the little disturbance of the 29th of April is over; that the parties implicated in it, after having destroyed about a quarter of a million dollars of property, and committed several murders, have retired to their homes; and that, in recognition of the inalienable rights of the citizen, they ought not to be disturbed. (5) That the governor had no right or authority to send an agent or representative to Shoshone county to consult and advise with the military officer sent there by the Federal government to assist in putting down the insurrection and restoring order in said county."

Counsel have argued ably and ingeniously upon the question as to whether the authority to suspend the writ of habeas corpus rests with the legislative or executive power of the government; but, from our view of this case, that question cuts no figure. We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demand it, for the successful accomplishment of this end in view it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ, or disregard it if issued. The statutes of this state make it the duty of the governor, whenever such a state or condition exists as the proclamation of the governor shows does and has existed in Shoshone county for the past six or seven years, to proclaim such locality in a state of insurrection, and to call

in the aid of the military of the state, or of the Federal government, to suppress such insurrection, and re-establish permanently the ascendancy of the law. It would be an absurdity to say that the action of the executive, under such circumstances, may be negatived, and set at naught by the judiciary, or that the action of the executive may be interfered with or impeded by the judiciary. If the courts are to be made a sanctuary, a city of refuge, whereunto malefactors may flee for protection from punishment justly due for the commission of crime, they will soon cease to be that palladium of the rights of the citizen so ably described by counsel.

Section 7405 of the Revised Statutes provides: "When an armed force is called out for the purpose of suppressing an unlawful or riotous assembly, or arresting the offenders, and is placed under the temporary direction of any civil officer, it must obey the orders in relation thereto of such civil officer."

The facts set forth in the governor's proclamation warranted his action. It is true that some of the facts recited therein are negatived by averment in the petition, which would seem to put in issue the truth or falsity of those recitals. On application for writ of habeas corpus, the truth of recitals of alleged facts in a proclamation issued by the governor proclaiming a certain county to be in a state of insurrection and rebellion will not be inquired into or reviewed. The action of the governor in declaring Shoshone county to be in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put into force, to a limited extent, martial law in said county. Such action is not in violation of the Constitution, but in harmony with it, being necessary for the preservation of government. In such case the government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. If hundreds of men can arm themselves and destroy vast properties, and kill and injure citizens, thus defeating the ends of government, and the government be unable to take all needful and necessary steps to restore law and maintain order, the state will then be impotent, if not entirely destroyed, and anarchy placed in its stead. It is no argument to say that the executive was not applied to by any county officer of Shoshone county to proclaim said county to be in a state of insurrection, and for this reason the proclamation was without authority. The recitals in the proclamation show the existence of one of two conditions, viz.: That the county officers of said county, whose duty it was to make said application, were either in league with the insurrectionists, or else, through fear of the latter, said officers refrained from doing their duty. Under the circumstances, it was the duty of the executive to act without any application from any county officer of Shoshone county. This conclusion is based upon what

we deem a correct construction of the provisions of our Constitution and statutes in force, construed *in pari materia*.

It having been demonstrated to the satisfaction of the governor, after some six or seven years' experience, that the execution of the laws in Shoshone county through the ordinary and established means and methods was rendered practically impossible, it became his duty to adopt the means prescribed by the statute for establishing in said county the supremacy of the law, and insuring the punishment of those by whose unlawful and criminal acts such a condition of things has been brought about; and it is not the province of the courts to hinder, delay, or place

obstructions in the path of duty prescribed by law for the executive, but rather to render to him all the aid and assistance in their power in his efforts to bring about the consummation most devoutly prayed for by every good and law-abiding citizen in the state.

The various questions raised by counsel have been considered by the court, and it is our conclusion that the petition does not state facts which show that the writ demanded ought to issue; wherefore *the said demurrer has been sustained, and the writ denied*.

Quarles and Sullivan, JJ., concur.

NEW JERSEY SUPREME COURT.

STATE of New Jersey *ex rel.* City of
BRIDGETON

v.

BRIDGETON & MILLVILLE TRACTION
COMPANY.

(.....N. J.....)

- *1. A street-railway company incorporated under the laws of this state, and the route of its road, and the location of its tracks, established by an ordinance of the municipality in the streets of which the company is to operate its road, such ordinance being accepted by such company, and its tracks laid in accordance therewith, and the road constructed and in operation, cannot, at its mere will and discretion, cease and abandon the operation thereof, or any portion thereof. It becomes the duty of the railway company, in the exercise of its rights, privileges, and franchises, for the benefit of the public, to maintain and operate its road according to the terms of the ordinance, and in compliance with statutes which confer upon the company such rights, privileges, and franchises.
2. An implied condition attaches itself to the grant of the franchise, that it be held for public benefit; and the duty upon the railway company is to exercise it for such purpose; and, as a public agent, it cannot escape this duty.
3. The company, duly incorporated, which has the ownership of, and is in possession and control of, such street railway, its appliances and property, whether under a lease of or by sale from

*Headnotes by LIPPINCOTT, J.

NOTE.—For mandamus to compel operation of railroad, see *note to State ex rel. Little v. Dodge City, M. & T. R. Co. (Kan.)* 24 L. R. A. 564; also *Chicago & A. R. Co. v. People ex rel. Hunt (Ill.)* 20 L. R. A. 224; *State ex rel. Kellogg v. Missouri P. R. Co. (Kan.)* 29 L. R. A. 444; *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co. (Ill.)* 35 L. R. A. 656.

For later cases as to compelling operation of street railway, see *San Antonio Street R. Co. v. State ex rel. Elmendorf (Tex.)* 35 L. R. A. 662; *State ex rel. Grinsfelder v. Spokane Street R. Co. (Wash.)* 41 L. R. A. 515; and *State ex rel. Knight v. Helena Power & Light Co. (Mont.)* 44 L. R. A. 692.

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the original or other company incorporated to construct and operate such railway, or by sale under a decree of the court of chancery of this state upon foreclosure under the statute of the state concerning the sale of the property and franchises of certain corporations (Pub. Laws 1897, p. 229, chap. 127), has conferred upon it all the corporate rights, liberties, privileges, and franchises of such original or other company, and upon it rests the same burden and duty to maintain and operate such street railway under the statutes and the ordinance of the municipality as was imposed upon the original company.

4. The fact that the located route of the railway is laid across a bridge over a stream, the construction, maintenance, and control of which bridge is in the board of chosen freeholders, which will not permit the tracks to be laid thereon unless upon proper and reasonable regulations for the safety of the bridge for the traveling public, furnishes no excuse why the road should not be operated upon its route through the streets of the municipality lying upon either side of such bridge. The acceptance of the ordinance being apart from the control of such bridge by the board of chosen freeholders, and having no relation to it, or to its use, and there being an agreement between the railway company and the chosen freeholders in relation to the use of such bridge, the court will not enter upon the consideration of the reasons why the company has not performed such agreement, in order to excuse the company from the performance of its duty towards the municipality in the operation of its road.

5. Mandamus is the proper remedy to compel such street-railway company to perform the duty of maintaining and operating such railway for the benefit of the public. The public duty imposed upon the company is always active, potential, and imperative, and must be executed until lawfully surrendered, suspended, or abandoned by the legally expressed consent of the state; and the performance of this duty can be lawfully enforced by mandamus.

6. The municipality in the streets of which the railway is located by ordinance is a proper relator in a proceeding by mandamus to enforce the duties of the company towards the public.

(June 21, 1899.)

APPPLICATION for a writ of mandamus to compel defendant to operate its cars over its entire route. *Writ awarded.*

The facts are stated in the opinion.

Mr. Thomas W. Trenchard, for relator:

The law puts the location of route of street railroad on city council.

For city council to leave the matter of what portion of the route shall be operated to the company would be an unwarranted delegation of authority.

State, Theberath, Prosecutor, v. Newark, 57 N. J. L. 312; *State ex rel. Bowman v. Caldwell*, 18 N. J. L. 313.

The appropriate remedy when an ordinance requires a railroad company to lay its road in a certain manner over a certain route, and the company duly accepts its provisions, and afterwards refuses to comply with its provisions, is by mandamus.

State ex rel. Wilbur v. Trenton Pass. R. Co. 57 N. J. L. 212; 8 Am. & Eng. Enc. Law, p. 616, note.

Mr. Thomas E. French also for relator.

Mr. Walter H. Bacon, for respondent:

A writ of mandamus will not lie to enforce the performance of an act which the defendant is without lawful authority to perform.

High, Mandamus, § 14; 1 Wood, Railroads, 378, 379; 2 Dill. Mun. Corp. 4th ed. 1007, note; *State ex rel. Bayer v. Hoboken*, 40 N. J. L. 152; *State, Roll, Prosecutor, v. Perrine*, 34 N. J. L. 254; *State ex rel. Wilson v. Longstreet*, 38 N. J. L. 312; *State ex rel. Ocean County Freeholders v. Vanardsdale*, 42 N. J. L. 536.

The legality of the act, performance of which is sought to be enforced, may be challenged on application for mandamus.

State ex rel. Pell v. Newark, 40 N. J. L. 71; *State ex rel. Rosenfeld v. Einstein*, 46 N. J. L. 479; *Lakewood Twp. v. Brick Committee*, 55 N. J. L. 275; *Danforth v. Philadelphia & C. M. Short Line R. Co.* 30 N. J. Eq. 12; *State ex rel. Mabon v. Halsted*, 39 N. J. L. 640; *State ex rel. Shackleton v. Guttenberg*, 39 N. J. L. 660; 2 Dill. Mun. Corp. 4th ed. 1036.

The consent of the board of chosen freeholders of Cumberland county is essential to the right of a street-railway company to lay tracks on the bridges spanning Cohansey creek in Bridgeton.

State, Leicis, Prosecutor, v. Cumberland Freeholders, 56 N. J. L. 416; *State, Elmer, Prosecutor, v. Cumberland County Freeholders*, 57 N. J. L. 366.

The first consent obtained by the Rapid Transit Company to operate its road over the Broad Street bridge was set aside by this court. The second consent has been revoked by the freeholders.

The defendant, therefore, is wholly without lawful authority to do the act, performance of which is sought to be enforced.

The court will not build a railroad, nor enforce a contract to locate it in a particular place, nor operate it.

Morawetz, Priv. Corp. §§ 1134-1136; Danforth v. Philadelphia & C. M. Short Line R. 45 L. R. A.

Co. 30 N. J. Eq. 12; Booth, Street Railways, 90-92; *State ex rel. Mooney v. Edwards*, 51 N. J. L. 479.

Two things must concur to authorize the issuing of a mandamus,—a specific legal right, and the absence of an effectual legal remedy.

State ex rel. Mount Pleasant Cemetery Co. v. Paterson, N. & N. Y. R. Co. 43 N. J. L. 505; 2 Dill. Mun. Corp. 4th ed. 1006, 1009; *State ex rel. Hugg v. Ivins*, 59 N. J. L. 139; *State ex rel. Vannatta v. Smith*, 61 N. J. L. 188; *State ex rel. Rader v. Union Twp.* 43 N. J. L. 518.

Previous to the making of the application to the court for the writ to command the performance of a particular act, an express and distinct command or request to perform it must have been made by the prosecutor to the defendant who must have refused to comply with such demand.

14 Am. & Eng. Enc. Law, p. 106; *State ex rel. Plainfield v. Runyon*, 42 N. J. L. 566.

Lippincott, J., delivered the opinion of the court:

This is a proceeding on a rule to show cause on the part of the relator why a writ of mandamus should not issue commanding the Bridgeton & Millville Traction Company forthwith to resume and discharge its duty as a common carrier of passengers and the exercise of its franchises by operating and continuing to operate for the transportation of passengers the street railway, with all necessary turnouts and switches, the tracks of which were located by ordinance 66 of the city of Bridgeton, the relator, entitled "An Ordinance Locating the Tracks of the Railway of the Bridgeton Rapid-Transit Company and Authorizing the Said Company to Construct a Street Railway in Certain Streets in the City of Bridgeton." The facts are that after the incorporation of the Bridgeton Rapid-Transit Company, it presented a petition to the city council of the city of Bridgeton for a grant to locate, construct, operate, and maintain a single-track street railway, with the necessary turnout, in the streets over the route designated in its articles of incorporation; among other streets, "beginning in Summit avenue, about 150 feet from the westerly line of Atlantic street, in the city of Bridgeton, in the county of Cumberland, in the state of New Jersey; thence along Summit avenue to Atlantic street; thence through and along Atlantic street to Broad street; thence through Broad street, and across the bridge over Cohansey creek, through Jefferson street to South Pearl street, through South Pearl street to South avenue, and through South avenue to Pampllylia avenue." On January 31, 1892, after consideration, the city council passed an ordinance locating the tracks in the streets of Bridgeton, including the streets above named, granting the company the right to operate the line in such streets by any mechanical power except steam, regulating the manner of construction in such streets, that the said railway should be com-

pleted within nine months from the acceptance of the ordinance by the company, and providing for the manner in which the streets should be used. In several sections of the ordinance the duties of the company in relation to the use and repair of the streets are defined, certain restrictions imposed, and the rights of the city in the streets expressly reserved. By the twelfth section of the ordinance it is provided, in substance, that if the company shall fail to run or operate its said cars for the space of five consecutive days, then it shall and may be lawful for the said city council of the city of Bridgeton to order the said company to remove its said tracks wherever it has failed to operate its cars, and unless the company shall forthwith remove the same, and place such street or highway in good repair and condition to the satisfaction of the city, then the said city shall have power to remove the track, repair the street or highway, and to sell the material removed therefrom, and from the proceeds pay the expense of removal and sale, paying the surplus, if any, to the company, and, in case of deficiency, the company to be liable for the same. On March 1, 1893, the Bridgeton Rapid-Transit Company filed an acceptance of the location of its tracks as designated in this ordinance. On the same day it also filed a general acceptance of the ordinance. On June 3, 1893, the Bridgeton Rapid-Transit Company leased to the South Jersey Traction Company, a corporation organized for the same purposes as the Bridgeton Rapid-Transit Company, the street railway of that company as located under the ordinance, or extended in pursuance of lawful authority then existing or which might thereafter exist, together with all "the branches, extensions, sidings, turn-out tracks, rights of way, lands, machinery, fixtures, depots, stables, shops, stations, buildings, structures, improvements, appurtenances, and hereditaments of whatever kind and description and wherever situate," and also "all rights, powers, franchises, and privileges," etc., for the term of 999 years. The South Jersey Traction Company on its part agreed to assume all existing contracts relating to the construction and operation of the railway, and agreed to forthwith proceed at its own cost and expense to construct, equip, and thereafter operate and maintain the whole of the railway not already constructed, over and along the streets and highways of the city of Bridgeton, as the route is designated in the articles of the association of the said lessor, and as the same has been located by the city council of the city of Bridgeton by the ordinance aforesaid." The agreement of lease also contained other stipulations that the lessee would exercise all the corporate powers conferred, and exercise every right, franchise, and privilege in respect to the use, management, and maintenance of such railway; and also that during the continuance of this lease the railway should be efficiently operated with a full equipment during the continuance of the lease. On July 1, 1893, the South Jersey

Traction Company, to secure its bonds amounting to the sum of \$400,000, mortgaged to the Solicitors' Loan & Trust Company 993 shares of stock of the Bridgeton Rapid-Transit Company and 300 shares of the capital stock of the Bridgeton & Millville Traction Company, the railway of the South Jersey Traction Company, with all its structures, cars, and appliances, and also all the leasehold estate acquired by lease from the Bridgeton Rapid-Transit Company, to the South Jersey Traction Company, dated the 23d day of June, 1893. At the same time of the lease from the Bridgeton Rapid-Transit Company to the South Jersey Traction Company, the latter company by lease acquired from the Bridgeton & Millville Turnpike Company the rights, franchises, and property in certain highways in the city of Bridgeton of that company, which leasehold estate, with all its appurtenances, rights, and franchises, were expressly included in this mortgage. The mortgage was foreclosed in the court of chancery of this state, and by master's deed dated on May 10, 1897, the shares of stock mortgaged, the railways, rights, franchises, station, and equipments of the South Jersey Traction Company were conveyed to one Frank S. Lewis, including the leasehold estate derived from the Bridgeton Rapid-Transit Company and the Bridgeton & Millville Turnpike Company. On May 11, 1897, the certificate of the organization of the Bridgeton & Millville Traction Company as a corporation of this state was filed in the office of the secretary of state, to which corporation Frank S. Lewis immediately conveyed the shares of stock acquired at the foreclosure sale; also all the railways owned by said South Jersey Traction Company, with all cars, shops, stations, etc., and appliances; also all the leasehold estates acquired by the South Jersey Traction Company.

The Bridgeton & Millville Traction Company was organized by virtue of an act entitled "An Act Concerning the Sale of Property and Franchises of Any Corporation Created by or under Any Laws of This State, except Steam Railroads, Canals, Turnpike or Plank Road Companies," approved April 16, 1897 (Pub. Laws 1897, p. 229, chap. 127). It will be seen that the Bridgeton & Millville Traction Company was duly organized under the statutes of this state, and became the owner and possessor of all the property and franchises of the Bridgeton Rapid-Transit Company, the South Jersey Traction Company, and the Bridgeton & Millville Turnpike Company, for the purposes of the operation of this street railway over the streets in question. By the statute last cited it is provided that "whenever the property and franchises of any corporation . . . shall be sold . . . by any decree or decrees of the court of chancery, . . . such sale . . . shall vest in the purchaser or purchasers thereof all the right, title, interest, property, possession, claim, and demand, in law and equity, of the parties to the suit . . . in which such decree . . . was . . . made, of, in, and to the said property so sold

with its appurtenances; and also of, in, and to the corporate rights, liberties, privileges, and franchises of the said corporation, but subject to all the conditions, limitations, restrictions, and penalties of the said corporation of and concerning the same." It appears in the case that the street railway has been constructed over the entire route located in the ordinance, and has been operated by these different companies in the order of their possession respectively. It appears from the facts that in Broad street, and in the route located by the ordinance of the city, there existed a bridge over Cohansey creek. The construction, maintenance, and repair thereof were invested in the board of chosen freeholders of the county of Cumberland; and it will be perceived that the ordinance provides for the location of the tracks of the street railway over this bridge as a part of Broad street as named in the ordinance. When the operation of the street railway commenced, in 1893 or 1894, the cars ran along Broad street to the easterly side of the bridge, and there stopped, and then the operation of their railway was resumed by cars on the west side of the bridge in Broad street. Later, rails were laid or located on said bridge, and the road was operated and crossed the same on its tracks. In proof it appears that this bridge had become out of repair, or otherwise insufficient to bear the burden of the cars and travel across it by the street railway, and the board of chosen freeholders either erected a new bridge or reconstructed the old one so as to render it of sufficient bearing capacity to accommodate the travel over the same, and upon which new bridge tracks also were laid, and for a time the railway was operated over the bridge on such tracks. The use of this bridge by the railway company was granted to the company by the board of chosen freeholders by virtue of resolutions granting such permission to use the bridge, and containing conditions for its use; and a formal agreement was entered into between the street-railway company and the board of chosen freeholders as to the construction of the tracks across the same, and the manner in which the operation should be conducted, together with regulations as to the location of the motors by which the cars were propelled across the bridge. The facts show that the street-railway company violated the terms of such agreement with the freeholders, whereupon a dispute arose, and after much contention between the company and the board, by direction of the board, the tracks across the bridge were removed, since which time the respondent has abandoned the use of that part of its located route which lies to the east of and over and beyond the bridge over this creek, and has persistently, after demand being made by the city to operate its railway in the streets of its located route lying in that portion of the city of Bridgeton, refused, and still refuses, to operate said portions of said road, or to make any attempt or endeavor whatever to do so. By the act under which these companies are organized, being an act entitled "An Act to Provide for

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the Incorporation of Street Railway Companies, and to Regulate the Same," approved April 6, 1886, and the supplements and amendments thereto (Gen. Stat. p. 3216), it is provided "that such articles of association shall not be tendered to the secretary of state nor filed and recorded in his office until . . . an affidavit [is] made by at least five of the directors named in said articles . . . that it is intended in good faith to construct, maintain, and operate the road mentioned in such articles, . . . or as its route may be designated by the authorities of the municipalities." In this case such affidavit was made and recorded, along with the certificate of organization, in the office of the secretary of state. The city of Bridgeton has a population of over 13,000 inhabitants. The city is divided by Cohansey creek. On the west side is the third ward of the city. On the east side are the first, second, and fourth wards. By the proof it is shown that the part of the route or line of railway in question in this case is almost wholly within the third ward, and therefore on the west side of this creek; that on this side the city contains a population of about 3,000; and that the end of the located route in that direction is the South Jersey Institute, where several hundred pupils attend school; and that along the located route Atlantic street is built solidly with houses near to or about to the end of the route. The proof also shows that the abandoned portion of the route was patronized to a considerable extent during its operation. The statute places the location of the route of a street railroad in the city council; and the design of the statute, as it appears to me, is that the city shall determine that question which so closely affects public convenience; and it cannot, under any circumstances, be left to the company itself to say what portion of its route shall be operated. The council could not do this, and, if it did, it would be an unwarranted delegation of authority. *State, Theberath, Prosecutor, v. Newark*, 57 N. J. L. 309. It appears by the proof in this case, not only was the route of the company located, but the same was operated upon, by either one or all of these companies, respectively, according to its period of occupation and ownership; and that since October 6, 1897, there has been a complete failure upon the part of any of these companies to perform their duties.

Upon the respondent in this case the burden and duty of the operation of this road rest. It was assumed by the defendant company under the law in the exercise of its rights, privileges, and franchises for the benefit of the public, and therefore it seems clear that their duty in this respect can be and should be enforced by mandamus. The respondent has the franchise and is under an obligation to perform the duties assumed by the Bridgeton Rapid-Transit Company. Its title to its property and franchises is deduced from the Bridgeton Rapid-Transit Company by the statute and by its own agreements.

It owes the same duty in respect to operation of the railway mentioned in the articles of association of the Bridgeton Rapid-Transit Company as the Bridgeton Rapid-Transit Company did originally if it had constructed and operated the railway. *State ex rel. Mount Pleasant Cemetery Co. v. Paterson, N. & N. Y. R. Co.* 43 N. J. L. 508. It became the duty of the respondent company to operate the railway over its entire route under the franchises as acquired by it. Its exercise of franchise in the operation of its railway upon this street was exclusive, and it was its duty to construct, maintain, and operate a railway on the surface of the street to carry passengers and demand tolls; and that was in so far exclusive that others could not use the road without the grant of legislature, nor exercise that same or similar franchise upon that street without such grant. *Citizens' Coach Co. v. Camden Horse R. Co.* 33 N. J. Eq. 267-279, 36 Am. Rep. 542. In *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457, Chief Justice Beasley, speaking of the duties of a common carrier in a case involving a contract creating illegal preferences, on page 410, says: "A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all." Again: "A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them." Again, he says: "It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient; but, to the contrary of this, I think an implied condition attaches to such grants that they are to be held as a quasi-public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, quasi-public agents." The grant being exclusive, they must be held to a good faith in the performance and fulfilment of their duties. I cannot perceive any excuse whatever by which the respondent can be permitted to abandon the operation or any part of it. That a portion is unprofitable, or that a portion is more difficult to operate, are not valid reasons for abandonment. Its application to the city was for the location of its tracks over the whole route. The terms and conditions of the ordinance, and the ordinance, passed on the faith of the duty of the company to operate its road over the entire route located. In view of this ordinance, it must be conclusively said that, if one part was to be operated and another part might be abandoned at the discretion of the company, the terms and conditions of the ordinance would have been different. This must be conclusively assumed in a case of this character. It appears clear from the statute and the ordinance that it is the duty of such companies

organized under the statutes to operate the roads mentioned in its certificate of incorporation for the benefit of the public, in consideration that it shall have the franchise of transporting the passengers, and taking the tolls from them, and that it cannot escape the performance of this duty as a public agent.

It also seems clear to me, as against the argument made to the contrary by counsel of the respondent, that mandamus is the only and the proper remedy, and that the city of Bridgeton, representing the public, for whose benefit the ordinance was passed, and the road constructed and operated, is a proper party as relator. This position seems to be clearly sustained by all of the authorities. *State ex rel. Mount Pleasant Cemetery Co. v. Paterson, N. & N. Y. R. Co.* 43 N. J. L. 508, affirmed on the opinion below, 45 N. J. L. 186; *New York & G. L. R. Co. v. Montclair Twp.* 47 N. J. Eq. 591; *State ex rel. Wilbur v. Trenton Pass. R. Co.* 57 N. J. L. 212; *King v. Scrern & W. R. Co.* 2 Barn. & Ald. 646. In the last case Best, J., said: "Both upon principle and authority I am of opinion that the court ought to grant this mandamus. Numerous applications are made to Parliament by speculative individuals to form these navigable canals and railways. Great public benefits are held out as inducements to the legislature to sanction these undertakings; and when their sanction is obtained, is it to be permitted to these persons to say that they will do only what is beneficial to themselves, and disregard entirely the interests of the public?" See *Talcott v. Pine Grove Twp.* 1 Flipp. 145, 19 Wall. 666, 22 L. ed. 227. In the case of *State v. Hartford & N. H. R. Co.* 29 Conn. 538-547, which was on a demurrer to a return to an alternative writ of mandamus, the court said: "We . . . prefer to place our decision on the simple ground of the corporate duty of the respondents. All jurists and judges will at once agree that chartered companies are obliged fairly and fully to carry out the objects for which they are created, and that they can be compelled by mandamus to do it, and it will not be questioned that in the case of public highways, whether turnpikes or railroads, they are bound to keep them fit for use, and, in the case of railroads, to keep them furnished with suitable cars, engines, and attendants, without which they cannot be used at all. We advise the issuing of a peremptory mandamus." The application for mandamus in this latter case was to compel the resumption of traffic over a small part of the road abandoned in accordance with an agreement with another railroad company. In *People v. New York C. & H. R. R. Co.* 28 Hun, 543-558, the court said: "The duties imposed must be discharged at whatever cost. They cannot be laid down, or abandoned, or suspended, without the legally expressed consent of the state. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered; otherwise, a public highway of great utility is closed

or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to mandamus or indictment." *People v. Rome, W. & O. R. Co.* 103 N. Y. 95; *Chicago, B. & Q. R. Co. v. State ex rel. Omaha*, 47 Neb. 549, 41 L. R. A. 481; *Indiana ex rel. Muncie v. Lake Erie & W. R. Co.* 83 Fed. Rep. 284; *State ex rel. Minneapolis v. Minneapolis & St. L. R. Co.* 39 Minn. 219; *State ex rel. Morris v. Hannibal & St. J. R. Co.* 86 Mo. 13; *State ex rel. New Orleans v. New Orleans & N. E. R. Co.* 42 La. Ann. 11; *People ex rel. Van Dyke v. Colorado C. R. Co.* 42 Fed. Rep. 638.

The only other pretense of excuse for the abandonment or cessation of the operation of this part of the route of its railway by the respondent was that the board of chosen freeholders removed from the bridge in Broad street over Cohansey creek the rails which were there laid, upon which it operated its road over the bridge. It is not shown by the proof in this case that the respondent ever attempted in any way to invoke legal proceedings to compel the board of freeholders to replace such rails, or has ever attempted from the time they were torn up to replace them there themselves. It does appear very clearly that a contract existed between the board of chosen freeholders and the respondent by which permission was given by the board for the free and full use of this bridge to locate its tracks over which the cars could be operated, qualified with a few simple, plain, natural, and reasonable conditions for the preservation of the bridge from danger on account of other public travel; and the dispute between the freeholders and the respondent under this contract seems clearly to have arisen over the location of the motor by which the cars were to be operated over the bridge. The facts show under this agreement that the motor was not to be located on top of the bridge, but either at one side or under it, or in some position where it would not interfere with the public use of the bridge. Upon this point the respondent and

the board of chosen freeholders seem to be at opposites; and the board of chosen freeholders—whether rightfully or wrongfully need not be considered—displaced the rails on said bridge in order to prevent the operation of the cars across it. It would appear to be a mere pretense of the respondent. And it may be remarked that the franchise of this company can be fully exercised in behalf of the public, without any reference at all to the location of its tracks upon this bridge. It was once so operated, and it can be again, and therefore, even if the action of the board of chosen freeholders was legal, and prevented the operation of the cars across this bridge upon the rails there located, or if they were illegally displaced by the board of freeholders, this would furnish no excuse whatever for the respondent for the failure to exercise and perform its duty to the public as it can be performed, as fully as it ought to be under the ordinances of the city to be performed. But it appears, from the facts, that the rails were removed by the board of freeholders from this bridge through the fault of the respondent in neglecting to keep its contract with the board in respect to the bridge. If the contract had been performed by the respondent company, there could have been no legal interference with the location of their tracks across the bridge by the board of chosen freeholders. The conclusion which the court has reached upon this matter is that this has been made by respondent a mere excuse for the nonoperation of a part of the road which, from one reason or another, it considers itself entitled to abandon. This cannot be made a legal excuse for such abandonment in any sense. The facts do not bear out the excuse even to any reasonable extent. The city of Bridgeton does not, under the facts, as it appears to the court, seem to be in any laches in this matter whatever.

The rule to show cause in this case must be made absolute, and the writ of peremptory mandamus awarded in accordance with it, with costs.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Elizabeth STREITWOLF

v.

August STREITWOLF, Appt.

(.....N. J.....)

*1. In a suit brought by a wife for a limited divorce on the ground of extreme cruelty, alimony pendente lite was awarded her. She subsequently applied for additional alimony pendente lite, to enable her to meet the expense for tuition and books,

*Headnotes by ADAMS, J.

NOTE.—The above case decides a novel question as to the liability of a man to pay for the law-school education of his son, who is in the custody of his wife and chiefly supported by her, after a limited divorce.

On the question of the enforcement of the 114-45 L. R. A.

at a law school, of her son, then in his twentieth year, who lived with, and was chiefly supported by, her. No order had been made giving the custody of the son to either parent. The application was granted, against the opposition of the husband, who testified that he thought his son unfitted for the law, and wished him to go into business. Held, that the order giving additional alimony pendente lite, to enable the wife, against the judgment of her husband, to secure for the son a professional education, should be reversed.

2. The right of a wife to support pend-

bility of a father for children after divorce, see *Re Zillee (Wis.)* 40 L. R. A. 579; *McKay v. San Francisco City & County Super. Ct. (Cal.)* 40 L. R. A. 585; and *Gibson v. Gibson (Wash.)* 40 L. R. A. 587.

ing suit embraces a provision for the suitable maintenance of herself and of children who are dependent on her, including the expense of ordinary education, but will not be extended, against the opposition or without the acquiescence of the husband, to include the cost of the professional training of a grown-up son not in the custody of the wife.

(Dixon and Lippincott, JJ., dissent.)

(July 24, 1899.)

A PPEAL by defendant from an order of the Chancery Court requiring respondent to pay the expense of the tuition of his son. *Reversed.*

The facts are stated in the opinion of Vice Chancellor PITNEY, which was as follows:

The suit is by the wife against the husband for divorce from bed and board on the ground of extreme cruelty. The bill was filed on the 17th of August, 1896, and some time after that a petition was filed for alimony *pendente lite*, which was finally brought to a hearing and heard on the 2d day of November, 1896, with the result that the chancellor ordered the defendant to pay the complainant alimony at the rate of \$12.50 per week. The parties have only one child, a son, now about nineteen years old. They separated a short time before the filing of the bill, and the son has lived with his mother ever since. On the day that the order for alimony *pendente lite* was made, the defendant presented a petition to the chancellor for the custody of the son. That petition was resisted by the wife, with the result that an order was made by the chancellor that the son should be sent to the Hightstown school, and that the father should pay his schooling there. That such order was made was admitted by counsel on both sides. I find nothing in writing among the papers. The boy went to the Hightstown school, and stayed there only a short time before he was expelled. For what reason does not appear. It is admitted, however, that a year previously he had been expelled from the same school, and the trend of the evidence is to show that he has a wayward and uncontrollable disposition. No order was made awarding his custody to the father, and he has ever since lived with his mother. Shortly after leaving Hightstown, in the fall of 1896, he obtained employment in New York city, as clerk in a lawyer's office, and the proofs tend to show that he was a faithful, diligent, and promising clerk. In the fall of 1897 an application was made to the chancellor to increase the alimony of the wife sufficiently to enable her to send the boy to a law school in New York, which was open at night. This application was met by a decree of divorce granted by a court of North Dakota in favor of the husband and against the wife. I can find no record among the papers of this application, but it was so stated by counsel during the present argument, and so admitted. The chancellor on that second application requested and substantially ordered, verbally, the father to

pay \$75 towards the boy's tuition for that winter, and the father acquiesced in such order, and did pay his way at the law school. In the meantime the wife filed a supplemental bill asking that the Dakota decree of divorce be set aside as obtained as the result of a fraud practised on the court. That cause has just been brought to hearing, and I have advised a decree setting aside that divorce. Simultaneous with that hearing and decision another application is made for an increase of the alimony *pendente lite*, sufficient to pay for the second winter's tuition at the same law school. Now, the proof satisfies me that after leaving Hightstown the last time the boy has been doing well, and that, while he is restive under the control of authority like a schoolmaster, he is not restive under a sort of self-control in connection with employment; and, so far as appears, his conduct in his duties as a law clerk has been entirely satisfactory and quite encouraging, and he seems to have an ambition to study and become a lawyer, and to have conducted himself in a way to indicate that that ambition may bear fruit.

Now, laying aside the question of age, and taking the matter on its merits, I am decidedly of the opinion that it is a case where the court ought to order alimony to include the expense of the boy's education in the direction in which he seems to have taken a bent. And the only question is as to his age. Is there any time fixed by the authorities beyond which the court will not order money paid for education against a father? I recollect of no such rule at all. I have not had an opportunity to look into the cases on the subject, and I hoped that counsel would have assisted me in that respect, since the matter was stirred on Wednesday last, as requested, but neither counsel has been able to assist me with any case on that subject. And at present I cannot see where the line can be drawn short of legal majority. The boy is making his home with his mother. She is giving him food and raiment. He is studying faithfully, and submitting himself to the discipline of the law school. It is apparently the first real success that the boy has made in self-government; and I think that, under all the circumstances, this order ought to be made. I make it with great hesitation as to the power of the court. On the merits I think it ought to be made; and I will therefore make an order that the money be paid. I will put it in such shape as shall please Mr. Voorhees as to seeing that the money is applied to that purpose. If Mr. Voorhees himself will buy that list of books, and pay the money to the proper bursar or treasurer of the university law school, he shall have the privilege of doing so; or Mr. Strong—

Mr. Strong: I would rather leave it with Mr. Voorhees.

The Court: So that there will be no kind of reason to believe that it will be diverted.

Mr. Voorhees: I don't want to be understood in that way; that it would be diverted by the boy. It is rather the principle in the case. I do not want to attend to it.

The Court: As general guardian of the

rights of the parties, it is my duty to do that, and I will make the order in that shape if you desire it.

Mr. Voorhees: I would rather not handle it.

The Court: Then I will have it paid to Mr. Strong, as an officer of the court. The defendant will pay the \$100 fee to the law school, and the bill for the cost of the law books required, and they must be bought at as low a price as possible.

Mr. Willard P. Voorhees, for appellant:

The child is grown up. Under such circumstances it is not proper to make an allowance on his account.

Amos v. Amos, 4 N. J. Eq. 171.

A court of chancery has no jurisdiction to compel a parent to support an infant child, and there is no difference between the parents as to their duty to maintain their offspring.

Alling v. Alling, 52 N. J. Eq. 92.

Temporary alimony should never include the support of the children, unless they be of such tender years as necessarily to come under the care of the mother.

Westerfield v. Westerfield, 36 N. J. Eq. 195.

The rule may be otherwise in regard to permanent alimony, if there the support of the children which have been made to the care of the mother formerly entered into the allowance.

Richmond v. Richmond, 2 N. J. Eq. 90.

Messrs. Alan H. Strong and Theodore Strong for respondent.

Adams, J., delivered the opinion of the court:

It will be observed that the decree appealed from awards, not permanent alimony, but, in the language of the decree itself, "additional alimony *pendente lite*." A husband is bound to support his wife, though she is separated from him, unless she is in fault. When in apparent good faith she sues him for a divorce or for separation, and sets forth a prima facie case, there is no presumption that she is in fault. She is therefore entitled to alimony *pendente lite*; otherwise she will be at her husband's mercy. But, on the other hand, while the merits of the controversy are yet undetermined, and since it may turn out that the wife is in the wrong, it is reasonable that the award of alimony pending suit should be somewhat strictly limited to the cost of litigation, and to the support of the wife and of her dependent children. In *Germond v. Germond*, 4 Paige, 643, Chancellor Walworth said: "As a general rule, to guard against any abuse of the privilege of the wife to obtain a temporary support pending a suit for a divorce or separation, and to prevent the bringing of improper suits for the mere purpose of obtaining a support during a protracted litigation, the temporary alimony must be limited to the actual wants of the wife, until the termination of the suit in her favor establishes the fact that she has been abused, and is in-
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titled to a more liberal allowance." The distinction between alimony pending suit and permanent alimony, and the nature of the husband's obligation to furnish them, respectively, in proper cases, are well stated by Vice Chancellor Van Fleet in the following passage extracted from the opinion in *Westerfield v. Westerfield*, 36 N. J. Eq. 195-197: "There can be no doubt that it is the duty of a husband to support his wife. This duty flows out of the marriage contract, and does not at all depend on the wife's means or want of means. The husband's duty is the same, in this respect, whether his wife has property or not. And it is equally clear that if the husband refuses to perform this duty by abandoning his wife, or separating himself from her, and refusing or neglecting to maintain and provide for her, this court may compel him to furnish suitable support and maintenance for her. But the court cannot give such relief to the wife until the husband has had his day in court, and been afforded an opportunity to contest her proofs and submit his own. An application for alimony *pendente lite* stands now solely on the ground of necessity. Originally such allowances were made, in divorce suits, almost as a matter of course. At common law, by the marriage contract the husband acquired complete control over all property owned by his wife at the time of the marriage, or which she might acquire during coverture. In such a state of affairs, unless the court required the husband to support his wife, and to furnish her with the means of prosecuting her suit or defending his, she would be left, during the litigation, both destitute and defenseless. She was, therefore, in almost all cases regarded as a privileged suitor, who had a right to call upon her adversary for both support and the means required to carry on the litigation on her part." The necessity spoken of by Vice Chancellor Van Fleet in the above passage is the necessity of the wife, arising from her pecuniary inability at common law—a necessity which, as the learned vice chancellor proceeded to observe, has been much ameliorated by the liberal modern rules as to the capacity of married women to hold property. But there is another sense in which alimony *pendente lite* "stands solely on the ground of necessity." For the reason above stated by Chancellor Walworth, it should include only items that are necessary. The word "necessary" is indeed to be taken in a liberal sense. As Vice Chancellor Pitney happily said in *Alling v. Alling*, 52 N. J. Eq. 92, 96: "The physical ability of the child to earn its bare food and clothing is not the test or gauge in this court of a parent's duty to support and educate it." The necessity that is the criterion of validity is not mere physical necessity, but rather social and moral propriety, having regard to the situation of the parties and the fitness of things. Food, shelter, and clothing are physical necessities. In an enlightened community the common education of a child is a moral and social necessity. Professional

training is not a general necessity, but is a special advantage. Whether a young man shall study a profession is a question usually determined for him by his parents, especially by his father, with some reference to the son's taste and capacity. It is not well for courts to assume unnecessary responsibility in the critical matter of choosing a profession, as to which even the persons most deeply interested and best qualified to judge are not free from liability to error, or to stand *in loco parentis* before the *locus parentis* has been vacated or forfeited by the death, disability, or misconduct of the rightful incumbent. It may be further observed that the courts, in determining the amount of alimony, have had regard to the age and earning capacity of the minor for whose support and education the wife asks an allowance. In *Snover v. Snover*, 13 N. J. Eq. 261, it was directed by Chancellor Green that so much of an award of permanent alimony as was designed for the support of a daughter should cease when she should reach the age of eighteen. In *Amos v. Amos*, 4 N. J. Eq. 171, Chancellor William Pennington said, "Where children are grown up, it is not proper to make an allowance on their account;" having evidently in mind their arrival, not at legal majority, but at a condition of earning capacity. Again, it is to be remembered that the courts are disposed to recognize and enforce proper agreements *inter partes* touching the support of a wife. *Calame v. Calame*, 25 N. J. Eq. 548. Moreover, it may be material to inquire whether the court has awarded to the wife the custody of the minor child who lives with her, and the cost of whose support she asks to have included in her award of alimony. This is so, because, in the case of a grown-up child, the father's duty to furnish support and the child's duty to render service are usually reciprocal.

Bearing in mind the general considerations above stated, the force and authority of which are evident, it remains to examine the facts of this case, and apply the appropriate rule. The bill was filed by the wife on August 17, 1896, for a limited divorce on the ground of extreme cruelty. On August 18, 1896, a petition for alimony *pendente lite* was filed. On November 2, 1896, an order was made directing the payment of a counsel fee and alimony at the rate of \$12.50 per week. On the same day another order was made, reciting that the defendant had filed his petition praying for an order awarding the custody of said petitioner's son, August Streitwolf, Jr., to him during the pendency of the suit, and that it appeared that it would be for the benefit of the infant that he should be put to school, and that at the school he should not be visited by either parent during the pendency of the suit, and that the father had expressed his willingness to defray the expenses of such disposition of the infant, and directing that said August Streitwolf, Jr., be placed in the Peddie Institute at Hightstown, New Jersey, where he formerly had

been at school, and that said petitioner pay the expenses of removing the said August Streitwolf, Jr., to said institute, and his expenses there, including, board, tuition, suitable clothing, and petty cash, and that he should not be visited by either parent while attending school. No order was then made, or has ever been made, awarding the custody of the son to either parent. The boy was sent to the Peddie Institute under this order, but remained only a short time. On August 19, 1897, an answer to the bill was filed, and on September 3, 1897, a replication was filed. No testimony has been taken to substantiate the allegations of the bill. On October 7, 1897, the defendant obtained a fraudulent divorce from his wife in the state of North Dakota, which, on supplemental bill filed in this suit, has been declared void by the decree of the court of chancery (41 Atl. 876), affirmed by this court (43 Atl. 683). This fraudulent proceeding, reprehensible as it is, throws no light on the merits of the case made by the complainant's first bill. The fact that the defendant got a fraudulent divorce from his wife in North Dakota has no tendency to prove that he treated her with extreme cruelty in New Jersey. The suit is at issue, with no proofs taken on either side, and with no presumption, as to that issue, for or against either party. In January, 1897, the son, being in his nineteenth year, entered a law office, and began to attend the night session of the law school of the University of the City of New York. It is said that an application was made to the chancellor in the fall of 1897 to increase the alimony of the wife sufficiently to enable her to pay the son's tuition in the law school for the year then beginning. There is no record of such an application, or of any order for such increase of alimony. It does appear that the defendant paid \$75 towards his son's expenses for that year. The proof does not, however, warrant the conclusion that the defendant then agreed or consented to educate his son as a lawyer. On November 10, 1898, or thereabouts, the defendant was notified of an application for an order requiring him to pay the sum of \$135 for tuition and law books for the law school year beginning October 1, 1898. There was no petition—merely a notice founded on an affidavit of August Streitwolf, Jr. The application was not in form for the payment of alimony *pendente lite*, but was for the payment of the sum above mentioned for tuition and books. The testimony of the father and son was taken before Vice Chancellor Pitney. It appears from the son's testimony that he was living with his mother, earning \$4 per week by work in a law office, and attending the night classes in the law school; that his mother boarded and clothed him; that his father had given him a suit of clothes and some money, and had further, at some time prior to August, 1896, found a place for him in a business house in New York city, which the son did not keep, as he thought it too hard for him. It appears from the testimony of the father that he is strongly opposed to his son's attendance on the law

school, and that he wants him "to do something practical." He mentions further details of his getting his son a place in a business house. The order applied for was, in substance, granted. It is from that order that the appeal was taken. When the order was made the son was in his twentieth year. He is now in his twenty-first year. His class at the law school will graduate in the year 1900.

From this recital it appears that the application to the court of chancery was virtually for an order compelling the husband, against his own judgment, by way of supporting his wife pending suit, to make a grown-up son a lawyer, and to pay the expense of his professional education. We do

not find that the husband had committed himself to this course by his own conduct, or that he had become bound to take it by any previous adjudication. For reasons already stated, we think that the order appealed from was an undesirable extension of a power that exists primarily for the protection of the wife. The son's ambition in the direction of a liberal education is in itself commendable, but upon the facts now before us, and at this stage of the suit, the father cannot be forced to gratify that ambition without making an unwise exception to a good rule.

The order is reversed.

Dixon and Lippincott, JJ., dissent.

ILLINOIS SUPREME COURT.

John HOLM, *Plff. in Err.*,
v.

Egbert JAMIESON.

(178 Ill. 295.)

A guaranty of the prompt payment of a note is not annulled by a judgment declaring the note void for want of authority in the one who executed it, as against one who took the note in reliance on the guaranty.

(April 21, 1898.)

ERROR to the Appellate Court, First District, to review a judgment reversing a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to enforce a guaranty on a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. James Frake and B. W. Ellis, for plaintiff in error:

The decree is not *res judicata* as to the present plaintiff and defendant, for the very obvious reason that the defendant was neither a party to the chancery suit, nor is he in privity with any of the parties.

Scates v. King, 110 Ill. 464; *Ohling v. Luitjens*, 32 Ill. 30; *Dunlap v. Wilson*, 32 Ill. 524; *Bigelow, Estoppel*, 3d ed. 59; 3 Phill. Ev. 918.

Unless a person is one of the real or nominal parties to the suit he cannot be bound by the decision.

Freeman, Judgm. 189, 252; *Black*, Judgm. 534; *Starkie*, Ev. 10th Am. ed. 97, note 1; 1 *Bigelow, Estoppel*, 3d ed. 54, 59; *Douglass v. Howland*, 24 Wend. 53; *Masure v. Noble*, 11 Ill. 531; *Fletcher v. Jackson*, 23 Vt. 592, 56 Am. Dec. 98; *Morris v. Lucas*, 8 Blackf. 9; *Bissell v. Kellogg*, 65 N. Y. 437; *Maybee v. Avery*, 18 Johns. 352; *State Bank v. Robinson*, 13 Ark. 214.

The defendant not being a party to the

NOTE.—As to the effect of the statute of frauds on a guaranty of the contract of a person under disability, see *Brown v. Farmers' & M. Nat. Bank (Tex.)* 33 L. R. A. 359. 45 L. R. A.

chancery suit its findings are a nullity as to him.

Cutter v. Jones, 52 Ill. 88; *Freeman*, Judgm. 159; *Edmondson v. Montague*, 14 Ala. 378; 1 Greenl. Ev. 524; *Starkie*, Ev. 10th Am. ed. 97, note 1; *Bissell v. Kellogg*, 65 N. Y. 437; *Bigelow, Estoppel*, 98-113; *Black*, Judgm. 548; *Bentley v. Cleveland*, 22 Ala. 821.

There is no privity between the makers and the guarantors of a note.

Bigelow, Estoppel, 59, 97; *Pritchard v. Hitchcock*, 6 Mann. & G. 151; *State Bank v. Robinson*, 13 Ark. 220; *Freeman*, Judgm. 159.

The guaranty was an acknowledgment that the note was duly executed by the maker, and the guarantor is not permitted to aver against or controvert it.

Baylies, Sureties, 21; *Penfield v. Goodrich*, 10 Hun. 41; *Bigelow, Bills & Notes*, 167, note 1; *Bigelow, Estoppel*, 453; *Veazie v. Willis*, 6 Gray, 90; *Rensen v. Graves*, 41 N. Y. 475; *Zabriskie v. Cleveland, C. & C. R. Co.* 23 How. 381, 16 L. ed. 488.

If a corporation made a note which it had no legal power to make, sureties on that note would be held.

2 *Parsons, Notes & Bills*, 244; *Veazie v. Willis*, 6 Gray, 90.

The guaranty is a primary and positive undertaking that the guarantor will pay the note at maturity.

Gage v. Mechanics' Nat. Bank, 79 Ill. 64; *Gridley v. Capen*, 72 Ill. 13; *Parkhurst v. Vail*, 73 Ill. 347; *Otto v. Jackson*, 35 Ill. 350; *J. Obermann Brewing Co. v. Ohlerking*, 33 Ill. App. 28.

No one can take advantage of a decree who is not a party to it, or else is so in privity with the parties to the decree as to be bound by it.

Bigelow, Estoppel, 98, 324; *Gwynn v. Hamilton*, 29 Ala. 236; *Bundy v. Chowling*, 22 Ala. 821; *Edmondson v. Montague*, 14 Ala. 370; *Black*, Judgm. 548; *Mail v. Maxwell*, 107 Ill. 559; *Scates v. King*, 110 Ill. 464; *Freeman*, Judgm. § 313.

There is no privity in the sense in which that word is used above, between the guarantors and the principal of a note.

Bigelow, Estoppel, 138; *Pritchard v. Hitchcock*, 6 Mann. & G. 151, 6 Scott N. R. 851; *State Bank v. Robinson*, 13 Ark. 220; *Freeman*, Judgm. § 313; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73.

Their contract of guaranty implies a warranty that the note guaranteed is a valid and binding instrument.

Baylies, Sureties, 21; Bigelow, Bills & Notes, 167; Story, Prom. Notes, §§ 135, 387; Edwards, Bills & Notes, 191, 273; 2 Parsons, Notes & Bills, 25; Bigelow, Estoppel, 453; *Veazie v. Willis*, 6 Gray, 90; *Remsen v. Graves*, 41 N. Y. 475, *Erwin v. Downs*, 15 N. Y. 575; *Hallifax v. Lyle*, 3 Exch. 452; *Burrill v. Smith*, 7 Pick. 294; *Turnbull v. Bowyer*, 40 N. Y. 460, 100 Am. Dec. 523; *Cole v. Mann*, 62 N. Y. 1.

Messrs. John A. Rose and Francis A. Riddle for defendant in error.

Phillips, Ch. J., delivered the opinion of the court:

On May 16, at Chicago, Illinois, the Great Western Wire Works, by E. B. Filkins, treasurer, executed its note for \$1,500, due sixty days after date, payable to itself, with 6 per cent per annum interest after maturity, with power of confession and judgment, which note was indorsed:

Pay to the Central Trust and Savings Bank or order.

Great Western Wire Works,
by E. B. Filkins.

This note came to the hands of John Holm, who brought suit on the guaranty indorsed thereon, which is as follows:

I hereby guarantee the prompt payment of the within note.
E. A. Filkins.
Egbert Jamieson.

The declaration alleges that, upon the consideration that the Central Trust & Savings Bank would discount the note if the defendants would guarantee the prompt payment thereof, the defendants, for the consideration aforesaid, did guarantee the payment of the same to the Central Trust & Savings Bank. That bank, relying upon the guaranty of the defendants, discounted the note for the maker. After the guaranty of the note by Filkins and Jamieson, and its indorsement to the Central Trust & Savings Bank, that bank made a second indorsement thereon, as follows:

Pay to John Holm or order.
Central Trust and Savings Bank,
by W. A. Paulsen.

John Holm having brought suit on the guaranty indorsed on said note, against Egbert Jamieson, one of the guarantors, the latter appeared, and filed a plea of general issue and a special plea, in which it was set forth that William Holland, Merchant & Co.

(a corporation), and other corporations and individuals filed their bill of complaint against the Great Western Wire Works, Sadie H. Filkins, Edward A. Filkins, John Holm, Charles B. Morrow, and Edward B. Filkins, in which it was averred that a note held by John Holm and numerous other notes similarly executed were fraudulent and void because of the fact that there was no authority in the treasurer to execute the same, and asking the cancellation of the judgment heretofore entered on said note of John Holm, and that said notes be declared fraudulent and void, and be canceled and surrendered, and that judgment entered upon the said notes so executed be vacated and annulled. A decree was entered on the hearing, in accordance with the prayer of the bill, and these facts by the special plea are averred. It is therein further averred that the contract of guaranty was written on paper on which said fraudulent and void promissory note was written, without any other or different consideration than the consideration for the said promissory note, which promissory note was declared to be fraudulent and void, and decreed to be canceled, and the plea further averred that said decree was in full force. To this special plea a demurrer was interposed, and a stipulation entered into by the parties to the declaration, by which it was agreed that the said special plea of Jamieson should be adopted as the plea of Filkins, and that the plaintiff will stand by his demurrer to his special plea, and, if the demurrer is overruled, the judgment to go for the defendants, and that the defendants agree to stand by their special plea, and, if the demurrer thereto is sustained, the judgment shall be entered for the plaintiff, and the plea of general issue be withdrawn. The trial court sustained the demurrer to the special plea, and entered judgment for the plaintiff, to which exception was taken; and on appeal to the appellate court for the first district that judgment was reversed, and judgment entered in the appellate court for the defendants, from which this appeal is prosecuted.

It is insisted, first, by the appellant, that the decree set up in the plea by which the note on which the guaranty was indorsed, and which was the basis of this action, was declared void, was not *res judicata* as to the defendant Jamieson, who was not a party thereto, and that that decree would be no bar to the prosecution of the suit on the guaranty indorsed on the note. The contention of appellee is that, as there is no debt or obligation due and owing to the appellant from the maker of the note, there is nothing due and owing to the plaintiff from the guarantors of the note; that as the maker of the note has been released and discharged by reason of the decree, and the guarantors have been deprived of their right of action over or subrogation as against the maker, there can be no liability as against the guarantors. The note of the Great Western Wire Works having been executed by one without authority to execute such a note, as found in the

decree set up in the plea, by that decree the note was declared for that reason fraudulent and void. To the proceeding by which this decree was so entered, the appellant, John Holm, was a party, but the appellee Egbert Jamieson was not made a party thereto. We do not deem it necessary to enter into an extended discussion of the question as to the effect of the decree on parties and privies, and as to its being of no effect in binding persons who were not parties to the proceeding. The material question in this case to be determined is: What is the effect of the contract entered into by the defendants in guaranteeing payment of the note in the language they did, and how is that guaranty affected by a decree declaring the note itself on which the guaranty was written, and the payment of which was so guaranteed, void. The language used in this guaranty, "I hereby guarantee the prompt payment of the within note," by its terms fixed the time at which the payment was to be made as of the date of the maturity of the note; and, if the payment is not made by the maker within the time fixed in the note, there is a breach of the guaranty on which a liability exists, regardless of the fact that no steps have been taken against the principal. *Gridley v. Capen*, 72 Ill. 11; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62. A different rule exists when a defense is made to a note by reason of payment or a proper set-off. In such case a defense exists to the guarantor to the same extent as to the maker. A guarantor may make a contract which is collateral, or one which is independent. This guaranty was an absolute undertaking that the maker would pay the note when due, and by the default of the principal an immediate liability existed. The undertaking of the guarantor was an independent contract, not resting on a necessity to exhaust a remedy against the maker; but, by the terms used in the guaranty, it was an undertaking to every subsequent holder that the instrument guaranteed was perfectly valid. By a guaranty of this character, the guarantor undertakes to every subsequent holder that the names of the maker and previous indorsers are really in the handwriting of those to whom they respectively purport to belong; and this is carried to the extent that, where a promise has been written upon the note itself, a person guaranteeing the payment of that note is bound, even though the names of prior parties, or some one of them, were in fact forged. *Veazie v. Willis*, 6 Gray, 90. And it has been held that where a party to a certificate of deposit transferred it to another, who had no connection with, and was ignorant of the circumstances attending its origin, with the guaranty of the payment thereof, the guarantor was liable for the amount of the certificate, although it was void for matter *dehors* its face; and the court said the guaranty was, in effect, the representation that the instrument or claim was perfectly valid, as well as a promise to pay it. *Purdy v. Peters*, 35 Barb. 239.

Under the terms of this declaration, the 45 L. R. A.

guaranty of the payment of the note by the signers to that guaranty was a condition precedent to its purchase by the Central Trust & Savings Bank, and it is further averred that its acceptance by that bank was because of its reliance on the guaranty. The contract thus made by the guarantors of the note was a promise as to its legality, and a liability which was not dependent on the prosecution of a suit against the maker of the note, nor dependent on the validity or legality of the note. If the liability of a guarantor of commercial paper were dependent on extraneous circumstances not appearing on or suggested by the face of the instrument, and such guaranty might be rendered invalid because of fraud, forgery, or other circumstances that might be set up as between the maker and the acceptor of the paper, it would practically destroy the value of commercial paper, and unsettle business transactions, to the great detriment of public interests. The guaranty is a contract by which the validity of the instrument is represented, and is binding on the guarantor to the full effect of such representation. Such being the case, the fact that the Western Wire Works, whose name was appended to the note, was placed there by the treasurer without authority, thereby rendering its execution, as against the maker, invalid, did not change the liability of the guarantor on his contract, because its effect—the effect of the contract of the guarantor—was to represent the note as valid and binding. Such liability existing by reason of the guaranty was not defeated because of the want of authority of the maker of the note to sign the name of the corporation. The decree entered declaring the note fraudulent and void because of the want of authority in the treasurer to sign the name of the corporation thereto did not constitute a defense in favor of the guarantors, and the plea was bad. The demurrer was properly sustained by the trial court. It was error in the appellate court to reverse the same.

The judgment of the Superior Court of Cook County is affirmed, and that of the Appellate Court for the First District is reversed.

City of CHICAGO, Appt.,
v.

MANHATTAN CEMENT COMPANY.

(178 Ill. 372.)

1. A statute compelling a county to pay three fourths of the value of property destroyed by a mob or riot, irrespective of ability or exercise of diligence

NOTE.—As to liability for property destroyed by mob, see *note* to *Glanfortone v. New Orleans* (C. E. D. La.) 24 L. R. A. 592.

As to liability of city for killing of person by mob, see *New Orleans v. Abagnatto* (C. C. App. 5th C.) 26 L. R. A. 320.

As to liability of county for lynching, see also *Brown v. Orangeburg County* (S. C.) 44 L. R. A. 734.

to protect the property, is a police regulation for the better government of the state, which does not violate Const. art. 9, §§ 9, 10, prohibiting statutes to impose taxes upon municipal corporations for corporate purposes.

2. A debt is not created against a county, within the meaning of Const. art. 9, § 12, by a statute making the county liable to owners for property destroyed by mobs and riots.

(February 17, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to hold defendant liable for property destroyed by a mob. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles S. Thornton and Thomas J. Sutherland for appellant.

Messrs. J. J. Brooks and C. V. Gwin, with *Mr. George Willard,* for appellee:

Our appellate court has expressly approved the act in question.

Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571.

Legislative acts having the same purport as the one in question and under Constitutions similar to our own have been held valid in several of the states.

Underhill v. Manchester, 45 N. H. 214; *Chadbourne v. New Castle,* 48 N. H. 196; *Darlington v. New York,* 31 N. Y. 164, 88 Am. Dec. 248; *Brightman v. Bristol,* 65 Me. 426, 20 Am. Rep. 711; *Re Pennsylvania Hall,* 5 Pa. 204; *Allegheny County v. Gibson,* 90 Pa. 397, 35 Am. Rep. 670; *Atchison v. Twine,* 9 Kan. 350; *Clear Lake Waterworks v. Lake County,* 45 Cal. 90; *Williams v. New Orleans,* 23 La. 507; *Folsom Bros. v. New Orleans,* 28 La. Ann. 936.

The doctrine of the state courts in such cases has received the approval of the Federal Supreme Court.

Louisiana ex rel. Folsom v. New Orleans, 109 U. S. 285, 27 L. ed. 936.

Also of the Federal circuit court.

Pennsylvania Co. v. Chicago, 81 Fed. Rep. 317.

The general assembly itself, it may be assumed, has full power to do whatever is necessary to keep the peace and insure domestic tranquillity.

Cooley, Const. Lim. 6th ed. 275.

The powers, duties, and liabilities of municipal corporations, unless restrained by constitutional limitation, are wholly under the control of the legislature, and the legislature has the right to impose the support of paupers on counties, cities, incorporated villages or townships as it may choose, this being a proper exercise of the police power of the state.

Fox v. Kendall, 97 Ill. 72.

The city cannot raise the question as to whether it is already indebted to an amount in excess of the constitutional limitation.

Bloomington v. Perdue, 99 Ill. 329; *Marion County v. Lear,* 108 Ill. 343; *Harris v. Whiteside County Supers.* 105 Ill. 445; *East* 45 L. R. A.

St. Louis v. People ex rel. Gundlach, 6 Ill. App. 76, 124 Ill. 655.

The elements of such legislative enactments are not new. They are found in the old English law, which made the hundred responsible for robberies.

Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571; *Ratcliffe v. Eden,* 2 Cowp. 485; *Wilmot v. Horton,* cited in *Hyde v. Coogan,* 2 Doug. 699.

Wilkin, J., delivered the opinion of the court:

Appellee brought its action on the case, in the circuit court of Cook county, against the city of Chicago, to recover three fourths of the value of a quantity of cement alleged to have been destroyed in consequence of a mob or riot in the city July 6, 1894. By agreement of parties, a jury was waived, and both matters of law and fact were tried by the court. The finding being for the plaintiff, judgment was rendered in its favor for \$150 and costs of the suit. The city prosecutes this appeal.

The action is based upon the statute entitled "An Act to Indemnify the Owners of Property for Damages Occasioned by Mobs and Riots," in force July 1, 1887. Laws 1887, p. 237. The 1st section of that act provides "that whenever any building, or other real or personal property except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in the city, then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three fourths of the damages sustained by reason thereof." Section 2 authorizes the bringing of a suit in any appropriate form of action, and provides that "whenever any final judgment shall be secured against any such city or county in any such action, the same shall be paid in due course, as in case of other judgments." By § 3 no recovery can be had if the loss is the result of the carelessness, neglect, or wrongful act of the plaintiff, nor unless such party shall have used all reasonable diligence to prevent the loss. Section 4 preserves the right of action against the parties engaged in the mob or riot, or in any manner participating in the same, and gives the city or county paying the damages a lien upon any judgment so obtained against such individual. Section 5 gives the city or county an action over against any person or persons engaged or in any manner participating in the mob or riot. By § 6 no action shall be maintained under the act unless notice of the claim shall have been given within thirty days, and the action brought within twelve months after the loss or damage occurred.

Plaintiff by its declaration alleged all the facts made necessary by these several sections to entitle it to recover. The trial was upon a stipulation of facts between the parties, by which the defendant agreed that all the facts alleged in the declaration were true,

and the plaintiff, on its part, admitted that at the time of the destruction of the property the city was indebted beyond the constitutional limit of 5 per centum on the value of its taxable property, and could lawfully obtain no funds for employing more firemen or policemen, or which could be expended for the purpose of protecting the plaintiff's property; that the funds which it had or could obtain were expended for the necessary running expenses of the city government, including the maintenance of the police and fire departments; also that, at the time of the destruction of the property, marshals appointed by the circuit court of the United States, and soldiers of the regular army and state militia, were present, engaged in protecting all public and private property within the city; that the city has now, and had at the time of the destruction of said property, no funds which, under the Constitution and laws of the state, can be used to pay a judgment in the action, if one should be rendered against it.

The only question at issue upon the trial was the constitutionality of the statute declared upon, and the court, in its rulings upon propositions of law submitted by counsel for the respective parties, decided in favor of the validity of the act. The correctness of that ruling is the only point presented for our decision.

Statutes similar to ours have been in force in England, as well as in several of the states in this country, for many years, and have uniformly been upheld by the courts. The constitutional right of legislatures to enact such laws, under our form of government, has been frequently challenged in courts of last resort, and our attention is called to no case denying that authority. The principle upon which these laws are held to be within the general scope of legislative power is stated in *Allegheny County v. Gibson*, 90 Pa. 397, 35 Am. Rep. 670, as follows: Speaking of the course of the ancient English law of the subject, it is said: "Formerly, as we have seen, a person robbed had his remedy against any inhabitant of the hundred; that is to say, the inhabitants were jointly and severally liable. Then the law was so changed that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterwards it was still further modified so as to give the right of action against the hundred. The principle upon which this legislation rested was that every political subdivision of the state should be responsible for the public peace and the preservation of private property; and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent, as well as to detect and punish, crime. . . . It was evidently a police regulation, based upon grounds of public policy, and enforced without regard to the hardships of particular cases." And referring to the Pennsylvania

act, which is very similar to that under consideration, it is further said: "Our act of 1841 is also a police regulation, and rests upon like grounds of policy. Under our political system the state grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers, and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the state and every municipality upon which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace and maintain good order within its borders. The state lends its aid when the local authorities are overborne, and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto.

In *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248, the court of appeals, having under consideration the statute of that state, passed in 1855, making counties and cities liable for property destroyed in consequence of mobs, said: "It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government, which they are not prohibited from exercising by the Constitution of the United States, or by some provision or arrangement of the Constitution of this state. This act proposes to subject the people of the several local divisions of the state, consisting of counties and cities, to the payment of any damages to property in consequence of any riot or mob within the county or city. The policy on which the act is framed may be supposed to be to make good, at the public expense, the losses of those who may be so unfortunate as without their own fault to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purposes in view."

Except that of the state of Maryland, all of the statutes of this character, so far as we can ascertain, like our own, fix the liability of the municipality without reference to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered by any of the courts passing upon the question, as an objection to their validity. In *Allegheny County v. Gibson*, 90 Pa.

397, 35 Am. Rep. 670, it was said: "It may seem a harsh rule to hold a community responsible for the effects of mob violence, which apparently, at least, they had no power to prevent; yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing, and had no means of arresting. In both cases it is a police regulation. It is based upon the theory that, with proper vigilance, the act might and ought to have been prevented." The following authorities either directly pass upon and sustain like statutes, or recognize their validity and give force to them: 2 Dill. Mun. Corp. § 959; *Davidson v. New York*, 27 How. Pr. 342; *Luke v. Brooklyn*, 43 Barb. 54; *Re Pennsylvania Hall*, 5 Pa. 204; *Underhill v. Manchester*, 45 N. H. 214; *Williams v. New Orleans*, 23 La. Ann. 507; *Ohabbourne v. Newcastle*, 48 N. H. 196; *Atchison v. Twine*, 9 Kan. 350; *Brightman v. Bristol*, 65 Me. 426, 20 Am. Rep. 711; *Clear Lake Waterworks Co. v. Lake County*, 45 Cal. 90.

In *Marion County v. Lear*, 108 Ill. 343, the question being as to the constitutionality of the statute requiring counties to pay sheriffs' fees in criminal cases where the defendants are acquitted, and to make up any deficiency in their salaries, we said, after holding that the passage of the law was an exercise of the police power (p. 349): "Whether the burden of enforcing police regulations, in the absence of express constitutional restriction—and none such is here claimed—shall be borne by the state at large, or be devolved upon the local municipalities, is a mere question of public policy, upon which the determination of the general assembly is conclusive. A county is a public corporation, which exists only for public purposes connected with the administration of the state government, and it and its revenues are alike, where no express constitutional restriction is found to the contrary, subject to legislative control." See also *Harris v. Whiteside County Supers*. 105 Ill. 445.

But counsel for the city assert that in none of the authorities cited as upholding the constitutionality of these mob or riot statutes were constitutional provisions in force like those contained in our Constitution of 1870. It is not and cannot be denied that the legislature of this state has full power to enact all laws pertaining to the civil government of the state, not prohibited by the Federal or state Constitutions. The Constitution itself confers that power, and, as said in *Firemen's Benev. Asso. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115 (speaking of the Constitution of 1848, similar in that regard to our present Constitution): "The general grant of legislative power found in the Constitution confers upon the general assembly all legislative power, and authorizes the lawmakers to pass any laws and do any acts which are embraced in the broad and general word 'legislation' as known and defined in the English language," etc. "The question of legislative power, and its extent, depends on the limitations contained in the 45 L. R. A.

Constitution. When a state is created it is invested with complete sovereign power, unless restricted by constitutional limitation." "By § 1, art. 4, of our Constitution, full, unlimited and uncontrolled legislative power is conferred and may be exercised, unless limited by other provisions of that instrument or by the Federal Constitution." *Harris v. Whiteside County Supers*. 105 Ill. 445.

It is not claimed that the statute in question is in any way violative of the Constitution of the United States. The question, then, must be, Has the city, by its counsel, succeeded in pointing out any provision of the Constitution of this state which restricts, limits, or prohibits the enactment of this law? The attempt to do so is by setting up the following sections of article 9, and the separate section prohibiting donations by municipal corporations to private corporations. These sections are as follows:

"Sec. 9. The general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

"Sec. 10. The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, and shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation."

"Sec. 12. No county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding 5 per centum on the valuation of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness."

Separate section: "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation."

Counsel for the city say in their argument (meaning, no doubt, §§ 9, and 10): "These sections prohibit any increase of indebtedness of cities, direct or indirect, present, future, or contingent, by or through any subsequent legislation, and, to be specific, prohibit any legislation which shall directly impose a debt, or create a condition of affairs which will be likely to produce a debt,—thus prohibiting the legislature from accom-

plishing the result by indirect methods which it is in terms prohibited from doing by direct provisions. In other words, the legislature is prohibited by these sections of the Constitution from enacting any law which shall, in and of itself, provide or create a present debt, or put into existence or motion any condition of affairs which will render it possible or probable that a municipal debt may thereby be created; such a law being in contravention alike both of the terms and of the spirit of the Constitution." If this proposition had been limited to indebtedness for "local or corporate purposes," within the proper meaning of the term, it might, at least for the purposes of this decision, be conceded. In *Marshall v. Silliman*, 61 Ill. 218, the question "whether the legislature can create a debt against a municipal corporation for municipal purposes, and subject it to a tax for its payment, without its consent," was disposed of in the following language: "Our new Constitution expressly prohibits this for the future, and the decisions of this court substantially hold that it could not be done under the Constitution of 1848"—citing and quoting from *Harvard v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Hessler v. Drainage Comrs.* 53 Ill. 105; and *Livingston v. Wider*, 53 Ill. 302. The cases of *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505; *Updike v. Wright*, 81 Ill. 49, and *Choisser v. People*, 140 Ill. 21, simply follow the preceding cases in holding that debts for merely corporate purposes cannot be created against municipal corporations by the legislature, under our Constitution, without their consent.

If it should be admitted that this act does create debts and impose taxes for their payment upon cities and counties without their consent,—a proposition, in our opinion, untenable,—still, unless it can be further successfully maintained that such debts are for local purposes,—merely and only for corporate purposes,—the foregoing sections of the Constitution, as heretofore construed, do not prohibit or limit the power of the legislature to enact the statute. In *People ex rel. McCagg v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278, Chief Justice Breese, construing § 5 of article 9 of the Constitution of 1848, and referring to *Harvard v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130, said (p. 30): "To what extent it is to be construed as a limitation upon the power of local taxation directly by the legislature itself, it was not necessary in that case, nor is it in this, to decide. However strong the argument in favor of so construing it, there nevertheless may be cases where the legislature, without the consent of the corporate authorities, might impose taxes, local in their character, if required by the general good government of the state, because such taxes would not be merely and only for corporate purposes, as, if one of the cities of the state should be insurgent, requiring the interposition of the military power, it will not be denied the state, on quelling the insurrection, could im-

pose taxes upon the city to defray the expense of a resort to military power. So, if the police department of a city should fail to furnish reasonable security to life and property, the state undoubtedly might provide such force and assess the city for the expense; but the tax authorized by the act in question is for a purpose purely local and corporate, having no other element about it, and the commissioners appointed by it are in no sense corporate authorities of the city of Chicago." This language clearly indicates that it was not intended, by any of the decisions cited, to hold that the legislature might not create a debt against cities or counties, and provide for the collection of the same, where it was done under a proper exercise of the police power, and hence they are in no way in conflict with what was decided in 103 Ill. and 105 Ill., *supra*.

In his work on Taxation, treating of the subject of local taxation under legislative compulsion, Judge Cooley, enumerating the cases in which such taxes are lawful, says (p. 686): "Mobs and Riots. Another similar case is where a municipal corporation is compelled, by means of taxation, to make compensation for losses sustained within its limits at the hands of mobs and rioters. It has been thought from very early times that that political division of the county which failed to exert its authority for the effectual suppression of disorder, by means whereof innocent parties suffer from lawlessness and violence within its boundaries, might justly be required to make good the losses, and that its diligence in maintaining the empire of the laws would be quickened by the requirement. Such legislation is, in effect, only a part of the state police system, under which the municipal divisions are severally looked to for the preservation of the public peace within their respective limits. And speaking generally, it may be affirmed that in any case in which compulsory taxation is found necessary, in order to compel a municipal corporation or political division of the state to perform properly and justly any of its duties as an agency in state government, or to fulfil any obligation legally or equitably resting upon it in consequence of any corporate action, the state has ample power to direct and levy such compulsory taxation, and the people to be taxed have no absolute right to a voice in determining whether it shall be levied, except as they may be heard through their representatives in the legislature of the state." The same author says, in his work on Constitutional Limitations (p. 283): "The legislature has undoubted power to compel the municipal bodies to perform their functions as local governments under their charters, and to recognize, meet, and discharge the duties and obligations properly resting upon them as such, whether they be legal, or merely equitable or moral: and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient."

Keeping in mind that the passage of this

and similar laws is for the better government of the state,—is a mere police regulation,—§§ 9 and 10 of the Constitution in no way limit the power of the general assembly to enact them. There is still less reason for the contention that § 12, *supra*, is such a limitation. By no possible construction can it be held to create a debt against municipal corporations of any particular amount, much less of an amount exceeding the constitutional limit. We certainly cannot be asked to assume that every county and city in the state would be compelled to become indebted, by its enforcement, to an amount, including existing indebtedness, exceeding 5 per centum on the value of its taxable property, in order to justify a holding against the validity of the act. Whether or not the city of Chicago was, at the bringing of this suit, indebted beyond that amount, is wholly immaterial in determining the constitutionality of the law. That question could only arise, if at all, upon a proceeding to collect the judgment.

But aside from the foregoing considerations, as already intimated, we do not think the act, in any proper sense, creates a debt against cities and counties. It does no more than provide that, under certain circumstances, they shall be liable to owners for property destroyed by mobs and riots. Owners seeking to recover for such loss must, as in any other case, make out their cause of action by alleging and proving all the facts prescribed by the several sections of the act. This right of action is no more a debt against a city or a county than is the right of recovery against such municipality for any other wrong or injury. The New York Constitution provided that on the final passage, in either house of the legislature, of every act which imposes, continues, or revives a tax, etc., three fifths of all the members should be necessary to constitute a quorum. In *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248, it was insisted the mob act of that state imposed a tax, and that the constitutional quorum was not present when it passed. Denio, Ch. J., rendering the opinion of the court, said: "The act of 1855 does not impose a

tax of any kind, either state or municipal. Its provisions may, and no doubt will, lead to the necessity of local taxation; and the same thing may be said of every act of legislation under which an expenditure for general or local purposes may, in any contingency, be required. If a local tax in a city or village is within the scope of the section, it will be sufficient to have the requisite quorum present when the law shall come to be voted. The act does not create a debt or claim. If no person should suffer damage by riot or mob, no money would be required, and no debt or charge would ever be created; and until such an event shall occur no debt or claim will be called into existence." Under the Illinois statute, there must not only be a loss by mob or riot, but the owner must have been free from fault, and given the required notice, etc., before money can be required or a debt or charge created. What has been said disposes of the contention that the act violates the separate section quoted above. The statute does not make, or provide for making, a donation to anyone.

Neither the wisdom of this law, nor the hardships which it may impose upon municipalities without any fault or neglect of duty upon their part, are matters for discussion or decision in passing upon its constitutionality. These are questions for the legislature, and not for the courts. The oft-repeated rule is "that, to render a statute unconstitutional, it must be clearly violative of the plain provisions of the Constitution. All doubts and uncertainties, arising either from the language of the Constitution or the law, must be resolved in favor of the validity of the statute. Every intendment is in favor of the constitutionality of enactments of the legislature." After giving the question here involved the careful consideration its importance deserves, we are of opinion that no sufficient reason is shown for holding the act in question unconstitutional.

The judgment of the Circuit Court will accordingly be affirmed.

Rehearing denied.

NORTH CAROLINA SUPREME COURT.

J. J. HOWARD *et al.*, *Appts.*,

v.

MUTUAL RESERVE FUND LIFE ASSOCIATION of New York.

(.....N. C.....)

1. The superior court has no original jurisdiction of a legal cause of action, where the amount claimed is under \$200.
2. An allegation that plaintiff has paid to defendant various amounts, but is not able to give the dates and the amounts,

NOTE.—For cases similar to the above, see *Condon v. Mutual Reserve Fund Life Assn.* (Md.) 44 L. R. A. 149; and *Clark v. Mutual Reserve Fund Life Assn.* (D. C.) 43 L. R. A. 390.

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with a request that the defendant file with its answer a schedule showing the items and dates of payment, is too vague to show any amount whatever for the purpose of jurisdiction.

3. A person who pays money under the demand of another, with full knowledge of all the facts, cannot afterwards recover.
4. Courts of one state cannot, by injunction, afford equitable relief even to one of its residents who is a member of a foreign corporation, by an order commanding and requiring such corporation to do or not to do certain specified acts connected with the internal management of its corporate affairs, although the statutes in general terms provide means for bringing foreign corporations into the courts of the state, and that

residents may bring actions in the courts for any cause of action.

5. An injunction forbidding a foreign insurance corporation to collect or levy any further assessments upon a resident member upon the plan adopted by the company would require an investigation and control of the management of the company, and is beyond the jurisdiction of the court, in the absence of any allegation of fraud, although the court would have jurisdiction in case of actual fraud in inducing the plaintiff to become a member of the corporation, to his pecuniary loss, or in the levying and collecting of assessments, or if the suit was to recover the amount due on his policy, and the defendant had declared the policy forfeited for failure to pay the assessments, as the latter suit would be merely to enforce the contract or give damages for its breach.
6. An amendment of a complaint which involves a question of fact and a matter of law entirely foreign to the case made up on appeal will be denied in the appellate court.

(September Term, 1899.)

APPEAL by plaintiffs from a judgment of the Superior Court for Craven County in favor of defendant in an action brought to recover back illegal assessments which had been paid to defendant upon a benefit certificate and to enjoin the making of further illegal assessments. *Affirmed.*

The facts are stated in the opinion.

Messrs. Simmons, Pou, & Ward, for appellants:

This court has the power to make amendments.

Robeson v. Hodges, 105 N. C. 50.

In *Allen v. Sullinger*, 108 N. C. 160, an amendment to complaint in ejectment was permitted to show a proper description of the land.

In *Monger v. Kelly*, 115 N. C. 294, it was held that an amendment could be allowed which would cause demurrer to complaint to be overruled.

Messrs. James E. Shepherd and John W. Hinsdale, for appellee:

The superior court has no jurisdiction of the legal cause of action for that it appears from the face of the complaint that in no event can the plaintiffs recover as much as \$200.

Money paid with a knowledge of the facts cannot be recovered.

Jones v. Jones, 118 N. C. 447; *Neirell v. March*, 30 N. C. (8 Ired. L.) 441; *Adams v. Reeves*, 68 N. C. 134, 12 Am. Rep. 627; *Lyle v. Siler*, 103 N. C. 261; *Macon County Comrs. v. Jackson County Comrs.* 75 N. C. 240.

The relief prayed for relates altogether to the management of the internal affairs of the defendant, and therefore the courts of North Carolina have no jurisdiction of the subject-matter of the action.

The courts of one jurisdiction will not interfere in controversies relating to the internal management of the affairs of a corporation organized in another jurisdiction.

6 Thomp. Corp. § 7904: *North State Copper & G. Min. Co. v. Field*, 64 Md. 151; *Wil-*

kins v. Thorne, 60 Md. 253; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Williston v. Michigan S. & N. I. R. Co.* 13 Allen, 400; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 Am. Rep. 439; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Bank of Virginia v. Adams*, 1 Pars. Sel. Eq. Cas. 534; *Gregory v. New York, L. E. & W. R. Co.* 40 N. J. Eq. 38; *Stafford v. American Mills Co.* 13 R. I. 310; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378; *Berford v. New York Iron Mine*, 24 Jones & S. 236; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179; *House v. Cooper*, 16 How. Pr. 292; *Chase v. Vanderbilt*, 5 Jones & S. 334; *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.* 30 Barb. 171; *Delaware, L. & W. R. Co. v. New York*, 8 & W. R. Co. 12 Misc. 230; *Leary v. Columbia River & P. S. Nav. Co.* 82 Fed. Rep. 775; *Murfree, Foreign Corp.* § 226; *Moore v. Silver Valley Min. Co.* 104 N. C. 545; *Guilford v. Western U. Teleg. Co.* 59 Minn. 339; *Bailey v. Birkenhead L. & C. Junction R. Co.* 12 Beav. 441; *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 154, 43 L. R. A. 390; *Taylor v. Mutual Reserve Fund Life Asso. (Va.)* 33 S. E. 385; *Condon v. Mutual Reserve Fund Life Asso. (Md.)* 44 L. R. A. 149.

The courts of this state cannot enforce its injunction against the defendant.

Bank of Bellows Falls v. Rutland & B. R. Co. 28 Vt. 470; *North State Copper & G. Min. Co. v. Field*, 64 Md. 151; *Clark v. Mutual Reserve Fund Life Asso.* 14 App. D. C. 154, 43 L. R. A. 390; *Condon v. Mutual Reserve Fund Life Asso. (Md.)* 44 L. R. A. 149; *Taylor v. Mutual Reserve Fund Life Asso. (Va.)* 33 S. E. 380.

The North Carolina statute providing for service of process on a foreign corporation does not confer authority upon the North Carolina courts to interfere with the internal management of such corporation.

North State Copper & G. Min. Co. v. Field, 64 Md. 151; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Kimball v. St. Louis & S. F. R. Co.* 157 Mass. 7; *Kansas & E. R. Constr. Co. v. Topeka, S. & W. R. Co.* 135 Mass. 34, 46 Am. Rep. 439; *Madden v. Penn Electric Light Co.* 181 Pa. 617, 38 L. R. A. 638; *Fisher v. Charter Oak L. Ins. Co.* 20 Jones & S. 179; *Howell v. Chicago & N. W. R. Co.* 51 Barb. 378; *Condon v. Mutual Reserve Fund Life Asso. (Md.)* 44 L. R. A. 149; *Taylor v. Mutual Reserve Fund Life Asso. (Va.)* 33 S. E. 385.

The purpose of the action is to compel the defendant association to perform its contract.

By becoming a member of a mutual association one is conclusively presumed to know the general laws which determine and regulate the very existence of the corporation itself. They are as much part of the contract of membership as though they were written into the certificate. And the courts will not permit such a member to set up ignorance in fact of the statutes, which are the very foundation and which constitute the fundamental law of the association.

Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557; *Wanschaff v. Masonic Mut. Ben. Soc.* 41 Mo. App. 206; *M'Cracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Fry v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 197; *Weingartner v. Charter Oak L. Ins. Co.* 32 Fed. Rep. 314; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138; *Cooke, Life Ins.* 1891, § 11; *Joyce, Ins.* 1897, § 194.

And members of a mutual insurance association are bound by the statutes of the state of incorporation, whether they reside in that state or elsewhere.

Fry v. Charter Oak L. Ins. Co. 31 Fed. Rep. 197; *Weingartner v. Charter Oak L. Ins. Co.* 32 Fed. Rep. 314; *Bockover v. Life Asso. of America*, 77 Va. 85.

The charter is part of the executory agreement between the association on the one hand and its members on the other.

Supreme Lodge, K. of P. v. Knight, 117 Ind. 489, 3 L. R. A. 409; *Simeral v. Dubuque Mut. F. Ins. Co.* 18 Iowa, 319; *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Hellenberg v. District No. 1, I. O. of B. B.* 94 N. Y. 580.

If the board of directors refuses to redress his grievances, the appellant can appeal to his fellow members.

Bailey v. Birkenhead, L. & C. Junction R. Co. 12 Beav. 433; *Haues v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Dunphy v. Traveller Newspaper Asso.* 146 Mass. 495; *Swan v. Mutual Reserve Fund Life Asso.* 155 N. Y. 9.

Under the New York statute, which is a part of the organic law of the defendant association, the plaintiff has not legal capacity to maintain this action.

As this defendant is chartered by the state of New York, and only by it, the legal existence, the home, the domicile, the habitat, the residence, the citizenship, of the corporation, can only be in the state of New York, although it may do business in other states whose laws permit it.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; *Shaw v. Quincy Min. Co.* 145 U. S. 450, 36 L. ed. 771.

The construction placed by the highest court of the state of New York in *Swan v. Mutual Reserve Fund Life Asso.* 155 N. Y. 9, being a construction of a statute of the said state, is binding and controlling upon the courts of North Carolina.

Supreme Council A. L. of H. v. Green, 71 Md. 266.

The provisions of the statute are to be treated as an amendment to and a part of the charter of the defendant.

Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; *Bockover v. Life Asso. of America*, 77 Va. 85.

Members of a mutual assessment insurance company are bound by the statutes of the state where it was organized. They are deemed as much part of the contract of insurance as though they were written into the certificate itself. The citizenship of the member is of no importance. 45 L. R. A.

Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557; *Railway Pass. & Freight Conductors' Mut. Aid & Ben. Asso. v. Robinson*, 147 Ill. 138; *Joyce, Ins.* § 194.

Montgomery, J., delivered the opinion of the court:

The defendant, a foreign corporation, is an insurance company organized on the assessment plan. The plaintiff, J. J. Howard, a resident of the state, insured his life in defendant company for the benefit of the plaintiff, J. M. Howard, and at the time the application was accepted a certificate of membership was issued, in which the defendant agreed and promised to pay to the beneficiary the value of the policy upon the death of the plaintiff J. J. Howard, in consideration of the payment to the defendant by J. J. Howard of the admission fee and the dues for expenses to be paid quarterly in each year and of all mortuary assessments. A by-law of defendant company, in force at the time the plaintiff became a member, was incorporated in the certificate of membership, and is in the following words:

"Whenever the death fund of the association is insufficient to meet an existing claim by death, an assessment shall be made upon the entire membership in force at the date of such death for such a sum as the board of directors shall have established and published, according to the age of each member;" and by another by-law in force at the time the plaintiff became a member of the company, certain definite rates of assessment for each member, according to age, were fixed, and those upon members of the age of the plaintiff J. J. Howard were fixed at \$2.10 for each \$1,000 of insurance.

Up to the 12th of June, 1895, the assessments against the plaintiff on account of the said mortuary fund were levied and collected according to the rates agreed upon in the beginning. But at that date, and also in January, 1898, the board of directors changed the rates of assessments, greatly increasing them as to the plaintiff J. J. Howard and all others who became members before the year 1890, without increasing at the same time in a proper ratio the assessments of members who had insured since 1890. The plaintiff has opposed the increased assessments, but has been compelled to pay to the company, under protest, the sum of \$155.65 in excess of the rates agreed upon and fixed at the time of his insurance.

The plaintiff was at the time of the commencement of this action beyond the insurable age. The prayer for relief is for judgment for \$155.65, the illegal part of the assessments collected from him on mortuary calls under the resolutions of 1895 and 1898 with interest from the date of payment; and that the defendant be restrained from further demanding or collecting the illegal portion of said mortuary calls, for costs and for general relief. The demurrer was sustained by his honor, and is in the following words:

"First. The defendant demurs to the cause of action stated in the complaint herein for

the recovery of money alleged to have been illegally exacted and paid, for that it appears upon the face of the complaint that the court has no jurisdiction of said cause of action because in no event can the plaintiff recover as much as \$200.

"Second. The defendant demurs to the cause of action stated in the complaint, in which the plaintiff seeks equitable relief by way of injunction of the defendant's making or levying the assessment complained of, for that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action: 1. Because the plaintiff being a member of a foreign corporation undertakes by this action to interfere with the internal management and administration of its affairs. 2. Because the plaintiff has not set forth that he has not exhausted his remedies within the corporation as a member thereof before bringing this action. 3. Because this court cannot enforce its injunction against the defendant. 4. Because, conceding for the purpose of this demurrer that the assessments complained of are illegal, the plaintiff has an adequate and complete remedy at law, and this action is premature.

"Third. The defendant demurs to the cause of action stated in the complaint in which the plaintiff seeks equitable relief for that it appears on the face of the complaint that this court has no jurisdiction of the subject-matter of the action, because the plaintiff as a member of the defendant company, which is a foreign corporation, seeks equitable relief by way of injunction against the defendant making or collecting the assessments complained of, and prays the court by this action to interfere with the internal management of a foreign corporation and the administration of its affairs."

It is clear that two causes of action are embraced in the complaint, though they are not separately stated; one, legal for the recovery of \$155.65, the alleged illegal assessments paid by plaintiff to defendant; the other, equitable, for injunctive relief to restrain the defendant from further demanding or collecting in the future such illegal and increased assessments.

The superior court in which this action was commenced is without original jurisdiction to entertain the legal cause of action, the amount claimed being under \$200. The proper jurisdiction for such an amount as is claimed in this action is in a court of a justice of the peace. Section 194 of the Code refers only to actions of which the superior court has jurisdiction, and was not intended to give to such courts jurisdiction of civil actions founded on contract wherein the sum demanded shall not exceed \$200. It is true that the plaintiff in this complaint alleged that he had paid to the defendant various amounts, and that he was not able to give the dates and the amounts, and asked that the defendant "file with its answer a schedule with the amounts so paid, together with the dates of payment." Such pleading is too vague for any purpose. The plaintiff

seems either not to have wanted an accounting with the defendant or thought he could not procure it in this action. But if it is difficult to see how the plaintiff could recover of the defendant the amount of the alleged illegal assessments, for they were paid with a full knowledge of all the facts.

We have a statutory provision which provides for the recovery of money paid for taxes illegally collected, when paid to a public officer under protest, but we know of no rule of law which would permit a person to pay money upon the demand of another with a full knowledge of all the facts and afterwards recover it.

The first and third grounds under the second head of the demurrer (the equitable cause of action) are based upon the legal view that the courts of one state cannot interfere with or exercise jurisdiction over the internal management of corporations formed, and resident in another state, and, especially, upon the view that the courts of one state cannot by injunction afford equitable relief even to one of its residents, who is a member of a foreign corporation, by an order commanding and requiring such corporation to do or not to do certain specified acts connected with the internal management of its corporate affairs. It seems that that part of the demurrer is well taken, for the authorities appear to be both numerous and respectable to the effect that the courts of one state will not interfere with the internal management of the business matters of foreign corporations by injunction or otherwise. It is considered best that such matters should fall under the exclusive jurisdiction of that state under the laws of which such foreign corporations were organized and where they are resident. 6 *Thomp. Corp.* § 7904; *North State Copper & G. Min. Co. v. Field*, 64 Md. 151; *Moore v. Silver Valley Min. Co.* 104 N. C. 545; *Clark v. Mutual Reserve Fund Life Assn.* 14 App. D. C. 154, 43 L. R. A. 390; *Taylor v. Mutual Reserve Fund Life Assn.* (Va.) 33 S. E. 385; *Condon v. Mutual Reserve Fund Life Assn.* (Md.) 44 L. R. A. 149. The reasons for such a rule are apparent. Only the courts of the state in which the corporation has its residence can enforce their judgment and orders against them; only those courts have power to remove the officers of such corporation for dereliction of duty, or to declare a forfeiture of their charters.

Section 3062 of the Code provides the means of bringing foreign corporations into the courts of our state, and § 194 provides that an action may be brought in our superior courts "by a resident of this state for any cause of action," while by the same section a plaintiff not a resident of this state shall only have his action "when the cause of action shall have arisen or the subject of the action shall be situated within the state." These provisions of our law had for their object the securing for suitors in our courts of the benefits of our own laws and the conferring upon our courts jurisdiction to declare and enforce their rights when the matters which

were the subject of litigation were in their jurisdiction, or the remedy sought could be granted. They were not intended to give our courts jurisdiction over the persons who are the officers of a foreign corporation residing in another state and over the internal management of such corporations over which our courts would be powerless to exercise any control or to enforce obedience to any of their orders.

Sections 124, 295, and 297 of art. 23 of the Code of Maryland are in substance like §§ 194 and 3062 of our Code. The Maryland statutes have been construed by the court of appeals of that state in the case of *Condon v. Mutual Reserve Fund Life Asso.* (the defendant in this action) (Md.) 44 L. R. A. 149, and in *North State Copper & G. Min. Co. v. Field*, 64 Md. 151. In the first-mentioned case the court said: "The object of our statute and of similar statutes passed by other states, is to provide for the collection of debts due from foreign corporations to our own citizens, and to enforce contracts made here by foreign corporations through its agents, and to protect our citizens from frauds or wrongs, whether the wrongdoer be foreign or domestic. But it was not the intent of our statute to give our courts jurisdiction over the internal affairs of a foreign corporation. Our courts possess no visitatorial power over them, and can enforce no forfeiture of charter for violation of law or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the by-laws, nor the relations between the corporation and its members arising out of, and depending upon, the law of its creation. These powers belong only to the state which created the corporation."

Section 1780 of the N. Y. Code of Civil Procedure provides that "an action against a foreign corporation may be maintained by a resident of the state or by a domestic corporation for any cause of action," and in the case of *Fisher v. Charter Oak L. Ins. Co.* (1885) 20 Jones & S. 179, the court (superior, now merged with the supreme) said: "The performance of the contract by defendant would involve the doing of such things by its officers as would be done by them if they were proceeding to ascertain if a dividend of profits should be declared in a case where profits could be divided among shareholders. The defendant is a foreign corporation. This court has no facilities or processes sufficient or fitted to compel a foreign corporation to take the proceeding described. It cannot bring the officers or the books or the assets of the corporation within its jurisdiction. It must enforce such a judgment, if at all, by proceedings for contempt, and yet there are no persons here whose action can direct the proceedings of the company. Under such circumstances it is said that a court of equity will refrain from proceeding to a judgment, and that the court of equity will not interfere with the internal administration of the affairs of a foreign corporation."

The question now arises whether or not the matters complained of in the plaintiff's ac-
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tion are such as are certainly those pertaining to the management of the internal business affairs of the defendant company, and can only be the subject of the jurisdiction of the courts of New York, the home of the defendant. The leading case on this subject is *North State Copper & G. Min. Co. v. Field*, 64 Md. 151, and on the point we are now discussing, the court said "that where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as a stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, that then such action is the management of the internal affairs of the corporation, and in the case of a foreign corporation our court will not take jurisdiction. Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction whenever the cause of action arises here."

It seems clear to us that, tried by that test, the matters complained of by the plaintiffs affect J. J. Howard only as a member of the defendant company, that they relate to the internal management of the company, and that if the courts of one state were to undertake to grant to the plaintiff the relief he seeks,—an injunction forbidding it to collect or levy any further assessments on their present plan,—they would be required to investigate and control that management. The defendant company was incorporated on the assessment plan, and every certificate member (there being no capital stock) becomes an insurer, as well as an insured. He is a member of the corporation, and what he complains of is his treatment as a member of the company. The plaintiff does not allege fraud. His complaint is the illegal increasing of his assessments, and his prayer is for an injunction to prevent the collecting of such in the future. There is no alleged fraud against the defendant in procuring the plaintiff to become a member by which he has suffered loss and damage, and the only question was whether the violation of his right affects him individually or as a member of the corporation. We have determined how that was.

It is to be remembered, however, notwithstanding what has been said in this case, that our courts would have jurisdiction over foreign corporations where individual rights would be concerned.

If the defendant had perpetrated an actual fraud on the plaintiff J. J. Howard in inducing him to become a member of the corporation by which he was subjected to pecuniary loss, or if an actual fraud had been perpetrated against him in the levying and collecting of assessments, based, for instance, on the reported losses by death which were knowingly false to the directors in such cases, our courts would be open to the plaintiff. So, too, if this suit was for the recovery of the amount due on the policy by the beneficiary, if the defendant had declared the policy forfeited because of a failure to

pay the increased assessments, the matter would be in the jurisdiction of our court. In such a suit, the courts would be compelled to pass upon the question as to whether the assessments were illegal and fraudulent, to interpret the policy, and to determine whether the amount of the policy could be recovered. In such a suit, the courts of North Carolina would not be required to regulate, by injunction, the internal management of a foreign corporation, but would be called upon to simply enforce the contract of insurance between the parties, or to assess and adjudge damages for its breach. But the subject-matter and the officers of the defendant corporation are beyond the jurisdiction of our courts in this case, and the remedy sought

is not in our power to grant. We have not found it necessary to consider the other grounds of demurrer.

In this court, a motion was made by the counsel of plaintiff to amend the complaint. The amendment prayed for is in substance that the defendant company since the commencement of this action has become a domestic corporation under the provisions of chapter 62 of the Laws of 1899. The amendment involves questions of fact and a matter of law entirely foreign to the case as made up on appeal, and it is on those accounts denied.

The judgment of the court below in sustaining the demurrer is affirmed.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH of Kentucky, *Appt.*,
v.

Ruben VAUGHN.

(.....Ky.....)

A conviction for furnishing intoxicating liquor to a minor without legal authority is not a bar to a prosecution for selling the liquor without a license where the sale to the minor is an offense irrespective of the license, and the sale without license is an offense whether sold to a minor or other person.

(September 24, 1897.)

NOTE.—*Prosecution and punishment of distinct offenses committed by single sale of intoxicating liquor.*

I. General rule.

(1. Principles exemplified.

I. General rule.

Although in this class of cases the act of the defendant in selling the liquor may be identically the same in both prosecutions, yet the offenses may be separate and distinct, and two different laws or statutes may be violated. For this reason, therefore, a conviction of one offense will not bar a prosecution for the other, or entitle the defendant to the plea of former jeopardy, *autrefois convict* or *autrefois acquit*, as such plea can only avail a defendant who has already been convicted or acquitted upon the same charge or offense for which he is charged the second time, or, in other words, when the two offenses are identically the same.

In *Ruble v. State*, 51 Ark. 170, it is said that the pleas of *autrefois acquit* and *autrefois convict* must be upon a prosecution for the same identical act and crime. See this case *infra*.

The rule upon the question has been stated as follows: "If the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of an additional fact would be necessary to constitute the offense charged in the second indictment, then the former conviction or acquittal cannot be pleaded in bar of the second indictment. *Blair v. State*, 81 Ga. 629, *et infra*.

In the case of *State v. Gapen*, 17 Ind. App. 45 L. R. A.

A PPEAL by the Commonwealth from a judgment of the Circuit Court for Green County in favor of defendant in a proceeding for violating the local option law. *Reversed.*

The facts are stated in the opinion.

Mr. W. S. Taylor for the Commonwealth.

Guffy, J., delivered the opinion of the court:

The appellee, Ruben Vaughn, was indicted by the grand jury of Green county for furnishing liquor to a minor without legal authority, and tried, and fined \$50 for said of-

524, *et infra*, the court stated that the true test to determine whether the plea of former conviction or former acquittal was a good bar was to decide whether the crimes as charged are so far distinct that the evidence which would sustain the one would not sustain the other, and that if they were so distinct there was no former jeopardy.

Thus, if one statute makes it an offense to sell without license, and another makes it an offense to sell to a minor without the consent of his parents or guardian, such statutes are entirely different. The object of the first is to enforce the law requiring licenses to be granted and fees to be paid therefor, while the object of the second is to protect the morals of minors, and prevent them from being led into intemperance, and the act or circumstance which makes the sale illegal in the one case is entirely different from the facts which make it an offense in the other.

Under the first statute, which makes it an offense to sell without a license, he is guilty if he has no license, irrespective of the minority of the purchaser, and under the other statute, which makes it an offense to sell to a minor as above stated, he is guilty if he sells to a minor without the written consent of his parents or guardian, whether he has or has not a license, and therefore the acts necessary to constitute the offenses are so wholly unconnected and distinct as not to be comprehended, the one with the other, and a party may be guilty of one and innocent of the other, or guilty of both, and the acquittal of one is not an acquittal of the other as they are separate and distinct offenses. *Ruble v. State*, 51 Ark. 170:

fense. At the same term of court he was indicted for selling spirituous liquors in violation of the local option law of said Green county, and after the conviction aforesaid the last-named indictment was called for trial, and appellee pleaded former jeopardy, as well as not guilty. The selling was proved, and it was admitted by appellee that the local option law was in force in Green county. At the conclusion of the testimony for the commonwealth the court instructed the jury peremptorily to find defendant not guilty. Thereupon a verdict was rendered in accordance with the instruction, and the prosecution dismissed, and, appellant's motion for a new trial having been overruled, this appeal is prosecuted.

It is evident that the selling to the minor is the same selling complained of in the indictment under consideration, and the sole question presented for decision is whether the first trial and conviction are a bar to this prosecution. It is clear that the selling to

the minor was an offense without regard to whether the appellee had license to sell or not. A sale to an adult would be no offense, unless the selling was in violation of some law. It has been held by some courts that, unless the same evidence which was necessary to establish the guilt of the accused on the first trial must be introduced on the second, the first trial would not bar the second. All that was necessary to prove on the first trial was the furnishing to the minor without the proper written authority. On the second trial the selling must be proved, and also the fact that the local option law was in force in Green county. The statute prohibiting the furnishing liquor to minors is intended to protect the youth of the land. The prohibition against selling without license or in violation of local option law is a police regulation, as well as a revenue measure; hence the selling in question violated two distinct statutes, and to convict the defendant the proof in one case was dif-

State v. Gapen, 17 Ind. App. 524, Affirmed in 17 Ind. App. 529.

In the Ruble Case the court pointed out that according to some of the authorities one of the tests to determine the identity of offenses was, that if the evidence of the facts alleged in the second indictment was not within itself sufficient to convict under the first indictment, the offenses charged in the two indictments were not the same.

With regard to the identity of the offense necessary to sustain a plea of former acquittal or conviction, the court in the Ruble Case quoted the rule as laid down in 1 Chitty, Crim. Law, 452, as follows: "As to the identity of the offense, if the crime charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution of the other."

And in the same case, the court further cited the proposition of law as contained in 1 Bishop's Crim. Law, 7th ed. § 1051, to the effect that the offenses were not the same, first when the two indictments were so diverse as to preclude the same evidence from sustaining both; secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; thirdly, when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction, a proposition of which the exact limits are difficult to define; fourthly, when some technical variance precludes a conviction on the first indictment, but permits it on the second; yet, fifthly, the offenses are the same in all other circumstances wherein the evidence to support one of the indictments sustains also the other; and, sixthly, if the two indictments set out offenses which are alike and relate to one transaction, yet if one contains more of criminal charge than the other, but upon it there can be a conviction for what is embraced in the other, the offenses, though of differing names, are, within the constitutional protection from a second jeopardy, the same.

In State v. Gapen, 17 Ind. App. 524 (rehearing denied 17 Ind. App. 529), the court pointed out that the jeopardy which was prohibited by the state Constitution was that which grows

out of the same offense, not necessarily of the same act or transaction, as the same act or transaction might constitute an offense under two or more jurisdictions. It was said to be well settled that jeopardy under one jurisdiction was no bar to jeopardy under another jurisdiction and that it frequently occurs that the same act constitutes two or more offenses under the same jurisdiction; that a sale of intoxicating liquor is not of itself an unlawful act, and is only made so by statute, and that a sale to a minor, and a sale without a license, although the same sale, constitute two offenses, entirely distinct, and that a simple sale without more is not a violation of law; and to make it unlawful it must be accompanied by the condition which the statute requires for constituting offenses. The court also pointed out in that case that the purposes of the two statutes were entirely dissimilar, as the one was passed for the purpose of raising revenue and to protect those who had obtained licenses, while the other was to guard the young against intemperance.

These principles are also followed and approved in Arrington v. Com. 87 Va. 90, 100, 10 L. R. A. 242, 248, wherein it is said that a single act may be an offense against two statutes, and if each statute requires proof of an additional act which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

II. Principles exemplified.

The majority of the cases upon this question support the holding of the court in *Com. v. Vaughn*: thus—

In *Ruble v. State*, 51 Ark. 170, *supra*, a former conviction for selling without a license was no answer to the second indictment for selling alcoholic, ardent, vinous, and intoxicating spirits to a minor without the written consent of his parents or guardian.

And the defendant's plea of *autrefois convict* was of no avail in *Blair v. State*, 81 Ga. 629, *supra*, upon an indictment for selling spirituous liquors without a license, with a previous conviction on the same sale of selling liquors to a minor without the written consent of his parents or guardian.

In *State v. Gapen*, 17 Ind. App. 524, *supra*, it was held that the sale of intoxicating liquors without a license, and the sale of intoxi-

ferent from that in the other. The selling or furnishing liquor is no offense, unless such selling is prohibited by statute.

The precise question under consideration was decided by the supreme court of Arkansas in *Ruble v. State*, 51 Ark. 170. We copy as follows from the opinion in that case: "Appellant sold one pint of ardent spirits to Peter Dees, a minor, without the consent of his parents or guardian. For doing so he was indicted for and convicted of selling liquor without license, and fined in the sum of \$200, and was indicted for selling ardent, alcoholic, and vinous liquors and intoxicating spirits to a minor without the written consent of his parents or guardian. After he was convicted under the first indictment, he pleaded such conviction and not guilty to the second indictment, and was convicted of the offense therein charged, and fined. Were the trial and conviction under the second indictment lawful? It is sometimes difficult to determine whether the offense for which an accused party stands charged is the same offense of which he has before been acquitted or convicted; and this is the only inquiry in this case. Mr. Justice Blackstone says: 'It is to be observed that the pleas of *autrefois*

acquit and *autrefois convict* must be upon a prosecution for the same identical act and crime.' 4 Bl. Com. 336. In *Com. v. Roby*, 12 Pick. 496, Chief Justice Shaw, in delivering the opinion of the court as to what is necessary to constitute offenses charged in two indictments the same, said: 'It must, therefore, appear to depend upon facts so combined and charged as to constitute the same legal offense or crime. It is obvious, therefore, that there may be great similarity in the facts where there is a substantial legal difference in the nature of the crimes; and, on the contrary, there may be a considerable diversity of circumstances where the legal character of the offense is the same as where most of the facts are identical; but by adding, withdrawing, or changing some one fact the nature of the crime is changed; as where one burglary is charged as a burglarious breaking and stealing certain goods, and another as a burglarious breaking with an intent to steal. These are distinct offenses. *King v. Vandercomb*, 2 Leach, C. L. 716. So, on the other hand, where there is a diversity of circumstances, such as time and place, where time and place are not necessary ingredients in the crime, still the offenses are

eating liquors to any person under the age of twenty-one years were two separate and distinct offenses under §§ 5323, 7285, Ind. Rev. Stat. 1894, 1896, and therefore one convicted of selling intoxicating liquors without a license could not successfully plead such conviction as a bar to the charge of selling liquors to minors, even though both offenses grew out of the same transaction. Rehearing Denied, see 17 Ind. App. 529.

So, a conviction for being a common seller of spirituous liquors is no defense to a subsequent prosecution for a single act of sale, even though such act is within the time embraced in the first indictment, as they are different offenses, the violation of the law in a single case being an offense. *State v. Maher*, 35 Me. 225. To the same effect, *State v. Coombs*, 32 Me. 529.

In *State v. Sonnerkalb*, 2 Nott & McC. 280, it was held that a person who sold liquor to a negro without a license might be convicted under the South Carolina act of 1874, for retailing without a license, and under the act of 1817, for trading with a negro without a ticket for the same act of selling, and the court pointed out that although the defendant committed physically but one act, yet two offenses were committed by such act.

The same conclusion was reached by the court in *State v. Glasgow*, Dud. L. 40, in which the defendant was convicted of retailing without a license and of trading with a slave. In that case also both offenses sprang out of the same act. A similar question was also posed upon in *State v. Taylor*, 2 Ball. L. 49, but that was not a case of intoxicating liquors.

And a conviction under an indictment for the violation of a statute prohibiting the sale of intoxicating liquors on Sunday cannot be pleaded in bar of an indictment for the violation of a statute prohibiting the sale of intoxicating liquors without a license, although the two offenses occurred on the same day, where evidence that the sale took place on Sunday is sufficient to cause a conviction under the first indictment, while evidence that the defendant had no license is required to justify a conviction under the second indictment. *Arrington v. Com.* 87 Va. 96, 100, 10 L. R. A. 242, 246.

But a different conclusion would seem to have been reached in *O'Brien v. State*, 91 Ala. 25, 29, where the defendant was indicted for selling liquor without a license, and contrary to law. The evidence showed that the liquor was sold on a Sunday, and it was contended that the defendant was guilty of a violation of the Sunday law, and could not be convicted under that indictment. The court held that such an act might be a violation of two distinct statutory provisions, and that the defendant could be prosecuted for either offense, but that a conviction of the one would bar any prosecution under the other for the same act, although if the defendant were prosecuted under one statute he could not defend upon the ground that he had violated the other, if he had not been convicted under it.

And a conviction under an indictment charging the defendant with keeping intoxicating liquors at a particular time and place with intent to sell the same contrary to law was held to bar a prosecution under a subsequent indictment charging him with selling intoxicating liquors contrary to the law at the same time and place, in *State v. Layton*, 25 Iowa, 193.

In *People v. Krank*, 110 N. Y. 488, reversing 46 Hun, 632, the defendant was convicted of the offense of selling liquors without a license upon proof which showed a sale on a Sunday, but the indictment did not allege a sale on that day. He contended that he could not properly be convicted of a sale on the latter day under such an indictment, and the question was not whether a conviction could be had on the sale under the provisions of § 21 of the New York act of 1857, to suppress intemperance without alleging that the sale was on such day, but whether, under a general indictment alleging a sale of liquor without a license, a conviction could be had under the provisions of § 13 of the same act, in case the proof showed that the sale did take place on a Sunday. The 13th section of the act was general in its application, and prohibited anyone from selling at any time without a license, while the 21st

to be regarded as the same.' In considering the identity of the offense, it must appear by the plea that the offense charged in both cases was the same in law and in fact. The plea will be vicious if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact; as, if one is charged as accessory before the fact, and acquitted, this is no bar to an indictment against him as principal. But it is not necessary that the charge in the two indictments should be precisely the same. It is sufficient if an acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter; and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder; for, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and, in the second instance, since the defendant was not guilty of manslaughter, he cannot be guilty of man-

slaughter under circumstances of aggravation which enlarge it into murder.' Chitty, in speaking of the identity of the offense necessary to sustain a plea of former acquittal or conviction, says: 'As to the identity of the offense, if the crime charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution of the other.' . . . Tested by the authorities cited and quoted from, was appellant twice indicted for the same offense? The sale of ardent or spirituous liquor within and of itself is no offense. Whether it be criminal or not depends on other facts. One statute makes it an offense to sell it without license, and another makes it an offense to sell it to a minor without the consent of his parent or guardian. The objects of the two statutes are entirely different. The object of the first is the enforcement of the law which requires license to be granted, and fees therefor to be paid; and of the other to protect the morals of minors, and prevent them from being led into intemper-

section of the original act prohibited a sale on a Sunday by any inn, tavern, or hotel keeper, even if he had a license, and the amended act of 1873, § 21, prohibited anyone from selling intoxicating liquors on a Sunday whether the person had a license or not. The court below had held that the amendment was to selling on Sunday had not only made a separate and distinct offense, but had so far altered the general law in that respect that it was no longer applicable to a sale on that day, and stated its reasons that if the general law still remained applicable a person who had no license and who sold on a Sunday would by the same act render himself liable to be punished for two crimes growing out of exactly the same transaction. The court upon appeal held that a person could not be held to double punishment by holding that the 13th section of the act remained in force as to one who sells on Sunday without a license, even though such a sale would render him liable to indictment and punishment under § 1 of the same act, and that he would be liable to indictment under either section, but a conviction under one would be a bar to a conviction under the other, and therefore a conviction of an individual for selling liquors without a license upon a proof of the sale on Sunday would bar the prosecution for the same sale under an indictment which charged the sale on a Sunday as coming under the 21st section of the act.

In *Wlecke v. People*, 14 Ill. App. 447, the first three counts in the indictment charged the defendant with selling intoxicating liquors to a minor in violation of the state statute, and the fourth and last count charged him with giving intoxicating liquors to a minor in violation thereof. He was found guilty as charged in the indictment, and fined upon each count, but the court reversed the judgment and remanded the cause, as there was no evidence to sustain the fourth count which charged him with the giving of liquor, although there was proof that he sold intoxicating liquors to a minor. The court pointed out that the sale and gift of intoxicating liquors to a minor under the statute were distinct and separate of-

fenses, and the proof of one would not sustain a charge for the other.

The principles declared in the first section of this note have been applied in cases of a somewhat similar character in which a former conviction for keeping and maintaining a common nuisance, such as a tenement used for the illegal sale, and illegal keeping for sale, of intoxicating liquors, was held to be no bar to a prosecution for keeping intoxicating liquors with intent to sell the same unlawfully, or for being a common seller of the same at the same time and place, or for keeping open on the Lord's day. These cases are not, however, those of a prosecution and punishment of distinct offenses committed by a single sale, as the offense therein charged is not the actual sale, but the keeping or being a common seller thereof, or the act of keeping open on a Sunday. Some of them were, however, cited and relied upon by the court in the principal case.

The following cases are among those that fall within this class: *Com. v. Carpenter*, 100 Mass. 204; *Com. v. Roland*, 12 Gray, 132; *Com. v. Bubser*, 14 Gray, 83; *Com. v. Cutler*, 9 Allen, 486; *Com. v. O'Donnell*, 8 Allen, 549; *Com. v. Hogan*, 97 Mass. 122; *Com. v. Harris*, 13 Allen, 534; *Com. v. Cotter*, cited in note to *Com. v. Hogan*, 97 Mass. 122, and *Com. v. Dickinson*, cited in same, both decided in October, 1867, for Worcester; *Com. v. Harrison*, 11 Gray, 308; *Com. v. McCauley*, 105 Mass. 69; *Morey v. Com.* 108 Mass. 433; *Com. v. Haseltine*, 108 Mass. 479; *Com. v. McShane*, 110 Mass. 502; *Com. v. Breisford*, 161 Mass. 61; *Com. v. McCabe*, 163 Mass. 400; *Com. v. Lahy*, 8 Gray, 459; *Com. v. Dunster*, 145 Mass. 101; *Com. v. Sullivan*, 150 Mass. 315; *Com. v. Hanley*, 140 Mass. 457; *Com. v. Cunningham* (Mass.) 5 New Eng. Rep. 116; *Com. v. Sheehan*, 105 Mass. 192; *McNell v. Collinson*, 130 Mass. 167.

The cases of *State v. Graham*, 73 Iowa, 553; *State v. Brown*, 75 Iowa, 768, Appx.; *State v. Wheeler*, 62 Vt. 439; *State v. Jangraw*, 61 Vt. 39; *State v. Lincoln*, 50 Vt. 644; *State v. Inness*, 53 Me. 536; *State v. Harris*, 64 Iowa, 289,—are also of a similar nature.

E. W.

ance. The act or circumstance which makes the sale illegal in one case is entirely different from the facts which make it an offense in the other. Under the first statute he was guilty if he had no license, although he sold to a minor with the written consent of his parent or guardian; and under the other he was guilty if he sold to a minor without the written consent of his parent or guardian, although he had or had not license. The acts necessary to constitute the offenses are so wholly unconnected and distinct as not to be comprehended the one within the other. The essential and constituent elements of the same are different. A party may be guilty of one and innocent of the other, or guilty of both; and the acquittal of one is not an acquittal of the other. They are separate and distinct offenses. In holding that the two offenses charged against appellant are not the same, we are not without precedents. In South Carolina two statutes were in force at the same time. One imposed a penalty of £50 on persons retailing liquors without license to persons of any description, and the other a penalty of \$1,000 and imprisonment on those trading with a negro without a ticket. In *State v. Sonnerkalb*, 2 Nott & M'C. 280, it was held that a person who sold liquor to a negro without a license and a ticket was lawfully convicted under these statutes of two offenses, and subject to the penalties imposed by both. In *State v. Taylor*, 2 Bail. L. 49, the same court held that the act of buying goods of a negro, knowing them to be stolen, subjected the purchaser to two punishments,—one for trading with a negro without a ticket, and the other for receiving stolen goods. And it was adjudged in *State v. Inness*, 53 Me. 536, that 'to punish a person for keeping a drinking house and tippling shop, and also for being a common seller of intoxicating liquors, although the same individual act contributed to make up each offense, is not a violation of the law which forbids a prisoner to be put in jeopardy twice for the same offense.' In *Com. v. Harrison*, 11 Gray, 308, it was held that a conviction for an illegal sale of intoxicating liquor is no bar to a subsequent charge of keeping open a shop for the transaction of business on the Lord's day, although the business transacted was the sale of liquor, for which the party had been previously convicted. And in *State v. Faulkner*, 39 La. Ann. 811, it was held that the accused, who, being intrusted with cotton for a particular purpose by the owner, obtained money on it, from a third person, by falsely representing himself as the owner, and selling it to him, was lawfully indicted for embezzling the cotton, and for obtaining the third person's money under false pretenses, and that the conviction of the latter offense was no bar to a prosecution for the other. According to the rule laid down by some authorities, one of the tests to determine the identity of offenses is, if the evidence of the

facts alleged in the second indictment is not within itself sufficient to convict under the first indictment, the offenses charged in the two indictments are not the same. Tested by this rule, are the offenses charged in the two indictments against appellant the same? In *Com. v. Thurlow*, 24 Pick. 374, it was held that it was necessary, in an indictment for selling spirituous liquors without a license, to allege that the defendant was not duly licensed, and on the trial it was incumbent on the state to produce prima facie evidence of that fact. According to that case the offenses charged against appellant were clearly not the same. But this court has held that the state, in such trials, is not required to prove that the accused had no license, because, if he has, it is particularly within his own knowledge and within his power to produce or prove it; and, if he has not, it is not convenient for the state to prove that he was not licensed. *Hopper v. State*, 19 Ark. 146; *Williams v. State*, 35 Ark. 434. It is nevertheless true that the sale alone does not constitute an offense, and in a trial for selling without a license the state must introduce prima facie evidence that the accused had no license when he made the sale, or the defendant fail to prove he had. The failure of the accused to prove he had is evidence that he had none, for, if he had, it is presumed that he would have proved it. So that proof of a sale of spirituous liquors to a minor without the written consent of his parent or guardian—without other material evidence—would not be sufficient to prove a sale without a license; and according to the rule, the offenses charged against appellant are not the same. But reverse the order of the indictments, and suppose that the appellant has been convicted upon the first indictment of selling liquor to a minor without the written consent of his parent or guardian, and pleaded such conviction in bar of the second, would the evidence necessary to sustain the second indictment, in that case, have been sufficient to procure a legal conviction on the first? Most unquestionably it would not. Then they are not the same offenses. The evidence of the one will not support the other, and 'it is,' in the language of Chitty, 'inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal (or conviction) of the one will be a bar to the prosecution of the other.' Judgment affirmed." 1 Bishop, Crim. Law, 7th ed. § 1051, seems to sustain the foregoing views and authorities. It seems clear, therefore, that the conviction under the indictment pleaded in bar in this case is no bar to this prosecution, and the court erred in giving the peremptory instruction.

Judgment appealed from is therefore reversed, and the cause remanded for a new trial upon principles consistent with this opinion.

CALIFORNIA SUPREME COURT.

SACRAMENTO BANK, *Respt.*,
v.

PACIFIC BANK, *Appt.*,
J. M. McDONALD, Intervener, *Appt.*

(.....Cal.....)

1. The collection by a creditor of an insolvent bank, after receiving part of his claim out of dividends from its assets, of another part by enforcing the liability of stockholders, will not prevent the computation of subsequent dividends to be paid from corporate assets upon the claim as it originally existed in the same proportion as is awarded to other creditors.
2. A stockholder of an insolvent corporation who has, in accordance with his statutory liability, satisfied a portion of the claim of a corporate creditor, cannot, upon the basis of the amount paid, share in future dividends to creditors from the corporate assets.

(March 28, 1899.)

A PPEAL by defendant and intervener from a judgment of the Superior Court for the City and County of San Francisco allowing plaintiff a dividend on its full claim out of assets of the defendant bank. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Sawyer & Burnett for appellant.

Messrs. A. C. Freeman and George E. Bates, for respondent:

The corporation and its stockholders may be regarded as though they constituted two distinct parties, both bound by the same obligation, the obligee having a right to pursue either or both to the full extent of his obligation until from one or both sources he has been completely satisfied.

If there is an insolvent debtor, and his creditors, or some of them, are entitled to proceed against him and also against someone else on the same liability, they may proceed against both until satisfaction has been realized, and a dividend from either source is not to be diminished because of a dividend from the other, provided always that the creditor does not from both sources realize more than the original amount of his indebtedness.

Re Meyer, 78 Wis. 615, 11 L. R. A. 841; *Re Bates*, 118 Ill. 524, 59 Am. Rep. 383; *Miller's Estate*, 82 Pa. 113, 22 Am. Rep. 754; *Lewis v. United States*, 92 U. S. 618, 23 L. ed. 513; *Kellock's Case*, L. R. 3 Ch. 769; *Re Hicks*, 19 Nat. Bankr. Reg. 299; *Bank of Pennsylvania v. M'Calmont*, Rawle, 307; *National Mount Wollaston Bank v. Porter*, 122 Mass. 308.

If a creditor of an insolvent has a security for his debt, he is entitled to pursue such security, and at the same time to present his

claim against the insolvent estate, and in computing dividends on his claim the original amount of his indebtedness must be made the basis without making any deduction on account of sums received by him out of any lien or collateral security he may have taken.

Jervis v. Smith, 7 Abb. Pr. N. S. 221; *Patton's Appeal*, 45 Pa. 151, 84 Am. Dec. 479; *Mason v. Bogg*, 2 Myl. & C. 443; *Third Nat. Bank v. Haug*, 82 Mich. 607, 11 L. R. A. 327; *Logan v. Anderson*, 18 B. Mon. 114; *Morris v. Olive*, 22 Pa. 441; *Walker v. Baxter*, 26 Vt. 710; *Cromwell v. Herron*, 11 Ohio C. C. 448; *Jones, Pledges*, § 587.

Mr. Roger Johnson for intervener.

Gray, C., filed the following opinion:

Appeal from judgment for plaintiff for the sum of \$1,014.38, claimed to be due on the sixth dividend declared in favor of creditors by directors of defendant. The appeal is taken on the judgment roll, from which it appears that the defendant became insolvent, and was placed in liquidation by proceedings of the bank commissioners in 1893; that it was indebted to plaintiff in the sum of \$20,272.70, or thereabout; that plaintiff presented its claim for that amount to the defendant, and that defendant in due form allowed the same; that from the defendant plaintiff has collected of this indebtedness, before the commencement of this suit, five dividends of 5 per cent each, or a total of 25 per cent of its original claim, amounting in the aggregate to about \$5,071.90; also from the solvent stockholders plaintiff recovered about \$5,100, being the proportion of the remaining 75 per cent of plaintiff's claim due from them, leaving a little over \$10,000 unpaid on plaintiff's original claim. After all these collections, a sixth dividend to the creditors of 5 per cent was declared by the directors of the insolvent defendant, and the first question presented to the court in this case is, How should plaintiff's right in that dividend be computed, and how much is plaintiff entitled to recover on account of such dividend? The trial court decided that plaintiff's share in the sixth dividend was the same as it had been in each of the first five dividends, and that it was entitled to 5 per cent of its original claim as it was before anything was collected. There is no explicit statute or previous decision of this court to guide us in this matter, but I think the trial court reached a conclusion that is correct upon principle, and is borne out by decisions of courts in other states on questions bearing a close analogy to those involved in this case. "If both the maker and indorser of a promissory note are declared bankrupts, the holder may prove the note for the full amount thereof against the estate of each, and the amount for which he may prove it against the estate of

NOTE.—As to computation of dividends on claims against insolvents, see also *National Union Bank v. National Mechanics' Bank* 45 L. R. A.

(Md.) 27 L. R. A. 479; and *Levy Bros. v. Chicago Nat. Bank* (Ill.) 30 L. R. A. 380.

each cannot be affected by any dividends received from the estate of the other, except that the dividends received from the two estates will not, in any event, be permitted to exceed in the aggregate the amount of the note." *Re Meyer*, 78 Wis. 615, 11 L. R. A. 841; *Re Bates*, 118 Ill. 524, 59 Am. Rep. 383. In *National Mount Wollaston Bank v. Porter*, 122 Mass. 308, where the question was what the dividend against the indorser should be where the payee had already received 50 per cent of his note from the maker, the court says: "The plaintiff had received 50 per cent of his debt from the estate of the maker, but this was no reason why the defendants should not pay them the 50 per cent upon the whole debt as they had entered it upon their schedule. The plaintiff was entitled to the benefit of its double security. Where both maker and indorser are liable, the holder of a note may prove the amount against each, and receive dividends to the full amount of his debt." On the principle followed in these cases it appears that the plaintiff in this case is in the position of a creditor having two debtors, one being the corporation, all the stockholders representing the other, each of whom owe him his entire claim; and that he is at liberty to proceed against both, or either separately, without reference to the other, until his entire claim shall be satisfied; and that the plaintiff's right to share in the dividends with the other creditors of the insolvent bank is to be measured by the amount of its claim as it was fixed by the approval of the same, made in course of the liquidation of the Pacific Bank; and it would follow from this that the plaintiff's share in the sixth dividend would be the same in amount as its share has been in every preceding dividend. By prosecuting its rights against the stockholders, the plaintiff forfeited no right that it had against the Pacific Bank. The law is swift to bestow a premium upon promptness and vigilance in the pursuit of one's rights, and will not rob plaintiff of any advantage it may have gained over the other creditors by its early suit against the stockholders. If, however, the appellants were to prevail in their contention that plaintiff's right to share in dividends should be measured by the amount of its claim left after deducting all that it had received on

it, the plaintiff might soon find itself in a worse position than it would have occupied had it refrained from suing the stockholders until the assets of the bank were exhausted. A construction of the law that would lead to such a result should be avoided.

The intervener also appeals from the judgment contending that he, being a stockholder owning 1,738 out of the total 10,000 shares of the Pacific Bank, had been compelled by plaintiff to pay it 1738/10000 of its demand against the bank, and that he is, therefore, entitled to be subrogated to the extent of the last-named fraction in and to plaintiff's right in the sixth dividend. It is clearly the law that the funds of an insolvent corporation are all to be dispensed solely for the benefit of its creditors, and while the stockholder may be compelled to put a great deal into the funds of such a corporation in the way of assessments, he is not as a stockholder permitted to share in its dividends either by subrogation or otherwise. Civil Code, § 309. Under the Constitution and statutes of this state each stockholder may be compelled to pay to the corporation assessments to the full amount of his subscription to the capital stock of the corporation for the payment of creditors of such corporation, and also be individually liable to each creditor for such proportion of his claim as the amount of stock held by such stockholder bears to the whole of the capital stock. These two liabilities and the remedies based thereon are concurrent. Civil Code, § 322; Const. art. 12, § 3; *Hiller v. Collins*, 63 Cal. 235; *Harmon v. Page*, 62 Cal. 448. It follows, then, that whatever the intervener has paid, either directly to the corporation in the way of assessments, or on account of his personal liability as a stockholder directly to the creditor, he was bound to pay under the law, and can recover no portion of the same back, either by subrogation or otherwise. The conclusion of law found by the court against the intervener is therefore correct. For the foregoing reasons I advise that the judgment be affirmed.

We concur: **Haynes, C.; Britt, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment is affirmed.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1899, Classified as Follows:

- I. PUBLIC, OFFICIAL AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES OR REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

The submission of proposed constitutional amendments to vote by ballots containing them, which are to be counted for each proposition not canceled by pencil or ink, and against those that are so canceled, is held sufficient to conform to a constitutional requirement for their submission in such manner that each could be voted for separately. (N. J.) 251.

Insurrection.

The governor or military officer in command is held entitled to suspend or disregard the writ of habeas corpus for the purpose of suppressing an insurrection or rebellion. (Idaho) 832.

Extraterritorial effect of law.

A foreign insurance company entering into a combination outside the state to fix rates of insurance in other jurisdictions, without affecting persons, property, or prices of insurance in the state, is held to be unaffected by a penal statute against combinations of insurers, as that can have no extraterritorial effect. (Ark.) 348.

Sanitary regulations.

A statute requiring the registration of all herds or cattle of persons who supply milk to cities, towns, or villages, and prohibiting the sale or shipment of milk from their premises if found unsanitary, until they comply with reasonable sanitary regulations, is held constitutional. (Md.) 433.

Elections.

The determination of a tie between candidates for justice of the peace which a statute attempts to give to county courts is held to be in conflict with the Missouri Constitution, which does not make any provision for the deciding of a tie in such a case, while it does provide therefor in respect to other officers. (Mo.) 363.

Officers.

Payment to a *de facto* officer of the salary of an office is held to be no defense to an 45 L. R. A.

action by the *de jure* officer for the salary, except for such period as the latter's exclusion from the office was due to his own fault by failing to qualify. (Wyo.) 295.

Privilege from arrest.

The constitutional privilege of members of Congress from arrest while attending a session of Congress or in going to or returning from the same is held not to extend to the service of summons in a civil action, not accompanied by any arrest, nor to a member who is absent on private business, but neither going to nor returning from the session. (S. C.) 563.

Consuls.

The jurisdiction of the consul of Sweden and Norway at Boston over a claim for wages made by one of the crew of a Norwegian vessel at that port is held by virtue of treaty to be exclusive of the jurisdiction of state courts, and an officer who under process of a state court in such case arrests the captain of the vessel after knowing its nationality is held liable without any protection by virtue of his process. (Mass.) 481.

The jurisdiction of a state court in a civil case over a consul general is denied. (Cal.) 579.

Contempt of court.

The power of the court to punish contempt without a jury trial is held to be beyond the reach of legislative interference other than by mere regulation without destroying the power. (Va.) 310.

Right to practise dentistry.

The right to practise medicine and surgery is held to include the right to practise dentistry as a branch of surgery, without complying with the special provisions of the law prescribed as a condition of practising dentistry. (R. I.) 269.

License law.

The constitutionality of a statute regulating the sale of intoxicants and granting li-

censes is held to be too plain for dispute. (Pa.) 399.

Interstate business.

Intoxicating liquors bought in another state for the personal use of the purchaser, and transported in his own conveyance over the state boundary, are held not to arrive within the state at the moment they cross the line, so as to be subject to state law before the purchaser reaches home. (S. C.) 567.

The sale of picture frames only in connection with pictures made in another state pursuant to previous orders is held to be protected from an ordinance imposing a license tax, on the ground that it is interstate commerce. (S. C.) 249.

Fisheries.

A town regulation limiting to residents of the town the right to dig clams for sale on certain flats is held not to violate the constitutional privileges or immunities of citizens of other states, or the statutory right of all residents of the state to take such shellfish for their own use or in limited quantities for bait. (Mass.) 475.

Mobs.

A statute making a county liable for three fourths the value of property destroyed by mobs or riots, without regard to ability or the exercise of diligence to protect the property, is held to be unaffected by constitutional provisions restricting taxation for corporate purposes, and limiting the amount of indebtedness of counties. (Ill.) 848.

Municipalities.

A statute exempting municipal corporations from liability for defective footways except when the defects are caused by the city or its authorized agents is held constitutional, even if a provision attempting to impose the liability on abutting owners is unconstitutional. (Del.) 79.

A city is held liable for draining the underground sources of a surface stream by pumping water from wells on its own land, to supply a reservoir. (N. Y.) 664.

Eminent domain.

Condemnation of land for railroad terminal facilities is held to be for a public purpose, notwithstanding the maintenance by the railroad company at the passenger station of a hotel, restaurant, and news stand. (Tenn.) 303.

Public improvements.

A statute authorizing assessments on abutting property, irrespective of the amount of special benefits, is held unconstitutional. (Tex.) 289.

Taxation.

Copyrights owned by a corporation are

held not to be taxable by state authority, but its goodwill incident to the business carried on exclusively within the state though the company is nominally domiciled in another state in which it does not do any business is held to be taxable as part of the capital employed in the state. (N. Y.) 126.

A debt due to a nonresident, being still in nonconcrete form, is held to have its situs at the domicile of the creditor for the purpose of taxation. (La.) 524.

A municipal corporation is held taxable on its franchise for the operation of waterworks, since it is deemed to occupy, in respect to them, the position of a private corporation. (Ky.) 518.

A direct inheritance tax which applies to all personal property passing by will or the intestate law, but exempting \$5,000 in each estate, is held to be in violation of the constitutional rule of uniformity of taxation. (Pa.) 316.

A municipal tax on rural property within city limits is upheld, overruling earlier decisions, on the ground that the Constitution subjects to taxation property within the limits of the authority levying the tax, and that the extent of the territorial limits of the municipality is a matter of legislative discretion which is not subject to judicial revision. (Utah) 628.

Personal assets of a national bank are held not to be taxable by a state. (Cal.) 747.

The taxation of shares of stock in national banks is held unlawful in California where the statutes provide that other corporations shall be taxed upon their property, but that no tax shall be made of the shares of stock, as this makes a discrimination in favor of the state banks, even if the national banks are not taxed under such statute, since there is no provision for deducting from the assessment of their shares of stock any debts of the owner or anything on account of the investment of the capital of the bank in non-assessable government bonds. (Cal.) 737

Gifts of public funds.

A statute authorizing money to be raised by taxation to repay drafted men or their heirs on account of services in war, or commutation money paid by them, is held to be in violation of a constitutional provision against gifts of public money. (N. Y.) 556.

A statute attempting to exempt certain persons from liability for an inheritance tax in a case where the liability had already accrued is held unconstitutional as an attempt to make a gift of public funds and a special law releasing a debt to the state. (Cal.) 788.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Conditions as to delivery.

Breach of a condition that a bond shall not be delivered until other sureties have signed it is held insufficient as a defense to the sureties as against an obligee who took it in good faith for a valuable consideration, 45 L. R. A.

and without any notice of the condition. (Iowa) 321.

Time under contract.

A contract to repurchase stock at the end of two years if called on is held to give a reasonable time to make the demand after

the expiration of the period, and not to require it to be made on the first day after the two years. (Mich.) 479.

Duress as affecting note.

The defense of duress is held to be cut off by transfer of a negotiable note to a bona fide holder. (Wis.) 407.

Guaranty.

A guaranty of the prompt payment of a note is held to be not annulled by a judgment declaring the note void for want of authority to execute it, as against one who took it in reliance on the guaranty. (Ill.) 846.

Insurance.

A policy of life insurance taken out on the life of a member of a building and loan association and assigned to secure his loan to the association is held void as against public policy. (Va.) 243.

Insanity is held to be included in the word "sickness" as used in the by-laws of a beneficial society. (R. I.) 559.

The fact that a person is in bed with a cold is held not to show that he is not in good health, within the meaning of an insurance policy requiring a premium to be paid while he is in good health, and this is held to be so even when pneumonia sets in within a day or two and proves fatal. (Pa.) 264.

Mere temporary change in the use of property, though increasing the risk, is held not to be within a provision for forfeiture by change in the use or condition of the premises increasing the risk; but, if such change so materially increases the risk as to make it apparent to any person of ordinary intelligence, it is held to relieve the insurer from liability for loss thereby caused, on general principles. (Ga.) 204.

A contract which in effect guarantees a certain revenue per acre from crops is held to constitute insurance. (N. D.) 166.

Public policy.

A contract by intending bidders for public work to prevent competition in the bidding is held void as against public policy, and after the work is done by the parties as partners one who has received the money cannot be compelled by the other to divide. (C. C. App. 9th C.) 410.

Notes and a deed given for the release of the maker's son-in-law from arrest and prosecution for embezzlement, as well as to pay the claim for embezzlement, are upheld against the claim that the transaction is against public policy, and also against the defense of duress, where the maker deliberately entered into the transaction on an agreement with his daughter that the payment should be taken as an advancement to her. (Tenn.) 400.

Carriers.

The right of a carrier to give a hackman the exclusive privilege of using a paved area on railroad grounds adjoining a passenger station is denied on the ground that it is against public policy as tending to enhance prices and restrain competition, and also on the ground that the carrier, having ac-
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quired its premises under the sovereign right of eminent domain, cannot grant special privileges that the state could not grant. (Ind.) 427.

A contract by a news company to indemnify a railroad company against liability for injuries to news agents carried on the railroad is held not to be against public policy. (Mo.) 380.

A rule of a railroad company that baggage will not be received into a baggage room until the passenger gets a ticket is held unreasonable and void. (Miss.) 112.

A rule for closing a railroad waiting room after the departure of a train until thirty minutes before the next train starts is held reasonable, even as applied to a person who came to the station to take a train and was driven out of the room to wait several hours before the regular time for his train, on a very cold night; but it is suggested that the rule might not be reasonable in case of through passengers or delayed trains. (N. C.) 163.

ChamPERTY.

A contract between attorney and client to give a statutory penalty when suit was brought on a sheriff's bond as the attorney's compensation, after the client receives his claim in full, is held not to be void for champerty, although it did not bring the client the results that he anticipated; but a stipulation that the client should not settle the controversy is held void. (Ark.) 196.

An agreement by which an attorney is to pay the costs and expenses of litigation, as well as to give his services in consideration of a part of the recovery, is held champertous and void. (Ill.) 110.

Competitive bidding.

The fact that an article to be used in a public improvement is in the hands of a single dealer, whether because of a patent or otherwise, is held insufficient to prevent specifying that article in letting a contract by competitive bidding. (Mich.) 121.

Contract with officer.

An implied contract for supplies furnished to a city by an officer thereof is held to be within the prohibition of a statute that the officer shall not be directly or indirectly interested in any contract with the city. (Cal.) 420.

Waiver of statutory protection.

The eight-hour law applicable to work in underground mines, smelters, etc., a violation of which is made a misdemeanor, is held to apply with equal force to both employer and employee, so that the employer cannot waive its provisions for his protection or recover on a *quantum meruit* for services in excess of eight hours per day. (Utah) 603.

Contract for good title.

The right of a vendee under a contract for a good and satisfactory title to reject the title on account of a defect shown by the abstract is denied where the title is in fact good, and also the search was accepted without objection

until after the time for furnishing a proper search had passed. (N. Y.) 666.

Privity.

A postal employee injured by negligence of a subcontractor who is carrying mails is

held to have no right of action on the contract, since he is a stranger to it, although the subcontractor agreed to assume liability to any person aggrieved by his defaults. (Wis.) 616.

III. CORPORATIONS AND ASSOCIATIONS.

A single sale by a foreign corporation is held not to constitute a transaction of business, within a statutory restriction on the business of foreign companies in the state. (N. J.) 538.

A private sale by a corporation of all its property is upheld when fair and reasonable and the company is unable to go on with its business, although a minority stockholder protests. (R. I.) 560.

Consolidation.

The lease of a railroad for ten years is held not to be within a constitutional prohibition of the consolidation of railroads or the uniting of their business. (Mont.) 271.

Charter.

A provision in the charter of a seminary, whereby fees, forfeitures, and penalties accruing to a certain county are granted to the corporation, is held not to be a contract, but subject to change at the will of the legislature. (Mo.) 675.

By-laws.

The power to enact by-laws is held to belong to the stockholders, and not to be given to the directors as part of their general power to manage the business of the corporation. (Wis.) 174.

National banks.

The exemption of national banks from the penalties of usury is strictly construed, and held inapplicable in an action to foreclose a mortgage which secures a note which was made to be used as collateral to a note due the bank. (Neb.) 654.

National banks being governmental agencies are deemed not to be of similar character to state banks within the meaning of a constitutional provision against giving foreign corporations greater privileges than corporations of the state, and therefore a state license tax on state banks is upheld, although it is not imposed on national banks. (Mont.) 760.

Paid-up stock.

A statute authorizing assessments on fully paid-up stock is held unconstitutional as against holders of pre-existing paid-up stock. (Neb.) 647.

Stock dividend.

A sale of stock, "including all dividends," is held to include a stock dividend, even if the seller did not know that it had been declared. (Pa.) 392.

Preferred stock.

The lien of preferred stock expressly given by statute on the property and franchises of a corporation is held not to extend to insurance on improvements and stock in trade, or to articles manufactured by the corporation for sale, or to rents collected by receivers. (Md.) 438.

Inspection of books.

The right of a shareholder to inspect the books of his corporation at reasonable times and places and for a proper purpose is held to be a common-law right, which is not restricted by statutes providing for the inspection of the stock book and for the furnishing of a statement of assets and liabilities on request of the owners of a certain percentage of the stock. (N. Y.) 461.

The right of a stockholder to inspect the books, documents, and records of the corporation is held not to be forfeited by the fact that he is a business rival of the corporation, and seeks information to be used to its injury and loss. (Md.) 446.

Partnership.

Implied authority of one partner to indorse notes in the name of the firm for accommodation is held to exist where for ten years other members of the firm had known that he was making accommodation indorsements, but had taken no measures to stop it, though remonstrating with him in private and repeatedly accepting his promises to stop. (N. Y.) 547.

Goodwill.

The right of an outgoing partner to have a forced sale of the goodwill of the business is denied in case of a firm of dentists, on the ground that no forced sale or transfer can be made of a goodwill based on professional reputation and standing, or on business connections. (Tenn.) 589.

IV. DOMESTIC RELATIONS.

Earnings of infants who have been emancipated by their father while he was in good financial condition are held sufficient consideration for a conveyance by him to them, as against his creditors. (Or.) 645.

Illegitimacy.

The recognition of an illegitimate son which makes him an heir under the Iowa 45 L. R. A.

statute is held sufficient, although it took place in another state in which no such right was given by the recognition. (Iowa) 93.

An illegitimate child born several years after the making of the deed of trust is held not entitled to any interest, under a provision for the mother during life with remainder to her children. (Ga.) 95.

Alimony.

A prima facie case of marriage made by the wife on her own showing, without a preponderance of evidence, when there is a counter-showing, is held insufficient to entitle her to alimony and suit money. (Cal.) 793.

The right to reduce alimony after a decree

therefor is held to exist, although there was no reservation of the right in the decree. (D. C. App.) 806.

Funds to provide for the professional education of a son in a law school are held not to be properly included in an allowance of alimony. (N. J.) 842.

V. FIDUCIARIES OR REPRESENTATIVES.

The right of a real-estate broker to a commission from both sides as a middleman is denied, if he has expressly contracted to serve the buyer and endeavors to do so. (Mich.) 33.

The commission of bigamy by a woman, and her administration of the estate of her sec-

ond husband as his widow, are held ineffectual to deprive her of the right to administer as widow upon the estate of her first and lawful husband, where she had resumed relations with him after the death of the other. (Cal.) 780.

VI. TORTS; NEGLIGENCE; INJURIES.

Proximate cause in case of malice.

The malicious shooting of a dog lying near his master's house is held to be the proximate cause of injury to a woman who is knocked down by the sudden rushing of the wounded dog into the house. (Vt.) 87.

Malicious act of servant.

The fact that an injury by a servant was wilful and malicious is held not sufficient to show that it was not done within the scope of his employment. (Md.) 527.

Taking misappropriated funds.

Brokers who receive drafts drawn in their favor by the president of a bank upon its funds, in settlement of his transactions upon the board of trade, are held to be bound to communicate that fact to the bank directors, and inquire as to his authority to execute the paper, else they cannot escape liability for his misappropriation of the funds. (C. C. App. 7th C.) 822.

Effect of reversal of judgment on prior act.

Acts done pursuant to a subsisting judgment are held to give no right of action for damages as for a tort on the subsequent reversal of the judgment. (Ky.) 800.

Cremating fragments of body.

The cremation of fragments necessarily amputated in attempting to save the life of an injured person at a hospital, when this is in accordance with the custom of the hospital, is held to create no liability on the part of a railroad company in whose service the person was injured to his representatives after his death, where he was taken to the hospital by an ambulance summoned by other employees, on his request that he be not taken home. (Mich.) 535.

Fraud.

Although mere silence is held not to be fraudulent when a person is purchasing property which is more valuable than the vendor knows, yet but little is needed in addition to constitute fraud, and statements ordinarily regarded as mere opinions may be sufficient, if they are calculated to mislead and prevent an examination of the property by the vendor. (Fla.) 814.

Procuring a person to sign a note as co-45 L. R. A.

principal when intending to be liable only as surety, by promising that no liability shall be enforced, and thereafter selling the note to an innocent purchaser, so that the signer is compelled to pay it, is held to be actionable fraud. (Ga.) 105.

Libel.

An indorsement on a note that it is a forgery, made by a cashier of a collecting bank in returning it, when this is done in accordance with a custom of bankers in the state, to show the reason for nonpayment, is held privileged. (Ky.) 735.

A letter of recommendation for a former employee, stating that, "like many others, he left our service during the strike," and delivered to one who, by his authority, made a request for it,—is held not to be libelous *per se* or to be published by such delivery. (Tenn.) 600.

The libel of a dead person is held to give no right of action to a surviving parent. (Iowa) 681.

Dangerous premises.

The liability of the owner of dangerous premises to trespassers thereon is held not to exist, even in the case of children, unless they have been induced to enter upon the land by something unusual and attractive placed upon it by the owner, or with his knowledge, and permitted to remain there. Such liability is denied in the case of a pond formed by surface water. (Tenn.) 591.

Stringing barbed wire from the corner of a house to the corner of a street, to prevent people from taking a short cut across the owner's grass, is held not to make him liable to a person who, by mistake, ran into the wire after dark. (Mass.) 500.

Danger of electricity.

Permitting employees to use a crane operated by electricity when there is a slight leakage of the electricity from the wire operating the motor to the hauling chain, although the current used is not dangerous, is held to make the master liable for injury caused by a dangerous shock to an employee, which is due to some contact outside the master's premises of the motor wire with some

wire carrying a dangerous current. (R. I.) 267.

Explosions.

The owner of nitroglycerine is held to be in substance an insurer against injuries by its explosion, and is held liable for damages thus caused, though he is not chargeable with negligence contributing to the explosion, and has not violated any provision of law regulating its storage. (Ohio) 658.

Fast driving.

Firemen driving to a fire are held not bound by an ordinance limiting the speed of vehicles on streets. (Kan.) 429.

Driving unsafe team.

The fact that a horse ran away some years before, when it was only a colt, because of the breaking of a strap and the dropping down of the pole, with a sharp report, is held no indication of a disposition of the horse to run away; and the mere fact that a team became somewhat unruly during a drive is held insufficient to require the owner to leave it at a temporary stopping place, instead of driving it home. (Md.) 531.

Carriers' negligence.

Failure of a railroad company to furnish a conductor on a mixed train, which ordinarily carries a good many passengers, is held to be negligence. (N. C.) 164.

A sleeping-car company is held liable for

failure to exercise reasonable diligence in looking after the persons and property of passengers while asleep on its cars, on account of which the property of a passenger is stolen. (Ala.) 767.

Passenger's negligence.

A passenger who, on alighting from a crowded street car, steps upon a track in front of another car which has given no signal of its approach, is held to be not guilty of negligence. (Wash.) 169.

A passenger alighting from a train at a regular stopping place, and immediately starting across an intervening track for the station, is held not to be chargeable with the duty to look and listen for trains. (N. J.) 671.

Standing on the platform of a street car with one's back against the dashboard is held not to be necessarily negligent. (Ill.) 108.

Negligence at railroad crossing.

A person approaching a railroad crossing where a train stands on a side track, discharging or receiving passengers, is held not to be guilty of contributory negligence in attempting to cross the main track without stopping, looking, or listening, when he knows of a rule of the carrier that an approaching train must stop before reaching the station when another train is receiving or discharging passengers. (Pa.) 261.

VII. PROPERTY RIGHTS; WILLS; LIENS.

Boundary by water.

Conveyance to high-water mark is held, in Virginia, by operation of law, to carry title to low-water mark, unless the contrary intent is clearly shown. (Va.) 227.

Fraudulent deed.

The right of grantees to have a deed sustained against the grantor's creditors on the ground that the grantor took a conveyance from them on a secret trust for them is denied on the ground of estoppel. (Iowa) 209.

Earnings of mortgaged property.

As between the mortgage bondholders and general creditors of a corporation it is held that the latter are entitled to the earnings of the company before actual possession is taken of the property by a mortgage trustee or receiver. (N. Y.) 132.

Crops.

Crops planted by one in possession under a bond for title, after he has refused to comply with his contract to purchase, and the vendor, having tendered a good title, has begun an action to foreclose the bond, are held to belong to the vendor. (Or.) 642.

Leasehold.

The owner of a lease for ninety-nine years, renewable forever, is held to be the owner of the property under the Ohio statutes respecting petitions for local improvements, so that his signature alone may be sufficient to justify an assessment which will bind the property and sustain a sale of it for default 45 L. R. A.

in paying the assessment, even as against the lessor. (Ohio) 662.

Reciprocal easements by prescription.

The claim that the long maintenance of a dam creates reciprocal easements such that a riparian owner may compel the continued maintenance of the dam, notwithstanding the proprietor's wish to abandon it, is denied where the dam is of a perishable character, and its maintenance involves the possibility of liability for persons injured by its bursting. (Minn.) 218.

Trusts.

A deed creating a trust for a married woman free from her husband's control and debts, and subject to disposal as she may direct or appoint by will or other writing, is held to give her an equitable fee simple, which descends to her heirs in default of her directing any disposal of the property, although the deed of trust provides that, if she leaves the property without directing its disposal, the trustee shall convey it to her husband, his heirs or assigns. This decision is based on the principles that the absolute power of disposition precluded any executory devise or limitation over. (Mo.) 53.

A deed by a trustee to a third person in contravention of the trust is held not to be void as matter of law, but the legal title is held to pass subject to disaffirmance by a court of equity or the securing of the purchase price for the benefit of the *cestui que trust*. (Ala.) 66.

Wills.

The inability of attesting witnesses to remember the facts stated in the attestation clause of a will is held insufficient to prevent the probate of the will, where the signatures are proved and there is nothing tending to disprove the recitals in the attestation clause. (Ill.) 682.

Lien for rent.

A statutory lien for rent on the property of an assignee of the lease is upheld against him, though made without the consent of

the lessor, and the transfer of the lease by his assignee for creditors is held ineffectual to avoid the lien. (Ky.) 513.

Vendor's lien.

A vendor's lien securing purchase-money notes is held to be extended by payments on the notes which interrupt the statute of limitations as to them, when made by the debtor while he owns the property, but not when made after he has transferred it or mortgaged it. (Ky.) 212.

VIII. CIVIL REMEDIES.

Interference with foreign corporations.

A case refusing to interfere with the internal management of a foreign corporation is one in which an attempt was made to enjoin an alleged illegal assessment by a mutual insurance company. (Va.) 621.

The jurisdiction of a court to interfere with the management of a foreign corporation is again denied in a suit to restrain the levying of assessments on a member of a foreign insurance corporation, in the absence of fraud, although the court says that in case of fraud it might take jurisdiction, as well as in a case to recover the amount due on the policy after the company had attempted to forfeit it. (N. C.) 853.

Setting aside judgment.

A suit in equity is sustained in a state court to set aside a judgment obtained in a Federal court by fraudulent pretense of diverse citizenship of the parties as a basis of jurisdiction. (Mo.) 386.

Limitations.

A statute shortening the period of limitations is held unconstitutional if it does not provide a reasonable time for bringing an action after the act goes into effect, even if there are several months between the passage of the act and its taking effect. (N. Y.) 118.

The defense of the statute of limitations when the statute merely gives a defense and does not vest property is held to be subject to be taken away by repeal of the statute or otherwise, and not to be a vested right. (W. Va.) 609.

Receivership.

The Federal bankruptcy law is held not to prevent the appointment by a state court of a receiver for a corporation, when it has not been adjudged a bankrupt. (Wash.) 177.

Sale of infant's property.

Jurisdiction of chancery over the estates of infants is held to extend to the sale of the entire property of an infant, where it is held in trust during the life of the infant's mother, although the trust does not extend to the legal fee in remainder. (Ga.) 712.

Garnishment.

A debtor garnished outside of the state of his residence is held not to be protected from suit in favor of his creditor, when he pays the debt to a representative of the foreign claimant after returning to his domicile and 45 L. R. A.

the entry of judgment against him, where he had not given any obligation to secure the payment, and there was nothing to make it compulsory. (N. C.) 257.

Garnishment of a city for a debt due to a nonresident contractor is sustained where the city itself made no objections. (Va.) 246.

Mandamus.

Mandamus to compel the erasure from journals of the legislature of false entries showing the passage of a statute is held to be the only adequate remedy for a person who will be subject to fine or imprisonment if the statute is valid. (Ala.) 772.

The duty of a street-railway company to maintain and operate the road for the benefit of the public is held to be enforceable by mandamus. (N. J.) 837.

Mandamus to compel service by a telephone company at less rates than it demanded, on the ground that it demands unreasonable compensation, is denied, where there has been no fixing of the reasonable rates by the legislature or under its authority. (Neb.) 113.

Enforcing liability of stockholders.

An assignee for creditors of a foreign corporation is held entitled to sue to recover a *pro rata* share of unpaid stock subscriptions of domestic shareholders on behalf of all the creditors of the corporation, and such suit is held not to depend on the law of the state in which the assignment was made, although the statute provides for such a suit. (N. Y.) 551.

Res judicata.

A judgment by default in an action by a physician for compensation is held to be no bar to an action by the patient against the physician for malpractice. (Minn.) 541.

Surety's right.

A surety who has paid a judgment against himself and cosureties on account of the principal's debt is held entitled to an assignment of it as a basis of contribution from cosureties, and the satisfaction of it will not inure to the benefit of a nonpaying surety. (Mont.) 285.

Damages.

Recovery of damages for mental anguish in case of failure to deliver a telegram promptly is sustained where the telegram stated that a person had been killed, but was sent by an agent and failed to show who sent

it, or the relation of the sender and addressee. (N. C.) 160.

The measure of damages for a telegraph line over a railroad right of way is held, overruling a former case, to be, not the value of the land between the posts and under the wire, but the extent to which the value of its use by the railroad company has been diminished. (Miss.) 223.

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Computing dividends.

A creditor of an insolvent bank who has received a part of his claim out of dividends and a further share by enforcing the liability of stockholders is held to be entitled to have subsequent dividends computed upon the original claim. (Cal.) 863.

IX. CRIMINAL LAW AND PRACTICE.

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Sunday sports.

A statute prohibiting the playing of baseball on Sunday when any admission fee is charged is sustained against attacks on several constitutional grounds. (Ind.) 504.

Combination to fix rates.

A combination to fix insurance rates is held not to be indictable either at common law or under the Kentucky statutes, although it may be void as a contract. (Ky.) 355.

Homicide.

The right to plead self-defense is held not to be taken away by the fact that the accused provoked the difficulty and was carrying a dangerous weapon, which he used, if he did not provoke it with intent to kill or do great bodily harm, or as a mere pretext for wreaking his malice. (Tenn.) 687.

The suicide of a person who was mortally wounded, and who was suffering great pain, is held not to relieve his assailant from liability for manslaughter. (Cal.) 783.

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Former jeopardy.

A conviction for selling intoxicating liquors to a minor is held not to be a bar to a prosecution for selling the same liquors without a license. (Ky.) 858.

An acquittal of a criminal charge is held to be a bar to a prosecution of the accused for perjury in swearing that he did not commit the offense. (Ky.) 216.

Confronting witness.

A constitutional right of an accused person to be confronted by witnesses against him is held to be violated by placing him 24 feet from a child who is testifying against him, in such a position that he can neither see nor hear the witness nor see the jury. (Utah) 638.

Parole.

The parole of a convict is held to be in the nature of an additional burden, and a summary arrest for violation of the parole and the return of the convict to custody is held not to violate any constitutional guaranties governing the arrest and trial of criminals. (Ala.) 502.

Excessive sentence.

Excess in a sentence imposed by a court which has jurisdiction is held insufficient to make the sentence void, except as to the excess. (S. D.) 136.

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1. An application for an appeal to the supreme court of Pennsylvania should be by petition stating clearly and distinctly the reasons, so that the court or any of its justices may readily determine whether it is within the letter as well as the spirit of the superior court act. *De Walt's Appeal* (Pa.) 399

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2. The supreme court of California has no jurisdiction of criminal cases on questions of fact. *People v. Lewis* (Cal.) 783

3. The construction or application of the Constitution of Pennsylvania is not involved, for the purpose of an appeal to the supreme court, by reason of a so-called constitutional question which has theretofore been raised, fully considered, and more than once definitely settled. *De Walt's Appeal* (Pa.) 399

Amending pleadings.

4. An amendment of a complaint which involves a question of fact and a matter of law entirely foreign to the case made up on appeal will be denied in the appellate court. *Howard v. Mutual Reserve Fund L. Asso* (N. C.) 853

Questions reviewable.

5. Questions of law in regard to the legal sufficiency of the evidence to sustain a verdict in a criminal case may be presented by motion for new trial, which may be reviewed by the supreme court. *People v. Lewis* (Cal.) 783

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12. Error in admitting evidence to establish immaterial facts incorporated in special findings does not require reversal. *Lamson v. Beard (C. C. App. 7th C.)* 822

13. Permitting the prosecution to offer unimportant evidence after the defense has closed does not require reversal of a conviction. *People v. Lewis (Cal.)* 783

14. A statement by the prosecuting attorney in opening a case of homicide by shooting and throat-cutting, that he will show that defendant did both, will not require reversal of a conviction, although no attempt is made to prove that defendant did the latter, if there is nothing to show that the statement was not made in good faith, and the effect was in fact to weaken the case of the prosecution. *Id.*

15. A decree in a cause in which the parties, after plea is filed and set down, fail to bring it on for hearing, and proceed to take testimony as to the merits of the plea, and further bring the case on for hearing, will not be reversed unless there is error on the merits. *Stackpole v. Hancock (Fla.)* 814

16. A judgment will not be reversed for a general charge directing a verdict, erroneous because not indicating the specific ground of the ruling, if no ground appears on which the adverse party could prevail in the action. *Weihenmayer v. Bitner (Md.)* 446

17. An instruction that plaintiff in an action to recover for negligent injuries may recover if guilty of only slight negligence, if defendant was guilty of gross negligence, will not require reversal if the jury find plaintiff was not negligent at all. *Smith v. Union Trunk Line (Wash.)* 169

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18. Acts done pursuant to a subsisting judgment which is afterwards reversed cannot be made the basis of an action for damages for tort. *Bridges v. McAllister (Ky.)* 800

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1. A finding of fact that the president of a bank made a wrongful and unauthorized appropriation of its funds for payment of his own debts cannot be overcome in favor of persons who received them, by the fact that entries exist in the bank's books which tend to show the contrary, since their liability to refund depends, not upon the fraudulent bookkeeping, but upon the misappropriation of the money, to which they were parties, in regard to which they were bound to inquire of the directors, and not look to the books. *Lamson v. Beard (C. C. App. 7th C.)* 822

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rest; (V.) proceedings for a receiver as affected by bankrupt law; (VI.) effect of creditors' bill or supplementary proceedings as against bankrupt proceedings; (VII.) effect of an assignment for creditors on the right to a discharge in bankruptcy. 177

BANKS.

See also ASSUMPSIT, 1; BONDS, 2; ESTOPPEL, 3; NOTICE, 1, 2; TAXES, 7-9; USURY.

1. Brokers who receive drafts drawn in their favor by the president of a bank upon its funds in settlement of his transactions upon the board of trade are bound to communicate that fact to the bank directors, and inquire as to his authority to execute the paper. *Lamson v. Beard* (C. C. App. 7th C.) 822

2. The license tax on banks created by the state, which is imposed by Mont. Pol. Code, § 4061, although it is not imposed upon national banks, is not for that reason in conflict with Mont. Const. art. 15, § 11, providing that no corporation formed under the laws of any other country, state, or territory shall have any greater rights or privileges than corporations of the "same or similar character" created under the laws of the state, since national banks, being governmental agencies, are not of the same or similar character as banks created under the laws of the state. *State v. Thomas Cruse Sav. Bank* (Mont.) 760

3. The collection by a creditor of an insolvent bank, after receiving part of his claim out of dividends from its assets, of another part by enforcing the liability of stockholders, will not prevent the computation of subsequent dividends to be paid from corporate assets upon the claim as it originally existed, in the same proportion as is awarded to other creditors. *Sacramento Bank v. Pacific Bank* (Cal.) 863

4. A stockholder of an insolvent corporation who has, in accordance with his statutory liability, satisfied a portion of the claim of a corporate creditor, cannot, upon the basis of the amount paid, share in future dividends to creditors from the corporate assets. Id.

BARBED WIRE.

See NEGLIGENCE, 3.

BASEBALL.

See CONSTITUTIONAL LAW, 4, 8; INDICTMENT, ETC.; STATUTES, 11.

BID.

See CONTRACTS, 10-12.

BIGAMY.

See EXECUTORS AND ADMINISTRATORS, 1.

BILLS AND NOTES.

See also BANKS, 1; FRAUD AND FRAUDULENT CONVEYANCES, 1; GUARANTY; LIBEL AND SLANDER, 4, 5; PARTNERSHIP, 1.

1. The negotiability of a note is not de-

stroyed by an agreement to pay costs of collection, including attorneys' fees, although Ga. Civ. Code, § 3667, provides that such agreements shall be void unless a plea be filed by the defendant and not sustained. *Jones v. Crawford* (Ga.) 105

2. A guardian is a bona fide holder of an unmatured note taken from a former joint guardian, who has resigned, to pay an indebtedness to the ward for property which the resigning guardian has had and failed to account for. *Mack v. Prang* (Wis.) 407

3. The defense of duress is one of the defenses to negotiable paper which is cut off by transfer to a bona fide holder. *Id.*

4. Brokers who take from its president drafts of a bank payable to them and signed by him, in payment of his individual debt to them, are not bona fide purchasers so as to be able to hold the proceeds against the bank in case he had no authority to draw the drafts. *Lamson v. Beard* (C. C. App. 7th C.) 822

NOTES AND BRIEFS.

Signed by married woman, see **HUSBAND AND WIFE.**

Bills and notes; condition as to execution of, by other party. 343

Effect of duress; fraud in inception of. 408

Ground of suspicion as to dealings of bank officer in. 828

BONA FIDE PURCHASER.

See **BILLS AND NOTES**, 2-4.

BONDS.

See also **NOTICE**, 3.

1. The breach of a condition on which sureties sign a bond, that it will not be delivered until other sureties have signed it, will not prevent them from being liable to the obligee, if he receives the bond in good faith, for a sufficient consideration, without knowledge or notice of the condition. *Benton County Sav. Bank v. Boddicker* (Iowa) 321

2. A bond taken by a savings bank in excess of the amount which it is authorized to take by Iowa Acts 15th Gen. Assem. chap. 60, § 18, limiting the amount of money that may be loaned to any person or firm, is not for that reason void,—especially when it is not limited to indebtedness for borrowed money. *Id.*

3. A bond conditioned to pay the full amount of the indebtedness of a firm, but which recites an intention to indemnify against all losses by reason of the failure of the firm to pay indebtedness then owing or afterward contracted, is not limited to the indebtedness then existing. *Id.*

NOTES AND BRIEFS.

Bonds; condition in execution of. 321

BOUNDARY.

See also **WATERS, NOTES AND BRIEFS.**

Riparian rights, including the right 45 L. R. A.

to the soil between ordinary high and low water mark, as incident or appurtenant to the adjacent land, pass in Virginia by virtue of the operation of the statutes extending the rights of individuals to low-water mark, although the conveyance is in terms made to "high-water mark," unless the deed manifests a clear intention to control the operation of the statutes. *Waverly Water Front I. & D. Co. v. White* (Va.) 227

BROKERS.

See also **BANKS, 1; BILLS AND NOTES, 4.**

A real-estate broker cannot be regarded as a middleman entitled to a commission from both sides, if he has contracted expressly to serve the buyer, and throughout the negotiations endeavors to depress the price and arrange conditions favorable to the buyer. *Leathers v. Canfield* (Mich.) 33

NOTES AND BRIEFS.

Brokers; fraud and secret dealings or interest of real-estate brokers as affecting their commissions:—(I.) General doctrine; (II.) in order to decrease price; (III.) in cases of conflicting interests; (IV.) nondisclosure of true position; (V.) soliciting others; (VI.) conspiring with purchaser; (VII.) secret profit; (VIII.) negligence of broker; (IX.) agreement to divide commissions; (X.) by purchase of property; (XI.) double commissions: (a) general rule; (b) reasons for the rule; (c) custom or usage; (d) pooling arrangements; (XII.) exceptions to rule: (a) general; (b) knowledge or consent; (c) mere middleman; (XIII.) as affecting purchaser; (XIV.) miscellaneous cases; (XV.) burden of proof. 33

BUILDING AND LOAN ASSOCIATIONS.

See also **INSURANCE**, 10-12.

1. A building and loan association which receives the benefit of the act of one of its members in taking a policy of insurance on his life and assigning it as collateral to secure a loan to the association, by the credit of the amount of the policy on its debt upon the death of the assured, will be liable to account for the amount to the assignee or representatives of the insured. *Tate v. Commercial Bldg. Asso.* (Va.) 243

2. A member may recover from a building and loan association the amount which he has contributed to it to enable it to pay the interest on its debt and the premium on a policy of life insurance assigned as collateral security for such debt. *Id.*

3. A judgment confessed by a building and loan association, otherwise than for a debt contracted or money loaned at the time, will, under Va. Code, § 1149, inure ratably to the benefit of all existing creditors. *Id.*

BUSINESS.

See **CORPORATIONS**, 20.

BY-LAWS.

See CORPORATIONS, 2.

CABLE CAR.

See STREET RAILWAYS, 4, 5.

CALL.

See CORPORATIONS, 7.

CARRIERS.

See also CONTRACTS, 4; HACKS; TELEPHONES; TRIAL, 3, 4.

1. A party coming to a railroad station with the intention of taking the next train is in contemplation of law a passenger, provided his coming is within a reasonable time before the departure of the train. *Phillips v. Southern R. Co. (N. C.)* 163

2. A rule for closing a railroad waiting room after the departure of a train, until thirty minutes before the departure of the next train, is a reasonable one as applied to a person who has come to the station at 8 P. M. to wait for a train at 1:30 A. M. and is driven out of the room, although the night is cold, to wait several hours until the regular time of reopening the room; but the rule might not be reasonable in case of through passengers or delayed trains. *Id.*

3. The ejection of a passenger who has no ticket, because he will not pay more than the regular fare, is wrongful, where his failure to get a ticket, for which he otherwise would have had time, was, without any fault of his, due to delay in finding his satchel in the baggage room, where he had left it without any check, at a time when the ticket office was closed, as he was directed to do by the baggage master, who refused to give him a check until he had procured his ticket. *Coffee v. Louisville & N. R. Co. (Miss.)* 112

4. A rule that a baggage master shall not receive baggage into the baggage room until a ticket shall have been procured is an imposition on the public, unreasonable, and void. *Id.*

Negligence.

5. It is negligence in a railroad company not to furnish a conductor on a local train with one passenger car, which runs on a schedule so arranged as to enable people on the route to visit a city for several hours, and return at a reasonable hour on the night of the same day, when the train ordinarily carries a good many passengers. *Means v. Carolina C. R. Co. (N. C.)* 164

6. A passenger has the right to presume that a train will not be permitted to pass between that from which he alights and the station, in violation of a rule of the company, while passengers are being received and discharged, and is not necessarily chargeable with contributory negligence for failure to look and listen before proceeding over the tracks towards the station. *Atlantic City R. Co. v. Goodin (N. J. Err. & App.)* 671

7. A passenger on a crowded street car, whose view in front of the car is obstructed by standing passengers, is not guilty of neg-

ligence, as matter of law, in stepping from the moving car upon the track used by cars going in the opposite direction, at a largely used street crossing in a populous city, when no signal of the approach of a car on that track has been given. *Smith v. Union Trunk Line (Wash.)* 169

8. Standing on the platform of a cable car, with one's back against the dashboard, will not constitute negligence on the part of a passenger who goes out of the car as he approaches his destination, so as to preclude a recovery for injury caused by a sudden jerk of the car, throwing him into the street. *North Chicago Street R. Co. v. Baur (Ill.)* 108

Sleeping cars.

9. A sleeping-car company must exercise reasonable diligence in looking after the person and property of passengers while they are asleep on the car. *Pullman's Palace Car Co. v. Adams (Ala.)* 787

10. A sleeping-car company may be found liable for loss of a passenger's effects, where the porter went to sleep during his watch, and also left the car at a station with no one on watch on the inside of the car. *Id.*

11. The mere fact that the porter did not go to sleep during his watch will not relieve the sleeping-car company of liability for loss of effects of a passenger, if he was guilty of other negligence which caused the loss. *Id.*

12. A passenger on a sleeping car is not required to place his pocketbook in the safest place in order to hold the sleeping-car company liable for its loss. *Id.*

13. The negligence of a fellow traveler will not deprive a passenger on a sleeping car of the right to hold the sleeping-car company liable for loss of his effects by theft while he is asleep in the car. *Id.*

14. That a passenger removes a ring from his finger to his pocketbook upon retiring for the night in a sleeping car will not deprive him of the right to hold the sleeping-car company liable for its loss by theft through its negligence. *Id.*

15. A passenger on a sleeping car cannot recover from the sleeping-car company the value of a ring carried in his pocketbook, and which was not capable of being used by him on the journey, although the loss occurred through its negligence. *Id.*

NOTES AND BRIEFS.

Carriers; right to make reasonable rules; passenger's right to occupy waiting room; when person becomes a passenger. 163

Duty of passenger to procure ticket. 112

Liability to news agent carried under special contract; contract limiting liability. 381

Negligence in riding on platform of street car. 109

Contributory negligence of passenger; negligence in alighting from moving train; in stepping from street car in front of other car. 170

Negligence in jumping from train; passen-

ger struck by train while going from car to station. 671

Liability of sleeping-car companies to passengers. 769

Power of legislature and courts over rights of. 113

CERTIORARI.

The determination of the board of state canvassers and the proclamation of the governor that proposed amendments to the Constitution had been adopted, made in pursuance of the duty with which they were charged by the legislature, are subject to review by the supreme court by certiorari at the instance of a citizen of the state. *State, Bott, Prosecutor, v. Wurts (N. J. Err. & App.)* 251

NOTES AND BRIEFS.

Certiorari; to review excessive sentence. 158

To test result of election; discretion in case of; interest of prosecutor; writ applied for too late. 252

CHAMPERTY.

1. An agreement by which an attorney is to bear the costs and expense of litigation, in consideration of an interest in the recovery, is champertous and void. *Geer v. Frank (Ill.)* 110

2. A contract giving each of two attorneys an interest in the subject-matter of litigation, in consideration of the legal services to be performed by each of them, and also of the payment of the cost and expenses of litigation by one of them, is void as to both, because of the illegal provision as to the payment of costs and expenses by one of them. *Id.*

3. A clause in a contract between attorney and client for compensation for conducting litigation, that the client shall not settle the controversy without the attorney's consent, is void because against public policy. *Davis v. Webber (Ark.)* 196

4. An agreement between attorney and client about to begin suit upon a sheriff's bond for his failure to pay over money as directed by a judgment, that the attorney shall have the statutory penalty for the default as his compensation after the client receives his claim in full, is not void for champerty, and will not be set aside merely because it did not bring the client the anticipated results. *Id.*

NOTES AND BRIEFS.

Champerty; in attorney's contract to carry on litigation. 110

Contingent compensation of attorney. 196

CHARTER.

See CORPORATIONS, 1.

CITIZEN.

See CONSTITUTIONAL LAW.
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CLERK.

See MANDAMUS, 8.

CLUB.

See CONSPIRACY, 3.

CODE.

See STATUTES, 13.

COLLATERAL ATTACK.

See GARNISHMENT, 4.

COLLATERAL-INHERITANCE TAX.

See TAXES, 13.

COMBINATIONS.

See CORPORATIONS, 22.

COMMERCE.

1. An ordinance imposing a license tax on occupations is invalid as against a person selling picture frames, when he sells them only on pictures made in another state pursuant to orders theretofore given. *Lauren v. Elmore (S. C.)* 249

2. Discrimination in favor of intoxicating liquors bought from a dispensary, against liquors purchased beyond the limits of the state for the personal use of the purchaser, with respect to the necessity of having certificates as to the purity of the liquors, or the fact that they are kept for personal use, would constitute a burden on interstate commerce. *State v. Holleyman (S. C.)* 567

3. Intoxicating liquors purchased in another state, at a distillery, for the use of the purchaser himself, and transported by him in his own private conveyance across the state line toward his home, have not arrived within the state, within the meaning of the Wilson act, so as to become contraband under the South Carolina statutes, while in course of transportation between the state boundary and the home of the purchaser. *Id.*

NOTES AND BRIEFS.

Commerce; interstate, as affected by license tax. 249

Interstate, in intoxicating liquors; inspection laws. 565

COMMON CARRIERS.

See CARRIERS.

COMPOUNDING CRIME.

An obligation given for the settlement of a claim for embezzlement by an agent of a private person, although the purpose of the transaction is to prevent a prosecution of the embezzler, is not void on grounds of public policy. *Loud v. Hamilton (Tenn.)* 400

COMPULSORY SERVICE.

A public-service corporation, like a telephone company, may be compelled to furnish to any citizen a telephone and telephonic service at reasonable compensation and without discrimination between patrons.

Nebraska Teleph. Co. v. State ex rel. Yeiser (Neb.) 113

CONCEALMENT.

See FRAUD AND FRAUDULENT CONVEYANCES, 2.

CONDITIONAL LIMITATION.

See REAL PROPERTY.

CONDITIONS.

See also BONDS, 1; EVIDENCE, 4.

NOTES AND BRIEFS.

Condition; in execution of contract 321

CONDUCTOR.

See CARRIERS, 5.

CONFLICT OF LAWS.

See also INSOLVENCY; STATUTES, 8, 9; TAXES, 3.

1. The law of one state declaring that cohabitation for a period of years is proof of marriage is not effective in another state to dissolve a former marriage of one of the parties to a person residing there. *Re Newman's Estate* (Cal.) 780

2. An action against all the domestic shareholders of an Illinois corporation, to recover the unpaid balance of their subscriptions to the stock, or such *pro rata* share thereof as is necessary to pay the debts of the company, may be brought in New York by the Illinois assignee for creditors, since the cause of action is a contract liability which has for its foundation the principles of the common law, and does not depend upon Ill. Rev. Stat. chap. 32, § 25, which provides for such a suit in equity against all delinquent stockholders. *Stoddard v. Lum* (N. Y.) 551

NOTES AND BRIEFS.

Conflict of laws; as to recognition of illegitimate child. 93

Enforcing liability of stockholders of foreign corporations. 552

CONGRESS.

See WRIT AND PROCESS, 1, 2.

CONSOLIDATION.

See STATUTES, 13.

CONSPIRACY.

See also STATUTES, 8.

1. A combination for the purpose of maintaining rates of insurance, although it may be a void contract, is not an indictable offense at common law. *Etna Ins. Co. v. Com.* (Ky.) 355

2. Contracts regulating insurance rates are not within Ky. Stat. § 3915, prohibiting combinations to regulate, control, or fix the price of "any merchandise, manufactured articles, or property of any kind." *Id.*

3. An unlawful combination of insurers in violation of Mo. act 1897 prohibiting any pool or combination to regulate prices or the 45 L. R. A.

premium to be paid for insurance is made by insurance companies, each of which buys and furnishes to its agent the rate book and correction slips prepared by a certain person, while the agents form what is called an "Underwriters' Social Club," to the secretary of which, who is an inexperienced young man, and not an insurance expert, each local agent submits his daily reports in an unsealed envelope, addressed to his company, that he may see that the agent does not write policies at less than the rates agreed. *State ex rel. Crow v. Firemen's Fund Ins. Co.* (Mo.) 363

4. Insurance companies charged with violating the statutes against illegal combinations, which make common cause with other companies similarly charged which are found guilty, will be treated in the same way as the other defendants, and ousted of all rights, privileges, and franchises under the law, although the evidence does not show that they are guilty. *Id.*

NOTES AND BRIEFS.

Conspiracies; what constitute; by combination of insurance companies. 355

CONSTITUTIONAL LAW.

See also APPEAL AND ERROR, 3; CERTIORARI; CONTEMPT, 1; CONTRACTS, 14, 15; COUNTIES; COURTS, 2; CRIMINAL LAW, 6; EMINENT DOMAIN, 1; FISHERIES, 2; HIGHWAYS, 5; LIMITATION OF ACTIONS, 1; MUNICIPAL CORPORATIONS, 3; TAXES, 1-3; VOTERS AND ELECTIONS.

1. The 5th Amendment to the Constitution of the United States is a restriction upon the legislative functions of the Federal government, and not of a state government. *Kimball v. Grantsville City* (Utah) 628

2. The provision that all property not exempt shall be "taxed in proportion to its value, to be ascertained as provided by law," which appears in Cal. Const. art. 13, § 1, is not self-executing. *McHenry v. Downer* (Cal.) 737

3. It is too late to question an election on proposed constitutional amendments because of ambiguity in the submitting statute, as to their separate submission, when the election has proceeded throughout the state without objection on the part of any person, and every qualified elector who desired to exercise his franchise has done so without seeking to vote on some of the amendments while refraining from voting on the rest. *State, Bott, Prosecutor, v. Wurts* (N. J. Err. & App.) 251

Equality.

4. Imposing a larger penalty on persons who play baseball on Sunday in violation of a statute than upon those who are engaged in hunting, fishing, rioting, quarreling, and in acts of common labor, does not violate the constitutional right of citizens to equal privileges and immunities. *State v. Hogriever* (Ind.) 504

5. The exclusion of citizens of other states from the right to dig clams for sale on

certain flats, by a regulation restricting the right to residents of the town, does not violate the constitutional privileges or immunities of citizens. *Com. v. Hilton* (Mass.) 475

6. The equal protection of the laws is not denied to persons who supply milk to cities, towns, and villages for consumption, by a statute compelling them to register their herds or cattle with the live-stock sanitary board, where it applies to all persons of that class, though it does not apply to every person who may occasionally sell milk in the country. *State v. Broadbelt* (Md.) 433

7. A statutory provision allowing attorneys' fees on a judgment in favor of the plaintiff in a mechanic's lien case, without making any such allowance to a successful defendant, does not violate the constitutional provision for equal protection of the laws. *Dell v. Marvin* (Fla.) 201

Class legislation.

8. The constitutional prohibition against class legislation is not violated by a statute prohibiting the playing of baseball on Sunday where a fee is charged under a penalty of a fine upon the players. *State v. Hogriever* (Ind.) 504

Due process of law.

9. The constitutional guaranty of the right to life, liberty, and property does not include the right of insurers to contract among themselves for the maintenance of rates. *State ex rel. Crow v. Firemen's Fund Ins. Co.* (Mo.) 363

10. Ordering a man to pay alimony and suit money without having had his day in court and a hearing on the question of the marriage, when that is denied, is a taking of his property without due process of law. *Hite v. Hite* (Cal.) 793

11. The registration with the live-stock sanitary board, of all herds or cattle of persons selling milk for consumption in cities, towns, and villages, may be required by the legislature in the exercise of the police power; and such statute will not deprive the milk dealers of property without due process of law. *State v. Broadbelt* (Md.) 433

12. A statute authorizing assessments on abutting property for the cost of a public improvement, in a sum materially exceeding the special benefits which that property derives from the work, is in violation of the constitutional provision against taking property without due process of law, or taking it for public use without just compensation. *Hutcheson v. Storrie* (Tex.) 289

13. A statute which shortens the period for bringing an action, without providing a reasonable time for bringing it after the statute takes effect, is unconstitutional as a deprivation of property without due process of law, even if a period of several months elapses between the passage of the act and the time when it goes into effect. *Gilbert v. Ackerman* (N. Y.) 118

14. There is no vested right to a defense under the statute of limitations, such that 45 L. R. A.

the legislature may not, by repeal of the statute or otherwise, revive the action and deprive one of such defense, where the statute merely gives a defense, and does not vest property. *McEldowney v. Wyatt* (W. Va.) 609

Police power.

15. A limitation of the duration of a day's work in underground mines, smelters, and works for the reduction or refining of ores or metals, known as the "eight-hour law," is a valid exercise of the police power of the state. *Short v. Bullion, B. & C. Min. Co.* (Utah) 603

16. Prohibiting the sale and shipment of milk to supply cities, towns, or villages, from premises found in an unsanitary condition, until they conform to reasonable sanitary regulations, is a valid exercise of the police power, although it interferes to some extent with property rights. *State v. Broadbelt* (Md.) 433

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Constitutional law; legislative power to create liabilities. 80

Power to regulate rates for business in which public have an interest. 114

Due process in local assessment. 289

Deprivation of rights without due process of law; denying equal protection of laws by imposing attorney's fee. 371

Discriminating class legislation; police power; delegation of power; due process of law. 433

Validity of Sunday laws; police power. 505

Validity of retroactive law. 557

Vested right in defense of statute of limitations:—(I.) Civil actions: (a) actions involving title to real or personal property; (b) actions not involving title to real or personal property; (c) revival of appeal or writ of error; (II.) criminal actions. 609

CONSULS.

See COURTS, 7; DIPLOMATIC AND CONSULAR OFFICERS, NOTES AND BRIEFS.

CONTEMPT.

1. The inherent power of courts created by the Constitution, to enforce respect and obedience by punishing contempts without a jury trial, cannot be taken away by the legislature. *Carter v. Com.* (Va.) 310

2. Attempting to obtain a continuance of a case by means of false telegrams stating that a party is ill constitutes a contempt of court. 1d.

NOTES AND BRIEFS.

Contempt; power of court to punish for: interference with, by legislature. 310

CONTRACTS.

See also ACTION OR SUIT, 1; BONDS, 1.
2; CHAMPERTY; COMPOUNDING CRIME; ESTOPPEL, 2; INSURANCE, 11.

1. A contract to repurchase stock "at the end of two years," if the holder so desires,

does not require him to give notice on the first day after the expiration of the two years, that he requires the promisor to repurchase it, but he has a reasonable time to give such notice. *La Dow v. E. Bement & Sons* (Mich.) 479

Validity.

2. A contract for the services of an unlicensed stallion is invalid, so that no recovery thereon can be had, under Ky. Stat. chap. 108, § 4201, making the owner liable to indictment and fine for failure to procure the license. *Smith v. Robertson* (Ky.) 510

3. When a contract is against public policy, but neither *malum prohibitum* nor *malum in se*, courts will allow compensation for services rendered under it, upon the rule of *quantum meruit*. *Davis v. Webber* (Ark.) 196

4. A contract by which a news company indemnifies a railroad company against any loss sustained by reason of any injury to employees of the news company, who are carried by the railroad company, is not against public policy. *Kansas City, M. & B. R. Co. v. Southern Railway News Co.* (Mo.) 380

5. A servant cannot claim either an express or an implied contract to pay for services under a contract in violation of laws fixing a penalty for doing the act upon which recovery is sought, and in no case can a contract be implied when the parties to it are *in pari delicto*, and when plaintiff, to make his case, must resort to the illegal transaction in proof and pleading. *Short v. Bullion, B. & C. Min. Co.* (Utah) 603

6. An employee who works more than eight hours per day in a mill or reduction works, in violation of Utah Sess. Laws 1896, n. 219, chap. 72, and Utah Rev. Stat. 1898, § 1337, cannot recover on a *quantum meruit* for his services during the overtime. *Id.*

7. An employee cannot waive the legislative protection created for him by the police power of the state, limiting hours of labor. *Id.*

8. An officer cannot recover on an implied contract with a municipality for materials supplied to it, where the statutes prohibit him from being "directly or indirectly interested in any contract" with the city, and make a violation thereof a misdemeanor. *Berka v. Woodward* (Cal.) 420

9. The allowance by a city council of a claim on an invalid contract does not give to it a validity which it otherwise did not possess. *Id.*

10. The fact that material to be used in the construction of a pavement or other public work is in the hands or under the control of a single dealer, whether by reason of a patent or otherwise, does not preclude the specification of that material in a contract for such improvement, to be let on competitive bidding. *Holmes v. Detroit* (Mich.) 121

11. An agreement between bidders for public work to pool their interests, procure 45 L. R. A.

the contract at the highest price possible, each having knowledge of the other's bid for that purpose, and divide the profits, while representing themselves as rival bidders, is void, so that in case the contract is procured in the name of one of them, the work done, and the money paid to him, the others will have no standing in court to compel an accounting. *Hoffman v. McMullen* (C. C. App. 9th C.) 410

12. A contract by intending bidders for public work, to procure the contract for a price as high as possible, and become partners in its execution, is not, after the work has been done and the money paid to one of them, within the rules that a contract will be enforced, even if incidentally connected with an illegal transaction, provided it is supported by an independent consideration, and that after the illegal contract has been fully executed one party in possession of the gains will not be tolerated to interpose the objection that the business was in violation of law, so as to enable the other parties to compel an accounting. *Id.*

13. That a municipal corporation has accepted work done under a contract let upon competitive bidding, and paid the price, with knowledge of a partnership agreement between the bidders which enhanced the contract price, will not entitle the partners to an account of the profits from one of their number who received the money, on the ground that the municipality was not injured by the illegal partnership agreement. *Id.*

Impairment of obligation.

14. A statute authorizing assessments on fully paid-up stock of a corporation is an unconstitutional invasion of property and contract rights as applied to the owners of pre-existing paid-up stock. *Enterprise Ditch Co. v. Moffit* (Neb.) 647

15. The provision of a charter of a public corporation created for public purposes, such as that of education, whereby fines, forfeitures, and penalties accruing to a certain county are granted to the corporation, is not a contract within the constitutional protection, but may be changed at the will of the legislature. *Watson Seminary v. Pike County Ct.* (Mo.) 675

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Public policy as to contract for indemnity. 381

Public policy in preventing competition for public contract. 410

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Conditional execution of contract under parol agreement that it shall not take effect until others have signed it:—(I.) Scope of the subject; (II.) bonds: (a) rule that nonperformance of condition vitiates; (b) rule that validity depends upon knowledge or notice; (c) rule when bond is joint; (d) what a sufficient condition; (e) knowledge

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CORPORATIONS.

See also BANKRUPTCY; BANKS, 2-4; CONFLICT OF LAWS, 2; CONTRACTS, 14, 15; COURTS, 11, 12; INSOLVENCY; INSURANCE, 3; MANDAMUS, 6; RAILROADS, 2; RECEIVERS; TAXES, 6; WRIT AND PROCESS, 3.

1. A general statute permitting the alteration or repeal of any charter becomes a part of a charter granted while it is in force, so that the right to repeal the latter will not be affected by the repeal of the general law. *Watson Seminary v. Pike County Ct. (Mo.)* 675

2. The power to enact suitable by-laws rests in the stockholders of a corporation, and is not included in the general power of the directors to control the stock and business of the company. *North Milwaukee Town-Site Co. v. Bishop (Wis.)* 174

Consolidation.

3. The consolidation of corporations is a merger, a union, or amalgamation, by which the stock of the two is made one, their property and franchises combined into one, their powers become the powers of one, their names merged into one, and the identity of the two practically, if not actually, runs into one. *State ex rel. Nolan v. Montana R. Co. (Mont.)* 271

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Meetings.

4. A meeting of the stockholders, called for the issue of preferred stock, is properly called under the provisions of Md. Code, art. 23, § 76, providing for meetings to increase or diminish the capital stock, to be called by directors, on four weeks' published notice, and is not within § 6 of the same article, which applies to meetings generally. *Heller v. National Marine Bank (Md.)* 438

Sale of property.

5. A corporation unable to go on may dispose of its property by a majority vote, in the absence of unfairness, oppression, or fraud. *Phillips v. Providence Steam Engine Co. (R. I.)* 560

6. A private sale of its property, made by a corporation which is unable to go on with its business, will not be disturbed at the suit of a minority stockholder, and a sale ordered at public auction, merely because he deems that the agreed price is inadequate, and that part of the property is worth more than the price at which it is scheduled, where he does not show that more, or even much, would be offered for the whole property if sold at auction. *Id.*

Stock and stockholders.

7. A call on stockholders, stating that they may pay in cash or "by a promise to pay in the form of a land contract or contracts," without showing who may exercise the option, or prescribing any conditions or terms to govern in settlement of the balance due the corporation, is void for indefiniteness. *North Milwaukee Town-Site Co. v. Bishop (Wis.)* 174

8. No assessment on paid-up stock of a corporation can be made, in the absence of statutory authority or power given by the articles of incorporation. *Enterprise Ditch Co. v. Moffit (Neb.)* 647

9. A sale of shares of stock, "including all dividends due or to become due thereon," includes a stock dividend. *Rose v. Barclay (Pa.)* 392

10. The failure of a purchaser of stock, "including all dividends," to inform the seller of the fact, of which the purchaser knew he was ignorant, that a stock dividend had been declared, does not avoid the sale, where the dividend had been declared at a regularly called meeting of the stockholders, and each had abundant and equal opportunities of knowledge on the subject. *Id.*

11. The preferred stock authorized by Md. Code, art. 23, § 294, differs radically from ordinary preferred stock in that it is expressly constituted "a lien on the franchises and property" of the corporation, with priority over subsequent mortgages or other encumbrances. *Heller v. National Marine Bank (Md.)* 438

12. The priority over "any subsequently created mortgage or other encumbrance," given to preferred shareholders by Md. Code, art. 23, § 294, extends to unsecured claims over which subsequent mortgages would have preference. *Id.*

13. Articles produced by a corporation for sale are not subject to the lien on the franchises and property of the company given by Md. Code, art. 23, § 294. Id.

14. Insurance collected by receivers for buildings, machinery, and stock in trade that were burned is not subject to the lien of preferred shareholders given by statute on the franchises and property of the company. Id.

15. Rents collected by receivers of a corporation are not included in a lien given to preferred shareholders on the company's franchises and property. Id.

Inspection of books.

16. A stockholder has the right at common law to inspect the books of his corporation at a proper time and place and for a proper purpose. *Re Steinway* (N. Y.) 461

17. The common-law right of a shareholder to inspect the books of his corporation is not affected by the New York stock corporation law (N. Y. Laws 1892, chap. 688, §§ 29, 52), providing for the inspection of the stock book and for the furnishing of a statement of assets and liabilities upon the request of stockholders owning a fixed percentage of the capital stock. Id.

18. All reasonable times are intended by a statute giving stockholders the right to inspect the corporate books at all times. *Weihenmayer v. Bitner* (Md.) 446

19. The statutory right of a stockholder of a corporation to inspect its books, documents, and records is not forfeited by the fact that he is a business rival of the corporation, and seeks information to be used to its injury and loss. Id.

Foreign.

20. A single transaction involving a purchase of coal on credit, with a guaranty by a third person, is held not to constitute "transacting any business," within the meaning of the New Jersey statute requiring certain acts of foreign corporations "before transacting any business in the state." *Delaware & H. Canal Co. v. Mahlenbrock* (N. J. Err. & App.) 538

21. A sale of coal made on an order and guaranty sent by mail from one state to another is not within the New Jersey corporation act of 1896, § 97, restricting the business of foreign corporations in that state. Id.

22. A foreign insurance company doing business in Arkansas, which enters into an agreement with other insurance companies formed outside the state, for the purpose of fixing the rates of insurance in foreign countries, not intended to affect, and which does not affect, persons, property, or prices of insurance in the state, does not thereby subject itself to the penalty imposed by Ark. act May 6, 1899, upon any corporation transacting any kind of business in the state, which becomes a party to any pool or combination to fix or limit rates of insurance. *State v. Lancashire F. Ins. Co.* (Ark.) 348
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Nature of preferred stock and rights therein. 439

Right of stockholder to inspect books of corporation:—(I.) At common law; (II.) under statutes; (III.) extent of the right generally: (a) at common law; (b) under statutes; (c) assistance of attorney or expert; (d) making memoranda and taking copies; (e) time of inspection; (f) the books and papers inspected; (g) effect of business convenience or necessity on; (h) to what corporations applicable: (1) domestic corporations; (2) foreign corporations; (3) insolvent corporations; (IV.) the remedy: (a) by mandamus; (b) by imposition of a penalty; (c) by action for damages; (d) other remedies; (V.) sufficiency of demand and refusal to sustain remedy; (VI.) effect of purpose of stockholder on remedy: (a) generally; (b) for hostile purposes; (c) to obtain grounds for litigation; (d) to obtain knowledge of condition of company; (VII.) rule that there must be a specific dispute; (VIII.) matters of procedure: (a) in mandamus; (b) in other proceedings. 446

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Foreign; power of state to impose conditions on. 349

CORPSE.

See also HOSPITAL.

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Corpse; right of action for. 535

COUNTIES.

See also FINES.

1. A statute compelling a county to pay three fourths of the value of property de-

stroyed by a mob or riot, irrespective of ability or exercise of diligence to protect the property, is a police regulation for the better government of the state, which does not violate Ill. Const. art. 9, §§ 9, 10, prohibiting statutes to impose taxes upon municipal corporations for corporate purposes. *Chicago v. Manhattan Cement Co.* (Ill.) 848

2. A debt is not created against a county, within the meaning of Ill. Const. art. 9, § 12, by a statute making the county liable to owners for property destroyed by mobs and riots. *Id.*

NOTES AND BRIEFS.

Counties; statute creating liability for act of mob. 848

COURTS.

See also APPEAL AND ERROR; CERTIORARI; CONTEMPT, 1; INSURANCE, 4; JUDGMENT, 10.

1. The court has no power to construe a contract, so as to make its decision *res judicata*, when the case made and the relief sought are beyond its jurisdiction. *Taylor v. Mutual Reserve Fund L. Asso.* (Va.) 621

Relation to legislature.

2. The judicial department of the government has the right to consider whether the legislative department and its agencies have observed constitutional injunctions in attempting to amend the Constitution, and to annul their acts in case they have not done so. *State, Bott, Prosecutor, v. Wurts* (N. J. Err. & App.) 251

3. A court cannot declare a statute void, or arrest its execution, unless it is in violation of some constitutional restriction. *Kimball v. Grantsville City* (Utah) 628

4. Courts cannot revise the legislative discretion as to the extent of the territorial limits of a municipality. *Id.*

5. The legislative determination that a particular use is a public use, justifying the exercise of the power of eminent domain, though entitled to the benefit of strong presumption, is not conclusive upon the court. *Ryan v. Louisville & N. Terminal Co.* (Tenn.) 303

6. The power—the jurisdiction—to determine in advance what compensation a public-service corporation may exact for services to be rendered, is a legislative, and not a judicial, function. *Nebraska Teleph. Co. v. State ex rel. Yeiser* (Neb.) 113

Jurisdiction of consul.

7. A state court has no jurisdiction in a civil case over the person of a consul general of a foreign country for the United States, who resides in the state. *Wilcox v. Luco* (Cal.) 579

Amount in controversy.

8. The superior court has no original jurisdiction of a legal cause of action, where the amount claimed is under \$200. *Howard v. Mutual Reserve Fund L. Asso.* (N. C.) 853

Power as to foreign corporations.

9. An attempt to investigate, overhaul, and control the management of the internal affairs of a corporation domiciled in another state, by compelling it to exhibit its books, papers, and vouchers and furnish a list of policy holders for inspection, and to determine questions of fraudulent misappropriation of assets and the reasonableness of a rate of assessment, is beyond the jurisdiction of the court. *Taylor v. Mutual Reserve Fund L. Asso.* (Va.) 621

10. An injunction to prevent a foreign assessment insurance company from taking any proceedings to have a certificate of membership or policy of insurance declared lapsed or forfeited for failure to pay an alleged illegal and extortionate assessment cannot be granted, for the reason that it could not be enforced, and would be an attempt to control and overhaul the management of a corporation in another jurisdiction. *Id.*

11. An injunction forbidding a foreign insurance corporation to collect or levy any further assessments upon a resident member upon the plan adopted by the company would require an investigation and control of the management of the company, and is beyond the jurisdiction of the court, in the absence of any obligation of fraud, although the court would have jurisdiction in case of actual fraud in inducing the plaintiff to become a member of the corporation, to his pecuniary loss, or in the levying and collecting of assessments, or if the suit was to recover the amount due on his policy and the defendant had declared the policy forfeited for failure to pay the assessments, as the latter suit would be merely to enforce the contract or give damages for its breach. *Howard v. Mutual Reserve Fund L. Asso.* (N. C.) 853

12. Courts of one state cannot, by injunction, afford equitable relief even to one of its residents who is a member of a foreign corporation, by an order commanding and requiring such corporation to do or not to do certain specified acts connected with the internal management of its corporate affairs, although the statutes in general terms provide means for bringing foreign corporations into the courts of the state, and that residents may bring actions in the courts for any cause of action. *Id.*

State and Federal.

13. A state court of equity may entertain a bill to set aside a judgment obtained by fraud in a Federal court. *Wonderly v. Lafayette County* (Mo.) 386

Stare decisis.

14. The rule of *stare decisis* is not inflexible, and will not be applied to uphold a decision which is clearly erroneous or contrary to well-established legal principles, or a decision which is not necessarily involved in the case. *Kimball v. Grantsville City* (Utah) 628

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Power to regulate or fix rates. 114

Refusal to decide political question; review of conclusion of election canvassers. 252

Interference with management of foreign corporation. 621

Interference with internal affairs of foreign corporation. 854

COVENANT.

The fact that the amount of a judgment was determined by agreement will not take the judgment out of the protection of a covenant to indemnify the defendant against liability upon the claim on which the judgment is taken, although it will reduce the judgment from conclusive to presumptive evidence of the liability. *Kansas City, M. & B. R. Co. v. Southern Railway News Co. (Mo.)* 380

CREDITORS' BILL.

NOTES AND BRIEFS.

Creditors' bill; effect of bankruptcy on. 193

CRIMINAL LAW.

See also APPEAL AND ERROR, 2, 5, 13, 14; HABEAS CORPUS, 1; INSURANCE, 5; TRIAL, 1, 2; WRIT AND PROCESS, 3.

1. Acquittal on a charge of a criminal offense is a bar to a prosecution of the accused for perjury in swearing that he did not commit the offense. *Cooper v. Com. (Ky.)* 216

2. A conviction for furnishing intoxicating liquor to a minor without legal authority is not a bar to a prosecution for selling the liquor without a license, where the sale to the minor is an offense irrespective of the license, and the sale without license is an offense whether sold to a minor or other person. *Com. v. Vaughn (Ky.)* 858

3. A sentence by a court having jurisdiction of the person and the offense, in excess of that permitted by law, is not void *in toto*, but the portion thereof which might have been legally imposed is valid. *Re Taylor (S. D.)* 136

4. The parole of a convict is in the nature of a conditional pardon, and within the constitutional grant of the pardoning power to the governor. *Fuller v. State (Ala.)* 502

5. A convict who elects to accept a parole, and avails himself of the liberty which it confers, must do so subject to the conditions upon which alone it is granted to him. *Id.*

6. The summary arrest of a convict who has violated his parole, and his summary return or remandment to servitude or imprisonment. 45 L. R. A.

prisonment under his sentence, are not in violation of the constitutional guarantees governing the arrest and trial of criminals. *Id.*

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Criminal law; effect of excessive sentence:—(I.) Introduction; (II.) general rule: (a) in state courts; (b) in United States courts; (III.) effect of application for habeas corpus: (a) sentence void, prisoner discharged; (b) discharged, proper sentence served; (c) discharge refused on habeas corpus; (d) discharge refused until legal sentence served; (e) sentence corrected or modified and affirmed; (f) sentence ordered modified, and case remanded; (g) proper sentence imposed, and prisoner remanded; (h) execution stayed, bail for future appearance; (i) remanded and record corrected; (IV.) effect on appeal or on writ of error: (a) in general; (b) sentence reversed, prisoner discharged; (c) prisoner discharged, legal sentence served; (d) judgment reversed in part and affirmed in part; (e) sentence corrected or modified, and judgment affirmed; (f) judgment ordered modified, and case remanded; (g) judgment reversed, and case remanded; (h) judgment reversed, and new sentence imposed; (i) judgment reversed, and new trial granted; (j) execution stayed, bail for future appearance; (k) discharged upon suing out writ of error; (V.) on certiorari: (a) discharge refused; (b) judgment reversed, and case remanded; (c) prisoner discharged; (VI.) English decisions. 136

Right of accused to be present and confront witnesses. 638

Prosecution and punishment of distinct offenses committed by single sale of intoxicating liquors:—(I.) General rule; (II.) principles exemplified. 858

CROPS.

See EMBLEMENTS.

DAMAGES.

1. The measure of damages for a telegraph line over a railroad right of way is not the value of the land embraced within the right of way between the poles and under the wires, but it is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes. *Mobile & O. R. Co. v. Postal Tele. Cable Co. (Miss.)* 223

2. Damages for mental anguish caused by negligent failure to deliver promptly a telegram stating that a person had been killed may be recovered, although the message was sent by an agent without disclosing who sent it or the relations of the sender with the addressee. *Cashion v. Western U. Tele. Co. (N. C.)* 160

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Damages; for ejection of passenger. 112

For mental anguish. 681

For mental anguish in case of default as to telegram. 160

For property taken by condemnation. 224

DAMS.

See also ESTOPPEL, 1.

The maintenance of a dam of perishable character, the proprietor of which is liable for negligence in maintaining it, if not an insurer of its safety, as to persons who may be injured by its bursting, will not, by lapse of time, give riparian owners a prescriptive right to have the dam maintained after the proprietor chooses to abandon it. *Kray v. Muggli* (Minn.) 218

DEATH.

See LIBEL AND SLANDER, 3; MUNICIPAL CORPORATIONS, 1.

DEBT.

See COUNTIES, 2.

DEBTOR AND CREDITOR.

For conveyance in fraud of creditors, see FRAUD AND FRAUDULENT CONVEYANCES. See also INFANTS, 2.

DECEIT.

See FRAUD AND FRAUDULENT CONVEYANCES.

DEEDS.

See also DURESS, 2; EVIDENCE, 7, 9; FRAUD AND FRAUDULENT CONVEYANCES, 3-5; TRUSTS, 1.

1. An absolute power of disposition in an instrument conveying land carries with it a full power in the real estate itself. *Cornwell v. Wulff* (Mo.) 53

2. The equitable estate of a *cestui que trust* is an equitable fee simple, where the trustee or feoffee to use has the entire fee-simple estate at law. *Id.*

3. A provision that a trustee of a married woman shall convey the premises to her husband, his heirs or assigns, if she dies without having disposed of the property or directed its disposal by will or otherwise, does not prevent her from taking an absolute equitable fee simple under the deed which creates the trust, where it conveys to the trustee, his heirs and assigns forever, in trust for her separate use, free from her husband's control and debts, and subject to disposal as she shall direct or request, or shall by will or other writing direct or appoint. *Id.*

4. The words "child," "children," and "issue," in a deed creating a trust for a girl during life, and after her death for her child or children, with a certain disposition of the property in case of her death without living issue, will not include an illegitimate child born several years after the making of the deed, where its language does not plainly show such an intention. *Johnstone v. Taliaferro* (Ga.) 95
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DEFINITIONS.

See CONTRACTS, 1; CORPORATIONS, 3, 20; INSURANCE, 13; RAILROADS, 1, 2.

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Definitions; "at." 479
"Issue." 96

DENTISTS.

See also GOODWILL.

Authority to practise medicine and surgery under R. I. Gen. Laws, chap. 165, includes the right to practise dentistry as a branch of surgery, without having complied with the requirements specially provided by R. I. Gen. Laws, chap. 155, as amended by Pub. Laws R. I. chap. 470, as a condition for practising dentistry. *State v. Beck* (R. I.) 269

DESCENT AND DISTRIBUTION.

1. Equitable estates are covered by the same rule of descents that covers the devolution of legal estates. *Cornwell v. Wulff* (Mo.) 53

2. Under a trust to permit a married woman to occupy land and receive the rent and income, and to execute conveyances as she directs, and protect the title or allow the name of the trustee to be used for that purpose, the estate vests in her heirs on her death. *Id.*

3. The recognition of an illegitimate son is general and notorious, within the meaning of Iowa Code 1873, § 2466, when it is open and extensive, though not universal. *Van Horn v. Van Horn* (Iowa) 93

4. The general and notorious recognition of an illegitimate son by his father, which will entitle him to inherit real and personal property of his father in Iowa, under Iowa Code 1873, § 2466, may be sufficient, although it took place in another state where the parties resided at the time, and in which the son might have no such right to inherit. *Id.*

NOTES AND BRIEFS.

Descent; from mother to illegitimate child. 96

DIPLOMATIC AND CONSULAR OFFICERS.

See also COURTS, 7.

The jurisdiction of the consul of Sweden and Norway at Boston over a claim for wages by one of the crew of a Norwegian vessel, who has left the ship at that port, is exclusive of any jurisdiction in the first instance of the courts of the state, under article 13 of the treaty of 1827 between the United States and Sweden and Norway, making the consuls judges and arbitrators "in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captains should disturb

the order or tranquillity of the country." 481
Telefsen v. Fee (Mass.)

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Diplomatic and consular officers; exemptions and privileges of:—(I.) Generally; (II.) jurisdiction of civil actions against consuls: (a) Supreme Court of the United States; (b) circuit courts of the United States; (c) United States district courts; (d) state courts; (e) English courts; (III.) jurisdiction of criminal actions against consuls; (IV.) exemption from obligation to appear as a witness; (V.) exemption from taxation; (VI.) exemption from military and jury duties; (VII.) domicile; (VIII.) trading with an enemy; (IX.) exemption from liability for judicial and other acts. 579

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DIVIDENDS.

See **BANKS, 3, 4; CORPORATIONS, 9.**

DOMICIL.

See **EXECUTORS AND ADMINISTRATORS, 2.**

DUE PROCESS OF LAW.

See **CONSTITUTIONAL LAW.**

DURESS.

See also **BILLS AND NOTES, 3.**

1. Threats to arrest a man for embezzlement unless his wife will execute a mortgage constitute duress, which will avoid the mortgage made by her, if they are sufficient to control her will. *Mack v. Prang* (Wis.) 407

2. Duress is not a defense to notes and a deed given by a man to settle a claim against his son-in-law and release him from arrest for felony, when he enters into the transaction deliberately, after manœuvring for a compromise, and on an understanding with his daughter that the payment shall constitute an advancement to her. *Loud v. Hamilton* (Tenn.) 400

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Duress; what constitutes; as affecting negotiable paper. 408
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See also **DAMS; ESTOPPEL, 1**

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Easements; by prescription; sufficiency of user; right to abandon; reciprocal rights. 218

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See **CONSTITUTIONAL LAW, 15; CONTRACTS, 6, 7.**

ELECTRICAL USES.

See **MASTER AND SERVANT, 2, 3.**

EMANCIPATION.

See **INFANTS, 1.**

EMBLEMENTS.

Crops planted by one in possession under a bond for title, after he has refused to comply with his contract to purchase, and the vendor, having tendered a good title, has begun an action to foreclose the bond, belong to the vendor. *Sievers v. Brown* (Or.) 642

EMINENT DOMAIN.

See also **CONSTITUTIONAL LAW, 12; COURTS, 5; TAXES, 2.**

1. The legislature cannot authorize taxation for the purpose of making gifts or paying gratuities to private individuals, as this would constitute a taking of private property for a private, and not for a public, use. *Bush v. Orange County Supers.* (N. Y.) 556

2. The provision of a railroad terminal for the accommodation of all railroads concentrated at a city, "to facilitate the public convenience and the safety of the transmission of railroad passengers and freight," is a public use, to acquire necessary property for which the power of eminent domain may be exercised. *Ryan v. Louisville & N. Terminal Co.* (Tenn.) 303

3. An enterprise is not shown to be a private one merely by the fact that it was set on foot for the profit of the corporators. *Id.*

4. That the charter of a corporation organized to construct a union terminal for all railroads entering a city fixes no rates to be charged by it for the use of its tracks does not prevent the enterprise from being a public one. *Id.*

5. The incidental right of a corporation organized under Tenn. act Gen. Assem. 1893, chap. 11, to furnish and provide a hotel, restaurant, and news stand in its union depot, does not convert the undertaking into a mere private enterprise, so as to invalidate the extension to the corporation of the right of eminent domain as respects its proper terminal purposes. *Id.*

NOTES AND BRIEFS.

Eminent domain; right to compensation for taking property; condemning right of way for telegraph line on railroad. 223
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passenger and freight stations; for repair shops; for spur track; for prospective business. 304

EQUALITY.

Constitutional right of, see CONSTITUTIONAL LAW.

EQUITY.

See also INFANTS, 3, 5.

The jurisdiction of equity over the estates of wards of chancery is broad, comprehensive, and plenary; and in all suits or legal proceedings of whatever nature, in which the personal or property rights of the minor are involved, the protective powers of a court of chancery may be invoked whenever it becomes necessary fully to protect such rights. *Richards v. East Tennessee, V. & G. R. Co. (Ga.)* 712

ERROR.

See APPEAL AND ERROR.

ESTATES.

See DEEDS; DESCENT AND DISTRIBUTION; REAL PROPERTY.

ESTOPPEL.

See also FRAUD AND FRAUDULENT CONVEYANCES, 5; PLEADING, 1; PUBLIC IMPROVEMENTS, 1.

1. An equitable estoppel will not arise in favor of riparian owners to prevent the destruction of a dam by which the water has been raised for the period of prescription, when their equities are not strong and substantial, while the other parties have strong counter equities. *Kray v. Muggli (Minn.)* 218

2. An agreement between two persons, that one shall make a contract with a third for the benefit of the other, which would be unlawful, cannot constitute an estoppel to a claim on behalf of the contractor against the intended beneficiary, who has received from such third person the fruits of a lawful contract substituted for the unlawful one. *Tate v. Commercial Bldg. Assn. (Va.)* 243

3. Whether or not a bank has, by permitting its president to use drafts drawn by himself upon its funds in payment of his own obligations, established a course of dealing which will estop it from denying his authority to do so, is a question of fact depending upon the circumstances. *Lamson v. Beard (C. C. App. 7th C.)* 822

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To deny title of grantor. 714

EVIDENCE.

See also APPEAL AND ERROR, 12; WILLS, 1.

1. Judicial notice may be taken of the 45 L. R. A.

prevalence of accusations of corruption in the letting of municipal contracts. *Holmes v. Detroit (Mich.)* 121

Presumptions and burden of proof.

2. It will be presumed that the law of another state as to which there is no proof is the same as that of the forum in respect to public policy. *Loud v. Hamilton (Tenn.)* 400

3. A judgment in favor of the vendor, in a suit against him for conversion of crops planted by the vendee in possession under a bond for title which has been foreclosed, raises the presumption that they were not planted until after the foreclosure suit was begun. *Sievers v. Brown (Or.)* 642

4. The burden of proof is upon a surety who claims that a bond was delivered in violation of a condition as to procuring additional sureties, with the knowledge of the obligee. *Benton County Sav. Bank v. Bodicker (Iowa)* 321

Documentary.

5. An assignment made in another state of a judgment of a Federal court, is not made admissible in evidence by an acknowledgment before a clerk in another state, or a clerk's certificate such as is required for proof of a judicial proceeding under Mo. Rev. Stat. 1889, § 4881. *Wonderly v. Lafayette County (Mo.)* 384

6. Letters passing between a man and his wife who has been guilty of bigamy are admissible upon the question of her right to administer upon his estate. *Re Newman's Estate (Cal.)* 780

Oral; as to writings.

7. Oral evidence that a deed was given merely as security for notes can be given by the grantee to disprove a claim by the grantor that the deed was intended to pay the notes. *Loud v. Hamilton (Tenn.)* 400

8. In a proceeding by a surety who has paid a judgment for the principal's debt and taken an assignment thereof to himself to enforce contribution from a cosurety, he may testify that a satisfaction of the judgment which he had subsequently effected was not intended to inure to the benefit of the cosurety. *Merchants' Nat. Bank v. Great Falls Opera House Co. (Mont.)* 285

9. Recitals in a deed by a trustee, showing an application of the purchase money in contravention of the trust, do not preclude the purchaser from establishing by parol evidence that the money was properly applied. *Robinson v. Stone (Ala.)* 66

Opinions.

10. Opinions of witnesses as to what attracts children to water, or as to whether or not boys like to ride on a plank in the water, are inadmissible. *Cooper v. Overton (Tenn.)* 591

Declarations; res gestæ.

11. The declaration or statement of a train hand on a mixed train, while hurriedly going from a coach at the rear end of the train to the engine in front, that he wanted to get to the engineer and give him his tick-

cts which he had collected, before the train got too fast, is competent as part of the *res gestæ*, where he was killed in attempting to return to the rear of the train, and death is alleged to have been caused by the negligence of the carrier in failing to furnish a conductor. *Means v. Carolina C. R. Co.* (N. C.) 164

12. In an action against a railroad company by one claiming to be the widow of one negligently killed by a train, evidence by a third person that the deceased had stated to her that the plaintiff was his wife is competent. *Atlantic City R. Co. v. Goodin* (N. J. Err. & App.) 671

Relevancy.

13. Evidence of obstructions not alleged in the petition, by which the roadway was narrowed, and also of the condition of the street and of the surroundings, is admissible in an action against a city for negligently allowing a certain obstruction to remain in a street unguarded, without lights or other warnings, by reason of which an accident occurred. *Kansas City v. McDonald* (Kan.) 429

14. A separate answer filed by a defendant, admitting the allegation of agency, cannot be used against his codefendants in the absence of proof that he occupied such a relation to them as to bind them by his representations. *Stackpole v. Hancock* (Fla.) 814

Weight; insufficiency.

15. To justify a verdict in favor of one on whom rests the burden of proof, the evidence as to any material fact must be such as reasonably to convince or satisfy the minds of the jury that the fact exists. *Pullman's Palace Car Co. v. Adams* (Ala.) 767

16. Testimony of plaintiff in an action for injuries by collision with a street car, that he believed the motorman tried to murder him, will not preclude a recovery for the injury, if it is found to have been done within the scope of his employment. *Baltimore Consol. R. Co. v. Pierce* (Md.) 527

17. The mere fact that horses ran away and an accident occurred will not justify an inference of negligence, without some evidence of the circumstances under which it occurred. *Creamer v. McIlvain* (Md.) 531

18. The fact that a horse ran away several years before, when only a colt, because of the breaking of a strap and the dropping down of the pole, making a report like a pistol or a gun, does not constitute any evidence of a disposition or proneness of the horse to run away. *Id.*

19. A material statement in a bill, to which no exception is filed, must be shown by at least a preponderance of evidence, where the case is brought to hearing on the replication to the answer. *Stackpole v. Hancock* (Fla.) 814

20. Proof of the fraudulent representations of a vendee in securing a deed sustains the allegations of a bill charging an agreement and combination on the part of several defendants to fraudulently obtain such 45 L. R. A.

deed, where in fact he was acting for the others, although they did not authorize such representations, and did not know of them at the time they were made or at the time the deed was executed. *Id.*

NOTES AND BRIEFS.

Evidence; burden of proof of freedom from fault in case of homicide, on plea of self-defense. 706

Burden of proof of fraud of broker. 33

Presumption in favor of statute. 304, 557

EXECUTION.

See also HOMESTEAD.

NOTES AND BRIEFS.

Execution; effect of bankruptcy on supplementary proceedings. 193

EXECUTORS AND ADMINISTRATORS.

See also JUDGMENT, 7.

1. The commission of bigamy by a woman, and her administration as widow upon the estate of the second husband, will not deprive her of the right to administer as widow upon the estate of the first husband, where after the death of the second husband she resumes her relations with the first one. *Re Newman's Estate* (Cal.) 780

2. A woman who goes to the state where her husband died leaving property, solely because of that fact, but who forms the intention of remaining and making her future home there, is a resident of that state within the meaning of the laws limiting the right of administration to residents. *Id.*

3. Lack of integrity within the meaning of a statute defining the qualifications of administrators is not shown by the fact that the applicant has been an unfaithful wife and violated her marital obligation. *Id.*

NOTES AND BRIEFS.

Executors and administrators; collateral attack on appointment of; estoppel to claim. 780

Widow's right to administer estate; as affected by her wrong conduct. 780

EXECUTORY DEVISE.

See REAL PROPERTY.

EXEMPTION.

See GARNISHMENT, 2.

EXPLOSIONS.

1. One who stores nitro-glycerine on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage, nor is chargeable with negligence contributing to the explosion. *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.* (Ohio) 658

2. Injury to any property within the circle of danger from an explosion of nitro-glycerine entitles the owner to recover the

damages, although the property was not on premises adjacent to those on which the explosive substance was stored. Id.

FALSE IMPRISONMENT.

See OFFICERS, 1.

FALSE PRETENSES.

1. A false pretense need not be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence, in order to be indictable. *Leffler v. State* (Ind.) 424

2. A false representation by a man that he is unmarried, on the faith of which money or property is obtained, may constitute an indictable false pretense. Id.

NOTES AND BRIEFS.

False pretenses; what constitute. 424

FEDERAL COURT.

See COURTS, 13; JUDGMENT, 10.

FENCES.

See also NEGLIGENCE, 3.

NOTES AND BRIEFS.

Fences; of barbed wire; dangerous character of. 501

FINES.

A legislative grant of fines, forfeitures, and penalties accruing to a county, when it is a mere gratuity or privilege, without any consideration, can be revoked at any time. *Watson Seminary v. Pike County Ct.* (Mo.) 675

NOTES AND BRIEFS.

Fines; grant of, by legislature. 676

FIRE DEPARTMENT.

See HIGHWAYS, 2-4; MUNICIPAL CORPORATIONS, 1.

FIREMEN.

See HIGHWAYS, NOTES AND BRIEFS.

FISHERIES.

See also CONSTITUTIONAL LAW, 5.

1. The common right of the public and the right of regulation are the same in regard to shell fish as in regard to swimming fish. *Com. v. Hilton* (Mass.) 475

2. A town regulation prohibiting all persons from digging clams on certain flats, without a permit, which will be granted only to residents of the town, is not unconstitutional or in violation of Mass. Pub. Stat. chap. 91, § 68, as amended by Mass. Stat. 1889, chap. 391, which expressly saves to every inhabitant of the commonwealth a right to take them without permit "for his own family use," and a limited quantity for bait. Id.

NOTES AND BRIEFS.

Fisheries; public right of; as to shell fish on flats; exclusive rights therein; excluding citizens of other states. 475
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FOOD.

See CONSTITUTIONAL LAW, 6, 11, 16.

FORGERY.

See LIBEL AND SLANDER, 5.

FORMER JEOPARDY.

See CRIMINAL LAW, 1, 2, NOTES AND BRIEFS.

FRAUD AND FRAUDULENT CONVEYANCES.

See also CORPORATIONS, 10; JUDGMENT, 10, 11; VENDOR AND PURCHASER, 8.

1. Fraudulently procuring a person to sign a negotiable note as coprincipal when intending to be a surety only, upon the express understanding that no liability shall be incurred, and thereafter transferring the note to an innocent purchaser before maturity, so that such signer is compelled to pay it, constitutes an actionable fraud. *Jones v. Crawford* (Ga.) 105

2. A vendee of land who knows of the existence of a mine on the land, of which the vendor is ignorant, is not bound to disclose such fact in making the purchase; but, if he undertakes to do so, must disclose the whole truth, without concealment of material facts, and without doing anything calculated to prevent an investigation on the part of the vendor,—especially if the latter does not reside near the land and the purchaser does. *Stackpole v. Hancock* (Fla.) 814

3. Earnings of minor children who have been emancipated by their father while he was in good financial circumstances, and when the earnings have been loaned to him, may constitute a good consideration for a conveyance to them from him as against his creditors. *Flynn v. Baisley* (Or.) 645

4. A conveyance by a widow to her son of land allotted to her, made to prevent the apparent lien of an anticipated judgment from attaching to the property conveyed, is not fraudulent, as against the judgment creditor, where she had previously agreed, for the purpose of effectuating her intention to give the land to her children who had remained at home and cared for the property, to allow the land to go to sale under foreclosure of a mortgage thereon, and permit the grantee to purchase the sheriff's certificate, who, after the certificate had ripened into a deed, was to bring an action to quiet the title, the consummation of such agreement having been prevented by litigation with reference to the land. *Cloud v. Malvin* (Iowa) 209

5. Grantees of real property cannot, to sustain the conveyance against an attack upon it as fraudulent by the creditors of the grantor, assert that the property was originally purchased and paid for by them, and the title conveyed to the grantor merely for the purpose of preventing their creditors from reaching it. Id.

NOTES AND BRIEFS.

Conveyance in fraud of creditors; gran-

tee's knowledge of fraud; validity as against guilty party. 209

Consideration to sustain deed as against creditors. 645

Effect of concealment of facts. 818

GARNISHMENT.

1. A city may be garnished for money in its hands due to a nonresident contractor, if the city itself makes no objections. Portsmouth Gas Co. v. Sanford (Va.) 246

2. That a debt represents a loan of the proceeds of a sale of exempt personal property will not prevent its garnishment in another state. Balk v. Harris (N. C.) 257

3. A debtor garnished in a suit against his creditor when out of the state of his residence is not protected from a suit in favor of such creditor by paying the debt to a representative of the foreign plaintiff after returning to his domicile and the entry of a judgment against him, where he had given no obligation to secure the payment, and he shows nothing which would have made the payment compulsory. Id.

4. A judgment subjecting a debt due to a nonresident to the payment of a claim against him is subject to collateral attack if no personal service of process was obtained upon the principal defendant, and the affidavit for garnishment did not state that he had any property in the state. Id.

NOTES AND BRIEFS.

Garnishment; of municipal corporations. 246

Effect of judgment in case of; jurisdiction; situs of property for purpose of. 258

GIFTS.

See EMINENT DOMAIN, 1; PUBLIC MONEY; TAXES, 1.

GOODWILL.

See also TAXES, 6.

No forced sale or transfer can be made of a goodwill, such as that of a partnership of dentists, in a suit to wind up the partnership, when it is based upon professional reputation and standing or upon business connections, although it might be the subject of a voluntary sale. Slack v. Suddoth (Tenn.) 589

NOTES AND BRIEFS.

Goodwill; of professional partnership. 589

GOVERNOR.

See HABEAS CORPUS; INSURRECTION.

GRANT.

See FINES.

GUARANTY.

See also BONDS, 3; STATUTES, 6.

A guaranty of the prompt payment of a note is not annulled by a judgment declaring the note void for want of authority in the one who executed it, as against one who 45 L. R. A.

took the note in reliance on the guaranty. Holm v. Jamieson (Ill.) 846

NOTES AND BRIEFS.

Guaranty; of note; effect of; when note is void. 846

GUARDIAN AD LITEM.

See INFANTS, 6.

GUARDIAN AND WARD.

See BILLS AND NOTES, 2.

HABEAS CORPUS.

1. In case of insurrection or rebellion the governor or military officer in command may, for the purpose of suppressing it, suspend the writ of habeas corpus, or disregard such writ if issued. Re Boyle (Id.) 832

2. The truth of recitals of alleged facts in a governor's proclamation that a certain county is in a state of insurrection or rebellion will not be inquired into or reviewed on application for a writ of habeas corpus. Id.

NOTES AND BRIEFS.

Habeas corpus; to review excessive sentence. 136

Suspension of writ of:—(I.) Power to suspend; who may suspend; partial suspension; (II.) extent and effect of suspension; as authorizing an arrest otherwise illegal; who are denied the privilege of the writ; continuance of suspension. 832

HACKS.

1. The payment by passengers for transportation includes payment for the common use of the station facilities, and entitles them to have the railroad company refrain from coercing them into yielding further tribute by giving an exclusive right to a hackman to solicit their business as they leave the station. Indianapolis U. R. Co. v. Dohn (Ind.) 427

2. A grant by a railroad company of the exclusive right to stand hacks on an area owned by it adjacent to a passenger station, for the purpose of soliciting business, is unlawful, as the company, which acquired its grounds through the sovereign right of eminent domain, whether by purchase or by condemnation, cannot grant special privileges and immunities that the state could not; and such action is also against public policy as tending to restrict competition and to enhance prices. Id.

HEIRS.

See DESCENT AND DISTRIBUTION.

HIGH-WATER MARK.

See BOUNDARIES.

HIGHWAYS.

See also PUBLIC IMPROVEMENTS, 3.

1. A city must exercise vigilance to the end that encroachments of building materials on a street shall not harm travelers. Kansas City v. McDonald (Kan.) 429

2. A city owes the same degree of care toward a fireman driving over its streets in the discharge of his duties that it owes to any other traveler. *Id.*

3. An ordinance making it a misdemeanor to drive faster than an ordinary traveling gait in any street is unreasonable and invalid as applied to the fire department in driving to a fire. *Id.*

4. Rules of a fire department requiring its members to drive in the middle of the street when going to a fire are made for the safety of the men, teams, and vehicles, and do not charge a driver of a hook and ladder truck with the use of any greater care and precaution for his safety than if the rule did not exist. *Id.*

5. A statutory exemption of municipal corporations from liability for defective condition of footways, except when caused by the city or its authorized agents, is not unconstitutional, even if that part of the statute which attempts to impose the liability therefor on abutting owners is invalid. *Wilmington v. Ewing* (Del.) 79

NOTES AND BRIEFS.

Highways; municipal duty to keep sidewalks in repair; statutory liability of lot-owners for sidewalks. 79

Restricting speed on; violation of regulation by firemen; recovering for injury in such case. 429

HOMESTEAD.

An execution upon a judgment for use and occupation of real estate withheld under an apparent legal title from one holding a superior equitable title cannot be levied upon other land which defendant had conveyed to his wife as a statutory homestead by a deed recorded prior to the rendition of the judgment. *Hardy v. Gunn* (Ala.) 804

NOTES AND BRIEFS.

Homestead; exemption of, from judgments for torts. 804

HOMICIDE.

See also TRIAL, 10.

1. To deny one who provokes a difficulty in which his adversary is killed the right to plead self-defense, he must have provoked it with intent to kill his adversary, or to do him great bodily harm, or to afford a pretext for wreaking malice upon him. *Foutch v. State* (Tenn.) 687

2. The right to plead self-defense by one provoking a difficulty in which his adversary is killed is not taken away by the fact that he had a dangerous weapon and used it, if without that fact the right would have existed. *Id.*

3. That one dying from a wound is induced by the pain, by remorse, or by a desire to shield his assailant, to end his life sooner than the wound would have done, will not, if the wound actually contributes to the death, relieve the one who inflicted 45 L. R. A.

it from being guilty of manslaughter. *People v. Lewis* (Cal.) 783

NOTES AND BRIEFS.

Homicide; self-defense set up by accused who began the conflict:—(I.) General doctrine; (II.) what amounts to provoking or bringing on the difficulty, or producing the occasion: (a) in general; (b) in seeking or returning to the deceased; (c) abuse or other act provoking attack by other party; (III.) threats; (IV.) where relative or other party is the aggressor; (V.) in case of mutual combat; (VI.) former quarrel induced by deceased; (VII.) burden of proof of freedom from fault; (VIII.) question for the jury; (IX.) the question of withdrawal: (a) in general; (b) retreat sufficient; (c) retreat insufficient; (d) as a question for the jury. 687

As affected by intervention of other cause of death. 784

HORSES.

See EVIDENCE, 17, 18; NEGLIGENCE, 4.

HOSPITAL.

Failure to deliver amputated portions of a man's limbs to his widow after his death will not render a railroad company liable, although they were amputated by the company's surgeon after being crushed by the cars while he was in the employ of the company, when the operation was performed at a hospital to which he was taken by the city ambulance as designated by its driver, on his request that he be not taken home, and when the fragments were cremated, according to the custom of the hospital, without the knowledge or direction of the company's surgeon. *Doxtator v. Chicago & W. M. R. Co.* (Mich.) 535

HUSBAND AND WIFE.

See also CONFLICT OF LAWS, 1; CONSTITUTIONAL LAW, 10; EVIDENCE, 12; FALSE PRETENSES, 2.

1. A valid marriage can be contracted in the state of New Jersey by the use of words in the present tense, without a ceremony, and without a witness. *Atlantic City R. Co. v. Goodin* (N. J. Err. & App.) 671

2. A prima facie case of marriage on the plaintiff's own showing, without a preponderance of evidence, when there is a counter showing, is not sufficient to entitle her to alimony and suit money in an action for divorce, but the judge should be satisfied, from the entire proof made, of the fact of marriage. *Hite v. Hite* (Cal.) 793

3. The right to award alimony, conferred on the courts of the District of Columbia by the act of Congress of June 19, 1860, was subject to the qualifications and limitations inherent in it in the English courts and under the Maryland act of 1777. *Alexander v. Alexander* (D. C. App.) 806

4. Failure to reserve the right subsequently to reduce the amount, in a decree awarding alimony, does not deprive the court

of power subsequently to make the reduction, even in cases of absolute divorce. *Id.*

5. Additional alimony *pendente lite* will not be awarded to a wife to enable her to meet the expense of the professional education of her nineteen-year-old son, whose custody was not awarded to either parent, against the opposition of the husband, who wishes his son to go into business. *Streitwolf v. Streitwolf* (N. J. Err. & App.) 842

NOTES AND BRIEFS.

Husband and wife; marriage by mutual promises. 672
Suretyship of wife for husband; signing note for husband. 105
Sufficiency of proof of marriage for allowance of alimony. 793
Alimony for support of children. 844
Allowance of alimony; modification of. 806

ILLEGITIMACY.

See DESCENT AND DISTRIBUTION, 3, 4;
PARENT AND CHILD; WILLS, NOTES
AND BRIEFS.

INDEPENDENT CONTRACT.

See MASTER AND SERVANT, 3.

INDICTMENT.

See also WRIT AND PROCESS, 3.

An affidavit charging violation of a statute against playing baseball on Sunday where an admittance fee is charged need not set out the name of any person paying such fee. *State v. Hogriever* (Ind.) 504

NOTES AND BRIEFS.

Indictment; insufficiency of; failure to describe offense. 355

INFANTS.

See also FRAUD AND FRAUDULENT CONVEYANCES, 3; HUSBAND AND WIFE, 5; JUDGMENT, 4, 5; NEGLIGENCE, 1, 2; TRUSTS, 2.

1. A writing is unnecessary to evidence the emancipation of an infant, but that may be implied from circumstances. *Flynn v. Baisley* (Or.) 645

2. The earnings of a minor child who has been emancipated in good faith by his father cannot be reached by the father's creditors. *Id.*

3. The entire interest of minors in real property, legal as well as equitable, may be ordered sold by a court of chancery in term time, upon an *ex parte* application by a trustee whose legal title is limited to the life of their mother, they having an equitable interest during her life and a vested remainder in fee, as they become wards of chancery upon the presentation of a petition disclosing their ownership of both a legal and an equitable estate. *Richards v. East Tennessee, V. & G. R. Co.* (Ga.) 712

4. An order for the sale of the legal and 45 L. R. A.

equitable interests of infants in the same property is not rendered void by the omission to file the petition, attach process, and docket the case, if the court had jurisdiction over the persons and subject-matter, especially where the interests of innocent purchasers are involved. *Id.*

5. It has not been necessary, since the first Georgia Code went into effect on January 1, 1863, in order to give the chancellor jurisdiction to direct a sale of the legal and equitable estates of minors in the same property, that a regular proceeding in equity be instituted; but such a sale may be ordered by the chancellor, in the exercise of his plenary power over infants, upon an *ex parte* petition, at the term of court when the petition is filed or presented. *Id.*

6. Before the passage of Ga. act 1876 requiring personal service on minors, an appointment of a guardian *ad litem* for a minor, and notification of him before the cause proceeded, was all that was required to have the interests of a minor properly represented in a cause in court. *Id.*

NOTES AND BRIEFS.

Infants; sale of property of; jurisdiction of court of chancery. 713

INJUNCTION.

See also COURTS, 10.

NOTES AND BRIEFS.

Injunction; to prevent irreparable injury; to avoid multiplicity of suits; to prevent illegal act. 219

INSANITY.

See INSURANCE, 13.

INSOLVENCY.

See also BANKS, 3; LANDLORD AND TENANT, 1.

A general assignee for the benefit of creditors of an insolvent corporation, being vested with the legal title to its property, and having the power to reduce its assets to possession, is permitted by public policy and state comity to sue in another state to collect unpaid stock subscriptions. *Stoddard v. Lum* (N. Y.) 551

NOTES AND BRIEFS.

Effect of bankruptcy on assignment for creditors, see BANKRUPTCY.

Insolvency; dividends as affected by other resources or securities of creditor. 863

INSPECTION.

See MANDAMUS, 5, 6.

INSURANCE.

See also BUILDING AND LOAN ASSOCIATIONS, 1; CONSPIRACY; CONSTITUTIONAL LAW, 9; CONTRACTS, 4; CORPORATIONS, 22; PLEADING, 2; STATUTES, 5; TRIAL, 7, 8.

1. A contract which in effect guarantees a fixed revenue per acre from farming lands,

by agreeing for a consideration to pay such amount per acre for a crop grown upon it if the owner chooses to sell it, constitutes insurance within the meaning of N. D. Rev. Codes, §§ 4441, 4445, regulating insurance business. *Re Hogan* (N. D.) 166

2. A foreign insurance company does not acquire any vested rights by complying with existing police regulations or comity laws, which cannot be affected by subsequent changes in such regulations or laws. *State ex rel. Crow v. Firemen's Fund Ins. Co.* (Mo.) 363

3. Insurance companies may be ousted of all rights, privileges, and franchises under the laws of the state, because of the violation of such laws by their agents through whom they do business. *Id.*

4. The provision for service of process on foreign insurance companies, made by Va. act of assembly May 18, 1887, by requiring the appointment of an attorney or agent to acknowledge service or on whom it may be made, does not deprive the corporation of the right to plead a want of jurisdiction on the ground that the subject-matter of the suit or the remedy sought is beyond the reach of the court, or not within the sovereign power of the state from which the court derives its authority. *Taylor v. Mutual Reserve Fund L. Asso.* (Va.) 621

5. Acting as agent for an insurance company which has no certificate of authority, in violation of N. D. Rev. Codes, § 3124, which act is punishable under § 3131 by fine, is within N. D. Pen. Code, § 6802, which makes any act prohibited by law and punishable by fine, a crime. *Re Hogan* (N. D.) 166

6. A person to whom the entire custody of insured property is intrusted, and who has full freedom in its use, will bind the insured by acts which would forfeit the insurance if done by the latter. *Adair v. Southern Mut. Ins. Co.* (Ga.) 204

7. Mere temporary changes in the use and occupation of the premises are not within a provision in a fire insurance policy for forfeiture "by any change in the use or condition" of the property by which the risk is increased. *Id.*

8. A material increase of the hazard of insurance, so great as to be apparent to any person of ordinary intelligence, made by some temporary change in the use of the property, may relieve the insurer from liability for loss thereby caused. *Id.*

9. A mere temporary use of a threshing machine operated by an engine for a few hours on premises where insured property is located will not *per se* work either a forfeiture or a suspension of the policy, under a clause providing for forfeiture by change in the use or condition of the property, which increases the risk. *Id.*

10. An agreement by a member of a building and loan association to insure his life and permit the policy to be used as collateral security for a loan to the association is void 45 L. R. A.

as against public policy. *Tate v. Commercial Bldg. Asso.* (Va.) 243

11. One who agrees to insure his life for the benefit of an association of which he is a member is not in *pari delicto*, so that the court will not interfere to compel the association to account in case it receives the benefit of the insurance. *Id.*

12. A secretary of a building and loan association is not prevented by his relation to the association from acquiring by assignment an insurance policy taken out by a member on his life for the benefit of the association contrary to public policy, so as to prevent his compelling the association to account in case it receives the proceeds of the policy. *Id.*

13. Insanity is included in the word "sickness" as used in the by-laws of a beneficial society. *Robillard v. Société St. Jean Baptiste* (R. I.) 559

14. A man who has a cold, on account of which he is in bed, may be nevertheless "in good health," within the meaning of a clause in a life insurance policy which requires the premium to be paid while he is in good health, although pneumonia sets in a day or two after the premium is paid, and proves fatal. *Barnes v. Fidelity Mutual L. Asso.* (Pa.) 264

NOTES AND BRIEFS.

Insurance; what constitutes. 166

Constitution and by-laws as part of contract. 623

Insurable interest in life of debtor. 243

Effect of representations by applicant; change of conditions; limitation on agent's power; agent's knowledge as waiver or estoppel; warranty as to health; effect of proofs of loss. 264

Forfeiture by change in use or condition of property. 204

By foreign companies; constitutional right to carry on business of. 349

INSURRECTION.

See also HABEAS CORPUS, 1.

An application by a county officer for a proclamation that the county is in a state of insurrection is not necessary to justify the governor in issuing such proclamation, when the facts require it and the county officers are either in league with the insurrectionists, or else, through fear of them, have refrained from doing their duty. *Re Boyle*, 57 Pac. 706 (*Id.*) 832

INTEREST.

Interest may be allowed upon the amount required to be refunded to a bank by persons who took its drafts from its president in payment of his individual debt to them, when he had no authority to use the drafts for that purpose. *Lamson v. Beard* (C. C. App. 7th C.) 822

INTERNATIONAL LAW.

See DIPLOMATIC AND CONSULAR OFFICERS, NOTES AND BRIEFS.

INTOXICATING LIQUORS.

See also **COMMERCE**, 2, 3; **CRIMINAL LAW**, 2; **MANDAMUS**, 12.

The state has power to regulate the sale of intoxicating liquors, and, in the exercise of that power, to authorize the granting of licenses to fit persons, under such conditions as the legislature may impose. *De Walt's Appeal* (Pa.) 399

NOTES AND BRIEFS.

See also **CRIMINAL LAW**.

Intoxicating liquors; constitutionality of license law. 399

JOINT DEBTORS.**NOTES AND BRIEFS.**

Joint debtors; condition as to execution of contract by others. 321

JUDGMENT.

See also **APPEAL AND ERROR**, 18; **BUILDING AND LOAN ASSOCIATIONS**, 3; **COURTS**, 13; **COVENANT**; **EVIDENCE**, 3, 5, 8; **GARNISHMENT**, 3, 4; **GUARANTY**.

1. The value of services rendered in one suit cannot be included in a judgment establishing the lien of an attorney for his fees on property received by his client in compromise of a judgment in a different suit. *Davis v. Webber* (Ark.) 196

2. A surety who has paid a judgment against himself and his cosureties on account of the principal's debt may take an assignment of it to himself as a basis for enforcing contribution from his cosureties. *Merchants' Nat. Bank v. Great Falls Opera House Co.* (Mont.) 285

3. The satisfaction of a judgment for a principal's debt, which a surety has paid and had assigned to himself, to enable him to enforce contribution from a cosurety, for the purpose of facilitating his dealings in real estate upon which the judgment was apparently a lien, will not inure to the benefit of the nonpaying surety, or absolve him from liability to contribute. *Id.*

4. It will be held, in aid of an order directing a sale of the legal and equitable estates of infants in the same property, that it was made in term, and not in vacation, where the petition was indorsed "January Adjourned Term, 1871," the order has entered on it at the place of the judge's signature, "January Adjourned Term, May, 1871," and it appears that the judge was actually holding a regular session of such adjourned term on that day, notwithstanding that the petition was not filed, the case was not entered on the regular docket of the causes for trial, no process was attached to the petition, and the order directed a record of the proceedings on the minutes, as is the custom when such orders are granted at chambers. *Richards v. East Tennessee, V. & G. R. Co.* (Ga.) 712

5. A decree establishing a trust in favor of certain children in land formerly belong-

ing to their grandfather, in which their mother held an equitable title superior to their equity, is not binding upon a prior purchaser of the mother's interest, where he was not made a party to the suit, although the mother prosecuted the same for the benefit of the children. *Id.*

6. A judgment against an employee in favor of a third person whose rights are affected by what is done in the course of the employment is binding on the employer, when he knows of the suit and testifies in it as a witness. *Bridges v. McAllister* (Ky.) 800

7. A decree of a probate court adjudging a person to be the widow of a decedent and entitled to administer on his estate is not conclusive in another state that she was not at the time the wife of another person upon whose estate she claims to administer as widow. *Re Newman's Estate* (Cal.) 780

8. A judgment by default in an action by a physician against his patient to recover for professional services is not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such service. *Jordahl v. Berry* (Minn.) 541

9. A decision as to the taxes of one year is not *res judicata* as to the validity of taxes for subsequent years, as the causes of action are distinct and different, though they may be similar. *Newport v. Com.* (Ky.) 518

10. A false pretense that the nominal plaintiff in a Federal court is the owner of bonds sued on, when made to give jurisdiction to that court on the ground of diverse citizenship of the parties, while the real plaintiff is in fact a citizen of the same state as the defendant, constitutes a fraud which will render the judgment subject to attack in equity, if the defendant is thereby deceived and prevented by the fraud from making his defense. *Wonderly v. Lafayette County* (Mo.) 386

11. A judgment is vitiated by fraud of the plaintiff, whereby defendant is prevented from making his defense, which rests in the peculiar knowledge of the plaintiff, who conceals it from the defendant. *Id.*

NOTES AND BRIEFS.

See also **APPEAL AND ERROR**.

Necessity of personal service to justify. 258

Recovery by physician as bar to action for malpractice. 541

Of probate; effect in other states. 781

Effect of, as to third parties, lack of privacy. 846

Setting aside for fraud; effect of concealing defense to; fraud in obtaining jurisdiction. 388

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See **EVIDENCE**, 1.

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See ACTION OR SUIT, 2; APPEAL AND ERROR; COURTS.

JURY.

NOTES AND BRIEFS.

Exemption of consul from.

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LANDLORD AND TENANT.

See also PUBLIC IMPROVEMENTS, 3.

1. The lien on the goods of an assignee of a lease, created by Ky. Stat. §§ 2305, 2307, 2317, to the extent of one year's rent accruing after the assignee's interest begins, cannot be avoided by his assignee for creditors by a transfer of the lease. *Louisville Trust Co. v. Gaertner* (Ky.) 513

2. An assignee of a lease cannot avoid the statutory lien on his property for rent by setting up the fact that the assignment was invalid because made without the consent of the lessor, if the latter has acquiesced in it. *Id.*

NOTES AND BRIEFS.

Colorable assignment of lease as affecting landlord's lien. 513

Leasehold as real estate.

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See EVIDENCE, 2.

LAW OF PLACE.

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LEGISLATIVE JOURNALS.

See MANDAMUS, 8, 9, 12; SECRETARY OF STATE.

LEGITIMATION.

See DESCENT AND DISTRIBUTION, 3, 4.

LETTERS.

See EVIDENCE, 6.

LIBEL AND SLANDER.

1. The delivery of a letter of recommendation for a former employee to a person who, by his authority, requested it, is not a publishing of any libel contained in it. *Kansas City, M. & B. R. Co. v. Delaney* (Tenn.) 600

2. A statement in a recommendation of a former employee, that, "like many others, he left our service during the strike," is not libelous or actionable *per se*, so as to constitute a cause of action without special damages. *Id.*

3. A mother cannot recover damages for a libelous publication about her deceased adult son. *Bradt v. New Nonpareil Co.* (Iowa) 681

4. An indorsement on a note to the effect that it was never signed, but is a fraud and forgery, made by a cashier of a collecting bank to show the reason for nonpayment, in accordance with a custom of bankers in that

state, when returning it to the party who sent it for collection, is privileged. *Caldwell v. Story* (Ky.) 735

5. A person who declares that a note presented to him for payment is forged, and thereby induces the cashier of a collecting bank, who presents it to him, to return it with an indorsement that it is a forgery, which constitutes a privileged communication by the cashier, is not guilty of libel, though he may be of slander, if the note is not forged. *Id.*

6. A communication made in good faith upon any subject in which the person has an interest, or with reference to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged. *Id.*

NOTES AND BRIEFS.

Libel; words used of person's business; what constitutes publication; privileged character; necessity of special damage. 600

Privilege of communication made as a duty. 736

LICENSE.

See BANKS, 2; COMMERCE, 1; CONTRACTS, 2; MUNICIPAL CORPORATIONS, 2.

LIENS.

See ATTORNEYS' FEES; LANDLORD AND TENANT; LIMITATION OF ACTIONS, 3, 4.

LIMITATION OF ACTIONS.

See also CONSTITUTIONAL LAW, 13, 14.

1. The legislature has power to alter a statute of limitations as to existing causes of action. *Lawton v. Chilton* (Wis.) 616

2. Staleness will bar a suit by remaindermen under a deed of trust who delay for forty years to institute proceedings to set aside a conveyance by the trustee in breach of the trust, and to establish their title, although the life tenant still lives, since all their rights will be cut off by the deed unless preserved by a decree in equity. *Robinson v. Stone* (Ala.) 66

3. Payments on purchase-money notes secured by a vendor's lien, made after the debtor has made a deed or mortgage of the land, will not, as against the grantee or mortgagee, extend the lien beyond the time for which it would otherwise continue, although they extend the statutory bar with respect to the notes, and the lien, as against the debtor himself, being only an incident of the debt, continues as long as the debt is not barred. *Cook v. Bramel* (Ky.) 212

4. An extension of the time of a vendor's lien by payments made by the debtor on notes secured thereby, which interrupt the statute of limitations as to the notes, will operate against his subsequent vendees or mortgagees, as well as against him, whether they have any notice of the payments or not. *Id.*

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Limitation of action; in equitable suits; effect of laches; in case of trusts. 66

Constitutionality of statutes changing time; reasonableness of time remaining. 119

To enforce purchase-money lien or mortgage; effect of payments. 213

LIVE-STOCK SANITARY BOARD.

See CONSTITUTIONAL LAW, 6, 11.

LOW-WATER MARK.

See BOUNDARIES.

MALPRACTICE.

See JUDGMENT, NOTES AND BRIEFS.

MANDAMUS.

1. The extraordinary remedy of mandamus cannot be invoked when an adequate remedy is afforded by express statute. Nebraska Teleph. Co. v. State ex rel. Yeiser (Neb.) 113

2. To require the issuance of a writ of mandamus to compel a public officer to perform an alleged duty, the duty must be imposed in terms by the statute, or must result therefrom by fair and reasonable construction or interpretation. State ex rel. Brickman v. Wilson (Ala.) 772

3. That it doubts, as matter of law, the existence of a duty, will not justify a court in refusing to issue a writ of mandamus to compel its performance, since the court's duty is to solve such doubts. Id.

4. The right to a peremptory writ of mandamus depends upon the conceded facts, the same as if the relator had demurred to the allegations of the defendant, when he proceeds to argument upon his petition and the opposing affidavits without issue of any alternative writ. Re Steinway (N. Y.) 461

5. The writ of mandamus to enforce the right of a shareholder to inspect the books of his corporation may issue in the sound discretion of the court, with suitable safeguards to protect the interests of all concerned. Id.

6. Mandamus will lie to compel the officers of a corporation to permit a stockholder to inspect the accounts of the president and directors, where the statute provides that such accounts shall be open at all times to the inspection of stockholders. Weihenmayer v. Bitner (Md.) 446

7. Mandamus to compel a telephone company to furnish a telephone at less than the rates charged therefor cannot be granted on the ground that the rates demanded are unreasonable, when there has been no action by the legislature, or under its authority, to determine the reasonableness of the rates. Nebraska Teleph. Co. v. State ex rel. Yeiser (Miss.) 113

8. The clerk of the house of representatives 45 L. R. A.

tives of a state cannot be compelled by mandamus to erase and expunge false entries from the journal, after he has delivered it, properly attested, to the secretary of state according to law for safe keeping, and all his control over it, except for the purpose of making a copy of it for the printer, has ceased. State ex rel. Brickman v. Wilson (Ala.) 772

9. Mandamus to compel the erasure, from journals of the legislature, of entries showing the passage of a statute imposing an additional tax upon the liquor business, which were erroneously made after the journals had been attested and delivered to the secretary of state for safe keeping, is the only adequate remedy for one who will be subject to fine or imprisonment for carrying on his business without paying the required tax. Id.

10. Mandamus is the proper remedy to compel a street-railway company to perform its duty of maintaining and operating its road for the benefit of the public. State ex rel. Bridgeton v. Bridgeton & M. Traction Co. (N. J. Sup.) 837

11. A municipality in the streets of which a railway is located by ordinance is a proper relator in a proceeding by mandamus to enforce the duty of the company to the public to operate its road. Id.

12. One having a license to engage in the sale of intoxicating liquor has sufficient interest to entitle him to file a petition for mandamus to compel erasure, by one whose duty it is to do so, of erroneous entries in the journals of the legislature showing the passage of a statute imposing an additional tax upon such business, payment of which is necessary to protect him from fine or imprisonment. State ex rel. Brickman v. Wilson (Ala.) 772

NOTES AND BRIEFS.

Mandamus; to enforce right to inspect books of corporation. 457, 862

Effect of other remedy; on refusal of officer to perform duty. 773

Precluded by other remedy; necessity that right must be clear and certain; to compel service by common carrier or similar public servants. 113

Requisites for issuance of; to test legality of statute. 838

MARRIAGE.

See FALSE PRETENSES, 2; HUSBAND AND WIFE.

MARTIAL LAW.

See INSURRECTION.

MASTER AND SERVANT.

See also CONSTITUTIONAL LAW, 15; CONTRACTS, 5-7; HOSPITAL; LIBEL AND SLANDER, 1, 2; TRIAL, 5, 6.

1. The mere fact that a servant acted unlawfully, wilfully, or wantonly does not show that he is no longer in his master's

employment, so as to relieve the latter from liability for injuries thereby caused. *Baltimore Consol. R. Co. v. Pierce* (Md.) 527

2. An employer knowing of the defective insulation of a crane operated by an electric motor, whereby there is a leakage of electricity from the motor to the hauling chain, although the current used is not dangerous, must be held liable for negligence in permitting employees to use the crane in that condition, when an employee is injured in consequence thereof by a dangerous current of electricity communicated to the chain by reason of some contact, outside the employer's premises, of the wire used for the motor and some other wire carrying a dangerous current. *Moran v. Corliss Steam-Engine Co.* (R. I.) 267

3. The delegation to an independent contractor of the duty of keeping a crane operated by electricity in safe condition for use by employees does not relieve the master from liability for injury to a servant resulting from neglect of the duty. *Id.*

4. The doctrine that a servant cannot recover for the negligence of a coemployee applies only in an action between the master and the servant, and is no defense in an action between two servants. *Lawton v. Chilton* (Wis.) 616

NOTES AND BRIEFS.

Assumption of risks by servant. 165

Duty to provide safe place to work; as to dangerous agencies. 267

Injury to servant outside of the scope of employment; assumption of danger by volunteer. 381

Liability for malicious management of car by motorman. 527

Contractor distinguished from servant. 617

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MENTAL ANGUISH.

See DAMAGES, 2; LIBEL AND SLANDER, 3.

MILITARY SERVICE.

See ARMY, NOTES AND BRIEFS.

MILK.

See CONSTITUTIONAL LAW, 6, 11, 16.

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See FRAUD AND FRAUDULENT CONVEYANCES, 2.

MOB.

See COUNTIES, NOTES AND BRIEFS.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 1.

MORTGAGE.

See also EMBLEMENTS.

The earnings of a corporation from its business prior to the time possession is actually taken of its property by a mortgage 45 L. R. A.

trustee or receiver belong to its general creditors in preference to mortgage bondholders. *New York Security & T. Co. v. Saratoga Gas & E. L. Co.* (N. Y.) 132

NOTES AND BRIEFS.

Right to earnings of mortgagor corporation. 132

MUNICIPAL CORPORATIONS.

See also ACTION OR SUIT, 2; CONTRACTS, 8-10; COUNTIES; COURTS, 4; GARNISHMENT, 1; HIGHWAYS; MANDAMUS, 11.

1. The purchase of an accident policy by a city for a fireman, under Kan. Laws 1895, chap. 363, out of a fund created by a tax on foreign fire insurance companies, and the payment of the policy to the widow of the fireman after his death, is no defense to her action against the city under Kan. Code, § 422 (Kan. Gen. Stat. 1897, chap. 95), for negligence in causing his death. *Kansas City v. McDonald* (Kan.) 429

2. A municipal corporation may be taxed for its franchise to operate waterworks, as in respect to them it occupies the position of a private corporation. *Newport v. Com.* (Ky.) 518

3. A statute authorizing the taxation for city purposes of lands lying outside the platted and improved portion of the city, and used only for the business of agriculture, is not unconstitutional, although it may be an abuse of the taxing power because the lands are beyond the range of municipal benefits. *Kimball v. Grantsville City* (Utah) 628

NOTES AND BRIEFS.

See also CONTRACTS; HIGHWAYS.

Municipal corporations; liability for torts; statutes exempting them from liability. 79

Prohibited contracts with interested officers. 420

Taxation of rural property in. 628

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See TAXES, 7-9, NOTES AND BRIEFS; USURY.

NEGLIGENCE.

See also CARRIERS; EVIDENCE, 17, 18; MASTER AND SERVANT, 4; RAILROADS, 4; STREET RAILWAYS.

1. The liability of the owner of dangerous premises to trespassers does not exist, even in the case of children, unless they are induced to enter on the land by something unusual and attractive placed upon it by the owner, or with his knowledge, and permitted to remain there. *Cooper v. Overton* (Tenn.) 591

2. A pond on an unfenced city lot, formed by surface water on account of the damming up of a natural drain therefor, by the dumping of trash and dirt into it by city authorities, without the knowledge of the owner, who does not know of the existence of the

pond, will not render him liable for the drowning of a boy while playing on the pond. Id.

3. A barbed-wire fence running diagonally from the corner of a house across the grass on private premises to a street corner, put there to prevent people from taking a short cut across the grass, after plain wire fence has been found ineffectual for that purpose, does not make the owner liable to a person who, by mistake after dark, left the line of the street, walked upon the grass, and was injured by the fence. *Quigley v. Clough* (Mass.) 500

4. Signs of being unruly, which horses that had previously been gentle and easily managed exhibited during a drive, will not require the owner to discontinue his drive and leave them at a place at which he has temporarily stopped, instead of driving them home, or permitting them to be driven by one of the party, who is a competent driver. *Creamer v. McIlvain* (Md.) 531

5. A subcontractor for transportation of mails is liable in tort for negligence resulting in damages to a postal employee who is a stranger to the contract, but who is being carried in compliance with the contract. *Lawton v. Chilton* (Wis.) 616

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Negligence; driving unsafe team. 531
As to barbed-wire fence. 501

Liability for dangerous condition of premises; premises attractive to children. 591

In keeping dangerous substance on premises. 653

NEGOTIABLE PAPER.

See **BILLS AND NOTES.**

NITRO-GLYCERINE.

See **EXPLOSIONS.**

NOTICE.

See also **PARTNERSHIP, 2.**

1. Knowledge by a bank president of his own frauds on the bank, perpetrated for his individual purposes, is not attributable to the bank. *Lamson v. Beard* (C. C. App. 7th C.) 822

2. That bank officers have possession of facts in books purposely kept in a manner to conceal the truth does not in law charge them with knowledge of the facts. Id.

3. Knowledge of such facts as would cause a person of reasonable prudence to investigate and discover that the delivery of a bond was not authorized would be sufficient to charge one with notice that the bond was illegal. *Benton County Sav. Bank v. Boddicker* (Iowa) 321

NUISANCE.

See **EXPLOSIONS.**

OFFICERS.

See also **CONTRACTS, 8.**

1. An officer arresting the captain of a 45 L. A.

foreign vessel in port, under process from a state court which has no jurisdiction because a treaty has given exclusive jurisdiction to a consul, is not protected by his process when he makes the arrest after being informed of the nationality of the vessel and that the claim will be adjusted at the consulate, since when informed of the facts he is bound to know the law that the court has no jurisdiction. *Telefsen v. Fee* (Mass.) 481

2. A *de jure* officer is not entitled to the salary of the office for a period during which he was excluded from the office by his own fault in failing to qualify, and during which a *de facto* officer held the office and received the pay. *Rasmussen v. Carbon County* (Wyo.) 295

3. Payment to a *de facto* officer is no defense to an action brought by a *de jure* officer for the salary of an office to which he has been legally declared entitled from the commencement of the term, except when he is himself in fault by failure to qualify. Id.

NOTES AND BRIEFS.

Officers; rights of *de jure* and *de facto* officers to salary. 296

PAID-UP STOCK.

See **CORPORATIONS, 8.**

PARDON.

See **CRIMINAL LAW, 4.**

PARENT AND CHILD.

See also **DESCENT AND DISTRIBUTION, 3, 4.**

NOTES AND BRIEFS.

Recognition of illegitimate child. 93

PAROLE.

See **CRIMINAL LAW, 4, 5.**

PARTNERSHIP.

See also **BONDS, 3; CONTRACTS, 12, 13; GOODWILL.**

1. Implied authority of a partner to make accommodation indorsements in the name of his firm exists where for about ten years the other members of the firm knew that he was using the firm name for the accommodation of friends, and took no effective steps to prevent it, but merely remonstrated with him in private, accepting his promise to stop the practice, which they had reason to believe he did not intend to keep, and knowing that he knew they did not expect him to keep it. *Bank of Monongahela Valley v. Weston* (N. Y.) 547

2. Mere notice to two prominent commercial agencies of the dissolution of a partnership will not bind a person who is not a subscriber to either of those agencies, and who subsequently takes negotiable paper indorsed by one partner in the name of the firm, without knowledge of the dissolution. Id.

NOTES AND BRIEFS.

Partnership; illegality of contract of; right to dissolve. 410

Implied authority of partner; unauthorized indorsement of notes. 547

PAYMENT.

See PLEADING, 3.

PENAL STATUTE.

See STATUTES, 9, 12.

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Penalty; for refusal of inspection of books of corporation. 457

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PHYSICIANS.

See DENTISTS; JUDGMENT, 8, NOTES AND BRIEFS.

PLEADING.

See also APPEAL AND ERROR, 4, 6, 15; EVIDENCE, 14, 19.

1. An estoppel is not available unless pleaded. *Cloud v. Malvin* (Iowa) 209

2. A general denial by insurance companies of knowledge of the acts of their agents in forming a combination to maintain rates in violation of a statute is not sufficient to raise an issue on that question, when the special defenses in the answer amount to a practical admission of such violation, and challenge the constitutionality of the statute. *State ex rel. Crow v. Firemen's Fund Ins. Co.* (Mo.) 363

3. An allegation that plaintiff has paid to defendant various amounts, but is not able to give the dates and the amounts, with a request that the defendant file with its answer a schedule showing the items and dates of payment, is too vague to show any amount whatever for the purpose of jurisdiction. *Howard v. Mutual Reserve Fund L. Asso.* (N. C.) 853

4. An answer in chancery containing the usual general denial is sufficient to make an issue on material allegations not admitted and to which no direct response is made. *Stackpole v. Hancock* (Fla.) 814

NOTES AND BRIEFS.

Pleading; averments of fraud. 621

POLICE POWER.

See CONSTITUTIONAL LAW.

POND.

See NEGLIGENCE, 2.

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See CONTRACTS, 11.

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See also ACTION OR SUIT, 1; NEGLIGENCE, 5.

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Postoffice; relation of mail contractor to government. 618
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POWERS.

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Powers; strict compliance with terms of; to sell for reinvestment, void exercise of; legal title of donee. 66

PREFERRED STOCK.

See CORPORATIONS, 4, 11-15.

PRINCIPAL AND AGENT.

See BANKS, 1; BROKERS, NOTES AND BRIEFS; INSURANCE, 5, 6.

PRINCIPAL AND SURETY.

See also BONDS, 1; EVIDENCE, 4, 8; JUDGMENT, 2, 3.

1. A creditor who gives false information or withholds information without sufficient cause, from a surety, thus inducing him to refrain from taking steps to protect himself, is liable for the loss which is thus caused: *Benton County Sav. Bank v. Bodicker* (Iowa) 321

2. The remedy provided by Mont. Code Civ. Proc. § 1242, to enable a surety who has satisfied the claim to secure contribution from his cosurety, is cumulative merely, and does not preclude a resort to the courts to enforce the right in any recognized mode. *Merchants' Nat. Bank v. Great Falls Opera House Co.* (Mont.) 285

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Principal and surety; condition as to execution of contract by others. 321

PRIVILEGE.

See WRIT AND PROCESS, 1, 2.

PRIVITY.

See ACTION OR SUIT, 1.

PRIZE.

NOTES AND BRIEFS.

Prize; jurisdiction of consuls in case of. 495

PROXIMATE CAUSE.

See also TRIAL, 10.

Unlawfully and maliciously shooting and wounding a dog lying near his owner's house is the proximate cause of an injury to a woman who is thrown down by the sudden and violent rushing of the wounded dog into the house, for which the person who shot the dog is therefore liable. *Isham v. Dow* (Vt.) 87

NOTES AND BRIEFS.

Rule of proximate cause in case of malicious tort:—(I.) The general rule; (II.) in case of wrongful violations of legal duty or positive law; (III.) in case of acts directly malicious or wilful; (IV.) wilful misrepresentations and false warranties; (V.) limit to the rule. 87

Of fire. 204

Of death; intervention of new cause. 784

PUBLIC CONTRACT.

See CONTRACTS, 8-13.

PUBLIC CORPORATIONS.See **CONTRACTS**, 15.**PUBLIC IMPROVEMENTS.**See also **CONSTITUTIONAL LAW**, 12;
CONTRACTS, 10.

1. An abutting property owner is not estopped to deny the validity of an assessment made without any fair opportunity to such owner to contest its correctness. *Hutcheson v. Storrie* (Tex.) 289

2. The failure of an abutting owner to appear when opportunity was afforded to contest an assessment, in default of which the statute provides that he be estopped from contesting the validity of the assessment, does not preclude him from showing that the assessment was invalid because the statutory basis on which it was made was unconstitutional. *Id.*

3. The lessee in possession under a lease of real property for ninety-nine years, renewable forever, in whose name the property stands for taxation, is so far the owner of it that he may subscribe a petition for street improvements under Ohio Rev. Stat. § 2272, without requiring the signature of the lessor also in order to authorize an assessment upon the corpus of the property, which, in case of default, will sustain a sale of the property as against the lessor as well as the lessee. *St. Bernard v. Kemper* (Ohio) 662

NOTES AND BRIEFS.

Public improvements; constitutionality of assessments; uniformity of burden; necessity of special benefits. 289

PUBLIC MONEY.See also **EMINENT DOMAIN**, 1; **TAXES**, 1.

The claim of the state to a portion of a decedent's estate, under a statute asserting the right and making the amount due and payable at death, cannot be released by the legislature, even prior to the state's receipt of the amount, where the Constitution prohibits the legislature from making any gift to any individual or corporation, and from passing any special law releasing any indebtedness to the state. *Re Stanford's Estate* (Cal.) 788

NOTES AND BRIEFS.

Public money; right to pay just and equitable claims. 557

PUBLIC POLICY.As affecting contracts, see **CONTRACTS**.
See also **HACKS**, 2; **INSURANCE**, 10.

That which is essentially in accord with the statutes does not contravene public policy. *Heller v. National Marine Bank* (Md.) 438

PUBLIC USE.See also **COURTS**, 5; **EMINENT DOMAIN**, 2-4.**NOTES AND BRIEFS.**

Public use; what is. 304
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RAILROADS.As Carriers, see **CARRIERS**.See also **EMINENT DOMAIN**, 2, 4, 5;
STATUTES, 6, 13.

1. Parallel railroads are those which run in one general direction, traversing the same section of country and running within a few miles of one another throughout their respective routes. *State ex rel. Nolan v. Montana R. Co.* (Mont.) 271

2. Competing railroads within the meaning of Mont. Const. art. 15, § 6, comprehend not only railroads which run between the same two principal points on their own lines, but those which, having one common terminus, are yet actually connected with other railroads, and which by arrangements with them are so related to one another in fact as to give them the opportunity, by geographical situation, directly to cut rates to principal or terminal points. *Id.*

3. A lease of a railroad, fair in its terms, for ten years, does not involve an abandonment of the railroad enterprise, or come within the prohibition of Mont. Const. art. 15, § 6, against consolidation of parallel or competing railroads, or the uniting of their business or earnings. *Id.*

4. A person approaching a railroad crossing at which a train is standing on a side track to receive or discharge passengers is not guilty of contributory negligence in failing to stop, look, and listen before attempting to cross the main track, when he knows of a rule of the carrier requiring a train to stop before reaching a station where another train is receiving or discharging passengers. *Betts v. Lehigh Valley R. Co.* (Pa.) 261

NOTES AND BRIEFS.

Railroads; negligence at crossing; duty to stop, look, and listen. 261

Restrictions on consolidation of parallel or competing railroads:—In general; against public policy; power of legislature to prevent consolidation; statutory provisions forbidding consolidation; permission to consolidate; leases; what are competing lines; enforcement of law. 271

RATES.See **COURTS**, 6.**REAL PROPERTY.**See also **DEEDS**, 1-3.

There cannot be a valid conditional limitation or executory devise, where the executory limitation is conjoined with an absolute power in the first taker or a primary devisee to defeat and cut off the further estate or interest by alienation of the entire fee in his lifetime. *Cornwell v. Wulff* (Mo.) 53

NOTES AND BRIEFS.See also **POWERS**; **TRUSTS**.

Real property; limiting fee upon a fee; effect of statute of uses. 53

Estate of remaindermen; equitable remainders; abandonment of remainder. 66

REBELLION.

See HABEAS CORPUS, 1.

RECEIVERS.

See also BANKRUPTCY; CORPORATIONS, 13-15; MORTGAGE.

A receiver will not be appointed at the suit of a minority stockholder for a corporation which is unable to go on with its business, when the majority stockholders have agreed on a reasonable arrangement for the disposal of all its property for a fair price, on a private sale. *Phillips v. Providence Steam Engine Co.* (R. I.) 560

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Receivers; relation of, to corporation. 133
For corporations at suit of stockholder. 561

Effect of bankrupt law on receiverships. 190

Foreign; right of action of. 552

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See EVIDENCE, 9.

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See SECRETARY OF STATE.

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STATUTES.

See also MANDAMUS, 8, 9; SECRETARY OF STATE; TAXES, 3.

1. A statute relating to persons or things as a class is a general law, while one relating to particular persons or things of a class is special. *McEldowney v. Wyatt* (W. Va.) 609

2. An act amending or supplementing the laws regulating succession to estates of decedents, which imposes a burden on so much of any estate only as is in excess of \$5,000, and leaves the law unchanged as to the residue, is a special law prohibited by Pa. Const. art. 3, § 7. *Re Cope's Estate* (Pa.) 316

3. A general enactment by the legislature, not referred to in the title of the chapter containing it, is not repugnant to Wis.

Const. art. 4, § 18, as the latter refers solely to private and local bills. *Lawton v. Chilton* (Wis.) 616

4. The title of an act, which is broad enough to cover its enactment and give fair and reasonable index to the purpose of the act, need not descend to particulars. *McEldowney v. Wyatt* (W. Va.) 609

5. A provision against a combination to maintain prices or premiums for insurance is within the title of "An Act for the Punishment of Pools, Trusts, and Conspiracies to Control Prices." *State ex rel. Crow v. Firemen's Fund Ins. Co.* (Mo.) 363

6. Provisions empowering railroad companies which contract with a terminal company to guarantee the principal and interest of bonds issued by such company, as well as other contracts, and to subscribe for its capital stock, are within a title, "An Act to Amend an Act Entitled 'An Act to Provide for the Organization of Railroad Terminal Corporations, and to Define the Powers, Duties, and Liabilities Thereof,'" *Ryan v. Louisville & N. Terminal Co.* (Tenn.) 303

7. The invalidity of a section of a statute which is separable from the remainder of the act, leaving provisions which are sufficient to be operative and accomplish their purpose, does not make the statute altogether void. *State ex rel. Crow v. Firemen's Fund Ins. Co.* (Mo.) 363

8. An extraterritorial effect of a statute against trusts and combinations does not follow from the use of the words "any corporation," "partnership or individual," and "any pool, agreement, contract, combination," in describing the persons or acts to which the statute applies. *State v. Lancashire F. Ins. Co.* (Ark.) 348

9. A penal statute against trusts and combinations will not be given an extraterritorial effect because the legislature, after the attorney general placed that construction upon the statute, rejected a proposed amendment expressly limiting its effect to combinations formed to affect prices in the state. *Id.*

10. A statute speaks from the moment it takes effect. *Gilbert v. Ackerman* (N. Y.) 118

11. A statute prohibiting baseball on Sunday where any fee is charged is not void for uncertainty and ambiguity because it does not describe what is meant by "fee" or by whom it is to be paid. *State v. Hogriever* (Ind.) 504

12. The rule that a penal statute is to be strictly construed should not be unreasonably applied so as to defeat the sovereign will, when that will is expressed with ordinary certainty and is easily intelligible. *Id.*

13. A statute regulating the consolidation of railroads, passed between the time of the report of Code commissioners and the adoption of the Montana Code, containing provisions at variance with sections reported by the commissioners, will be held to be a re-45 L. R. A.

peal of those sections, although they were not stricken from the Code as adopted. *State ex rel. Nolan v. Montana Railway Co.* (Mont.) 271

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Statute; constitutional provisions as to title. 371

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Repeal of, as affecting inchoate rights. 676

STOCK.

See CORPORATIONS, NOTES AND BRIEFS.

STREET RAILWAYS.

See also CARRIERS, 7, 8; MANDAMUS, 10, 11; TRIAL, 6.

1. A street-railroad company cannot avoid its duty to operate a portion of its road because it has rightfully or wrongfully been excluded from a county bridge separating such portion from the rest of the road until it will comply with certain conditions, where it is practicable to operate both portions of the road without crossing the bridge. *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.* (N. J. Sup.) 837

2. A street-railway company which has accepted a franchise from a city, and has laid its road in the streets in accordance therewith, cannot arbitrarily discontinue the operation of any part of such road, to the detriment of the city and its inhabitants, as an implied condition attaches to the grant that it be held for the public benefit. *Id.*

3. A company incorporated under N. J. act April 16, 1897 (N. J. P. L. 1897, p. 229; chap. 127), entitled "An Act Concerning the Sale of Property and Franchises of Any Corporation Created by or under Any Laws of This State, except Steam Railroads, Canals, Turnpike, or Plank Road Companies," which has acquired and is in possession and control of a street railroad, its appliances and property, whether under a lease of or by sale from the original or other company incorporated to construct and operate such railway, or by sale under a decree of the court of chancery upon foreclosure under such statute,—succeeds to the duty imposed upon the original company by its acceptance of its franchise, to maintain and operate the railway. *Id.*

4. A cable-car company is guilty of gross negligence in running two cars past each other at a largely used street crossing in a populous city, without giving some signal or warning as they approach. *Smith v. Union Trunk Line* (Wash.) 169

5. Negligence on the part of a cable-car company is shown by the fact that the gripman on a moving car did not, because engaged in conversation, see a person on the track in front of the car, until his attention was called by a passenger, when it was too late to avoid a collision. *Id.*

6. Negligence cannot be imputed to a pedestrian for not anticipating culpable and gross negligence on the part of a street-car company in running its cars past a largely used street crossing. Id.

7. A pedestrian has a right to rely upon a street-car company's giving the signals in common use when approaching a street crossing. Id.

NOTES AND BRIEFS.

See also CORPORATIONS.

Street railways; negligence in passing behind one car in front of another. 170

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SUCCESSION TAX.

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SUNDAY.

See also CONSTITUTIONAL LAW, 4, 8; INDICTMENT, ETC.; STATUTES, 11.

NOTES AND BRIEFS.

Constitutionality of Sunday laws. 505

SURGERY.

See DENTISTS.

TAXES.

See also BANKS, 2; CONSTITUTIONAL LAW, 2; COUNTIES, 1; EMINENT DOMAIN, 1; JUDGMENT, 9; MUNICIPAL CORPORATIONS, 2, 3; PUBLIC MONEY.

1. A statute authorizing counties to raise by ordinary taxation money to be paid to drafted men or their heirs on account of services in the Civil War, or the payment of commutation money in lieu thereof, is in violation of N. Y. Const. art. 8, § 11, prohibiting gifts by counties or municipalities of any money or property to or in aid of any individual, association, or corporation. *Bush v. Orange County Supers.* (N. Y.) 556

2. The constitutional provision that private property shall not be taken or damaged for public use without just compensation is not a limitation of the taxing power of the state, but of the exercise of the power of eminent domain. *Kimball v. Grantsville City* (Utah) 628

3. A tax imposed on a nonresident whose property is not in the state is null, as tax 45 L. R. A.

laws can have no extraterritorial effect. *Liverpool & L. & G. Ins. Co. v. Board of Assessors* (La.) 524

4. A debt due to a nonresident, which is still in nonconcrete form, has its situs for the purpose of taxation at the domicile of the creditor, and not at the domicile of the debtor. Id.

5. Copyrights, like patent rights, are exempt from taxation by state authority, because they are Federal grants or privileges. *People ex rel. A. J. Johnson Co. v. Roberts* (N. Y.) 126

6. The goodwill of a corporation, which is the result of carrying on its business in the state, and inseparable from that business, is taxable as capital employed in the state, although the corporation is nominally a corporation of another state in which it has never done any business. Id.

7. The taxation of shares of stock in national banks is permitted by the act of Congress of June 3, 1864, as amended February 10, 1868 (U. S. Rev. Stat. § 5219), provided they are taxed in the city or town where the bank is located and at no greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state. *McHenry v. Downer* (Cal.) 737

8. To assess shares of stock in a national bank as other personal property, without any deduction for debts of the owner or for investments of the stock of the bank in non-assessable government bonds, would work an illegal discrimination in favor of state banks and against shares of national banks, when state banks are taxed under Cal. Pol. Code, § 3608, providing for the taxation of the property of corporations, but that no assessment shall be made of shares of stock or any holder thereof be taxed therefor, and § 3629 provides for the deduction of the debts of the owner from the assessment of credits. Id.

9. Personal assets of a national bank cannot be taxed by a state under U. S. Rev. Stat. § 5219, which permits and regulates the taxation of the shares of stock in such corporations. *People v. National Bank of D. O. Mills & Co.* (Cal.) 747

10. Taxes and assessments are levied in Ohio upon the corpus of real property, and not upon the titles by which it may be held, unless otherwise provided by statute. *St. Bernard v. Kemper* (Ohio) 662

11. An assessment on real property to a person not the owner or the one making the return is invalid, since the provision of Fla. act 1887, chap. 3681, § 22, that a failure to give the name of the owner or person making the return shall not invalidate the assessment, does not apply to such a case. *Stackpole v. Hancock* (Fla.) 814

12. Property not on the verified list returned to an assessor may be added by him to the assessment without first issuing a subpoena and without an examination, under Cal. Pol. Code, § 3632, if he knows of the property, and its possession and ownership

are admitted by the taxpayer. *People v. National Bank of D. O. Mills & Co. (Cal.)* 747

13. The exemption of \$5,000 in each estate from the Pennsylvania direct inheritance tax act of May 12, 1897, imposing a 2-per cent tax on all personal property which shall pass by will or by the intestate law, after deducting debts and costs of administration, is in violation of Pa. Const. art. 9, §§ 1, 2, requiring all taxes to be uniform upon the same class of subjects, and prohibiting exemptions other than those therein specified, since the act does not profess to be anything less than a tax law. *Re Cope's Estate (Pa.)* 316

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State taxation of national banks:—(I.) Decisions prior to establishment of national banks; (II.) acts establishing national banks; (III.) taxation of property franchises of processes of banking; (IV.) taxation of shares of stock: (a) shares may be taxed; (b) requirement as to equality: (1) form of legislation; (2) what is moneyed capital; (3) effect of exemption of property in state; (4) discrimination; (5) deduction of indebtedness; (6) other deductions; (7) difference in manner of taxing state and national banks; (8) discount for prompt payment; (9) uniformity throughout state; (c) method of fixing value of shares: (1) valuation above par; (2) deduction for investment in bonds; (3) deduction for investment in real estate and other property; (d) method of assessing the tax; (e) period for which tax payable; (f) where tax is to be assessed; (g) territories may exact tax; (V.) bank officers to assist; (VI.) provisions of state constitutions; (VII.) remedies; (VIII.) contracts for special rates; (IX.) tax on bank officers. 737

TELEGRAPHS.

See also DAMAGES.

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Telegraph; right of action by agent or principal for default in sending message. 160

TELEPHONES.

See also COMPULSORY SERVICE; MANDAMUS, 7.

A private corporation engaged in the business of operating a telephone plant is a common carrier of news and intelligence, within the scope of Neb. Comp. Stat. 1897, chap. 72, art. 8, § 1, providing for the regulation of the rates of common carriers. *Neb. 45 L. R. A.*

braska Teleph. Co. v. State ex rel. Yeiser (Neb.) 113

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See APPEAL AND ERROR, 18, NOTES AND BRIEFS; HOMESTEAD; PROXIMATE CAUSE, NOTES AND BRIEFS.

TRIAL.

See also APPEAL AND ERROR, 16, 17; EVIDENCE, 1.

1. One accused of crime is not confronted with the witness against him, within the meaning of Utah Const. art. 1, § 12, when he is compelled to sit 24 feet from the witness, so that he cannot hear her testimony or see her face or see the jury, although the witness states that she is afraid to tell because she is afraid of the defendant, and will not testify until he is removed from immediately facing her. *State v. Mannion (Utah)* 638

2. Where a defendant in a criminal case, instead of submitting the case upon the evidence of the prosecution, which is lacking upon some essential issue, introduces his own evidence, the court may on just terms allow the defect to be supplied at any time before the final submission of the case. *People v. Lewis (Cal.)* 783

3. The question of a railroad company's negligence in failing to furnish a conductor is a question of law, where the train ordinarily carries a good many passengers, and runs on a schedule so arranged as to encourage travel upon it. *Means v. Carolina C. R. Co. (N. C.)* 164

4. A passenger who alights from a train receiving and discharging passengers at a regular stopping place, and, while proceeding towards the station is struck by an incoming train, is not necessarily chargeable with contributory negligence although he might have seen the danger had he looked and listened; but the question is for the jury. *Atlantic City R. Co. v. Goodin (N. J. Err. & App.)* 671

5. The question whether a servant's act was done in furtherance of the master's business and within the scope of his employment is generally one for the jury. *Baltimore Consol. R. Co. v. Pierce (Md.)* 527

6. The master's liability for the act of a motorman in running his car against a buggy at a crossing is a question for the jury, notwithstanding the claim that he did it maliciously, if there were any circumstances from which it could be fairly inferred that he was simply endeavoring to clear the track so he could proceed with the car or do something in furtherance of his master's business. *Id.*

7. The question whether or not a person is in good health, within the meaning of an insurance policy, is for the jury, when the evidence is conflicting on the material questions of fact. *Barnes v. Fidelity Mut. L. Asso. (Pa.)* 264

8. The question of the material increase of the risk of insured property by the temporary use of a threshing machine operated by an engine is for the jury, when during its operation a sudden gust of wind came, and about the same time fire was noticed in the straw, and was carried along by the wind, and burned the property insured. *Adair v. Southern Mut. Ins. Co. (Ga.)* 204

9. On the offer of an instruction that there is no evidence legally sufficient to entitle the plaintiff to recover, if made at the close of all the testimony, both plaintiff's and defendant's, the court must consider the whole evidence, and not that of the plaintiff alone. *Baltimore Consol. R. Co. v. Pierce (Md.)* 527

10. An instruction that one on trial for killing another who, after receiving a gunshot wound from accused, cut his own throat, must be acquitted if it was impossible to tell which wound caused the death, is properly refused, since conviction would be proper in case both wounds contributed thereto. *People v. Lewis (Cal.)* 783

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Trial; question of fact as to false pretenses. 424

Question for court or jury as to amount of evidence. 109

TRUSTS.

As illegal combination, see CONSPIRACY. See also DEEDS, 2-4; DESCENT AND DISTRIBUTION, 1, 2; LIMITATION OF ACTIONS, 2; STATUTES, 5, 8.

1. A deed by a trustee to a third person in contravention of the trust is not void as matter of law, but the legal title will pass to the purchaser subject to the right of the *cestui que trust* to go into a court of equity and disaffirm the sale, or have the purchase price brought in and secured for his benefit. *Robinson v. Stone (Ala.)* 66

2. An order directing the sale of property in accordance with a petition by a trustee for the sale of the entire property embraced in the conveyance to him, for the purpose of supplying the immediate necessities of all the beneficiaries, including children, and of making permanent investments for their benefit, will be construed to direct an

absolute sale of the entire estate, including the legal fee in remainder, which had vested in the children, as well as their equitable interests, notwithstanding that an order appointing a guardian *ad litem* states the case as an "application to sell trust property." *Richards v. East Tennessee, V. & G. R. Co. (Ga.)* 712

NOTES AND BRIEFS.

See also CONSPIRACIES.

Effect of statute of uses. 53, 66

Following trust property; remedy of *cestui que trust*; legal title of trustee; power of trustee to convey; dry trust. 66

USURY.

1. The exemption of national banks from the penalties of usury prescribed by a statute of the state owes its existence to laws enacted by Congress, and such exemption should not by implication be extended beyond the import of the Federal statute. *Gadsden v. Thrush (Neb.)* 654

2. In an action to foreclose a mortgage securing a note made to be used as collateral to a note owing to a national bank, the mere fact that the proceeds of such collateral, when collected by the payee thereof, are to be used to discharge the said principal note to the bank, does not justify the extension of the Federal exemptions of national banks from penalties for usury to such foreclosure proceedings. *Id.*

VENDOR AND PURCHASER.

See also LIMITATION OF ACTIONS, 3, 4.

1. An intending purchaser of real estate must make a proper and thorough examination of the title in the light of the search furnished, before he is justified in declining to perform his contract because of insufficiency of title. *Moot v. Business Men's Invest. Asso. (N. Y.)* 666

2. A contract to furnish a good and satisfactory title to real estate is performed by furnishing a good title. *Id.*

3. A contract to convey a good and satisfactory title to real estate is complied with by tending a deed conveying a good title, under circumstances such that the purchaser should have ascertained that fact, although there are discrepancies in the abstract of title accompanying the deed. *Id.*

4. An intending purchaser of real estate cannot, upon receiving an acceptable abstract from which he discovers an apparent defect in the title, refuse to complete his contract to purchase if proper examination would disclose that the defect had been remedied. *Id.*

5. Acceptance by the purchaser of real estate, without objection until after the time for performance has passed, of a search which purports to be a mere abstract of the indexes of the records in the clerk's office, will relieve the seller from any further compliance with his contract to furnish an abstract truly showing the condition of the title. *Id.*

6. The intending purchaser of real estate must, upon receiving a satisfactory abstract showing that the title in part depends on a judgment, make an examination which will disclose the true condition of the title by ascertaining the contents of the judgment roll and determining the validity, character, and extent of the judgment,—especially where there is a conflict between the diagram and contents in the abstract; and such facts need not be disclosed by the seller. Id.

7. A proffered title to real estate cannot be rejected by the intending purchaser and the contract declared void, where the title is good, although the abstract shows a defect caused by the improper record of a judgment, if failure to discover that the defect has been removed is due to the purchaser's negligence. Id.

8. A sale will be set aside for fraud where some of the representations made by the vendee in procuring the deed are true, and some are false and sufficient to set aside the sale, which might and did influence the vendor in the disposition of the land. *Stackpole v. Hancock* (Fla.) 814

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Vendor and purchaser; rights under quitclaim deed. 66

Contract as to title; defective records of title. 667

VESTED RIGHTS.

See CONSTITUTIONAL LAW, 14, NOTES AND BRIEFS.

VOTERS AND ELECTIONS.

Ballots properly rejected are to be excluded from the computation of votes cast for or against proposed constitutional amendments, under N. J. Const. art. 9, requiring their approval or ratification by a majority of the qualified electors voting thereon. *State, Bott, Prosecutor, v. Wurts* (N. J. Err. & App.) 251

NOTES AND BRIEFS.

Requisites of ballot; action by board of canvassers. 252

WAIVER.

See CONTRACTS, 7.

WATERS.

See also BOUNDARIES; DAMS.

The draining of the underground sources of a surface stream by pumping water from wells to supply a city reservoir renders the city liable to the owner of the land through which the stream naturally flows, although the city is the owner of the land on which the wells are located. *Smith v. Brooklyn* (N. Y.) 664

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Waters; rights created by permanent obstruction; reciprocal rights; in artificial condition; what waters are public. 220
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Title to land between high and low water mark:—(I.) The rule in England; (II.) the rule in the United States; (III.) conflicting rights of owner and public; (IV.) what is shore; (V.) boundary of municipal corporations. 227

Interception of percolating waters; diversion of underground stream by suction. 664

WELLS.

See WATERS.

WILLS.

See also WITNESSES.

1. Affidavits of attesting witnesses to a will, prepared for use, upon the first application for probate, are, although the proceeding is dismissed without result, admissible, together with the testimony of the subscribers, as to facts and circumstances which attended the signing, in a subsequent proceeding to probate the will. *Re Thompson's Will* (Ill.) 682

2. That the attesting witnesses to a will are unable to remember the facts stated in the attestation clause will not prevent the admission of the will to probate, if the signatures of testator and the witnesses are proved, and no evidence appears tending to disprove the recitals, in the attestation clause, of compliance with the statutory requirements, where the statute permits the party seeking to probate a will to support the same by any evidence competent to establish a will in chancery. Id.

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Wills; sufficiency of proof of, by attesting witness; effect of attestation clause. 682

Meaning of words "issue," "child," and "their;" rights of illegitimate children under. 95

WITNESSES.

The rule that the party who produces a witness cannot impeach or discredit him does not apply with full effect in case of a witness produced, as required by law, to prove a will. *Re Thompson's Will* (Ill.) 682

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Witnesses; exemption of consuls from serving as. 586

WRIT AND PROCESS.

Protection of officer by, see OFFICERS, 1.

1. The privilege from "arrest" conferred upon members of Congress by U. S. Const. art. 1, § 6, does not extend to service of summons in a civil action, unaccompanied by an arrest. *Worth v. Norton* (S. C.) 563

2. A member of Congress not in attendance on or going to or returning from its session, but absent on private business, is not within the constitutional privilege of members of Congress from arrest during

their attendance at the session of their respective houses, and in going to and returning from the same.

Id.

3. Valid service of summons on a misdemeanor indictment against a foreign insurance company may be made under Ky. Stat. § 631, requiring consent to service of process on the commissioner "in any action," and Ky. Crim. Code, chap. 3, § 147, providing 45 L. R. A.

that process upon indictments shall be served as in civil actions. *Ætna Ins. Co. v. Com. (Ky.)* 355

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Writs; privilege of members of Congress in respect to. 563

Service on agent of foreign corporation. 622

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